Landmark Chambers

Litigation in the Upper Tribunal

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Gardiner & Theobald

- *Gardiner & Theobald LLP v Mr. David Jackson (VO)* [2018] UKUT 253 (LC)
  - obligations of an expert in relation to success-related fees
  - circumstances in which success-related fees are acceptable

Surveyors instructed ‘to provide a comprehensive rating service’ for a portfolio of properties including the subject hereditament office block on Tottenham Court Road

The fee arrangements in the case:

- The firm of surveyors had agreed to conduct all rating work for G&T on a CFA (‘no win no fee’): the surveyors would be paid a % of any savings made
- Expert witness work was to be paid for separately, *but the firm remained entitled to the success fee where the proceedings secured savings for the client*
- However, the expert had- twice- declared that he was not ‘instructed under any conditional or other success-based fee arrangement’

President of the Tribunal's introduction to the case:

- The decision is "concerned with important matters of principle affecting the conduct of experts, including surveyors, who undertake the vitally important role of providing expert reports and evidence in appeals or references before this Tribunal.

- Does the obligation to declare a success-related fee arrangement apply to remuneration not only for services as an expert witness, but also for services provided by that expert (or the practice for which he or she works) other than as an expert witness, whether before or during the currency of those proceedings?

- To what extent may success-related fees be compatible with an expert's obligation to the Tribunal to act independently?"

Importance of an expert's duty of independence

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- The civil courts have concluded that it is only 'in a very rare case indeed' that the evidence of an expert acting under a contingency fee agreement will be considered by the court
- Lord Phillips in *Factortame v SST* (para 73):
  - "To give evidence on a contingency fee basis gives an expert, who would **otherwise be independent**, a **significant financial interest in the outcome** of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an **authoritative opinion on issues that are critical to the outcome** of the case. In such a situation the **threat to his objectivity** posed by a contingency fee agreement may carry greater **dangers to the administration of justice** than would the interest of an advocate or solicitor acting under a similar agreement."

Did the Tribunal come to the same conclusion:

- No, it stopped short of saying that. Instead:
  - Expert evidence given under a conditional fee agreement would not be excluded
  - But the basis under which an expert was acting might go to the weight to be attributed to their evidence
  - This would be decided in a future case
- The failure to disclose the CFA in sufficient detail was “wholly unacceptable”; the issue was referred to RICS to take any further action

Concerns about independence in the case

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- The fee arrangement gave the expert “a direct financial interest” in the assessment of RV which could undermine the “independence and impartiality” required for the Tribunal hearing
- No adverse findings made in this case
- Should only exceptionally be any need for going through a *Hamid*-style procedure as adopted by High Court: opportunity for person/practice involved to explain why the case should not be referred to the professional body and to
  - put forward an explanation
  - identify lessons learned and actions taken
  - give assurances about steps to be taken to prevent future repetition

Practical implications: transparency is key

- For expert witnesses appearing before the Upper Tribunal:
  - Declare any success-related fee at any early stage (Lord Phillips in *Factortame* also said that a party wanting to instruct an expert on a contingency fee basis should tell the court as soon as possible- permission for that would then be decided in the course of case management)
  - Do not simply rely on the firm's standard terms of engagement as securing compliance with the rules – they will not override or detract from the obligations which **each expert personally owes**. The expert's declarations in their report must not be treated as a 'mere formality' nor as 'something which may be dealt with perfunctorily'
  - Tribunal gave guidance on interpretation of RICS' Practice Statement 'Surveyors acting as expert witnesses'; found it to be inconsistent with the fee arrangements in place'

Practical implications

- For firms who employ expert witnesses appearing before the Upper Tribunal:
  - Firms normally instructed under any form of CFA placed in a difficult position
  - Risk, in persisting with current arrangements, that any expert evidence required to be given will be excluded or given no (or reduced) weight
  - Could either:
    - Remove any element of success-related fee from their fee structure
    - Retain it but make it clear that it will be recoverable *only* where the case is settled in advance of the preparation of any expert witness evidence
    - If that point arrives, commute work done to that point to a fixed fee (though does this assuage concerns about objectivity in relation to those earlier stages?)
    - Apply an hourly rate going forward

Practical implications

- Impact of that approach combined with ‘Check, challenge, appeal’
- Previous practice- proposal made, precursor to lengthy negotiation process
- Now- evidence (including expert evidence) provided up front with the proposal (the challenge stage)
- Success-related fees will come to an end at the proposal point

- Would any concern be reduced if the other side also used experts employed on a CFA basis?

RICS

- Planned to review the Practice Statement Surveyors Acting as Expert Witnesses (4th ed publication), to consider whether its wording and the related advisory guidance should be made more specific to provide further clarity on RICS' expectations in respect of expert witness appointments and wider fee earning relationships, with a public consultation to be taken on the draft

Merlin

- *Merlin Entertainments Group Ltd v Wayne Cox (VO)* [2018] UKUT 0406
- Status of the evidence given by the surveyor: was not confined to factual evidence and was treated as containing expert opinion evidence given in his expertise as a surveyor in dealing with the rating value of hereditaments such as Alton Towers (the instant case)
- Application for his evidence to be treated as such was granted, but M then on reflection limited his evidence to evidence of fact
- “Neither the email nor the statement of Mr W said anything to indicate that his firm’s fees were dependent on the outcome of the appeal”
- Tribunal was unaware of that background when raising the status of the evidence at the outset of the hearing
- Given its provisional view that it was an expert report, it directed the filing of an addendum with the RICS expert witness declarations
- It was then indicated that that would not be possible, as Mr W had entered into a CFA dependent on the outcome of the appeal
- This was why Mr W had elected to have his statement treated as evidence of fact; the Tribunal confirmed this was “misconceived”

Abuse of process/avoidance of *Gardiner*

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- Tribunal found the only reason for changing tack and purporting to give evidence on a purely factual basis was to circumvent the effect of the decision in *Gardiner & Theobald* "including the important requirement to inform the Tribunal (and any other party) about any relevant contingency fee arrangement"; the view had been taken that there was no need to alter the fee arrangements if Mr W was giving factual evidence only
- In these circumstances, the Tribunal "formed the provisional view that this was an abuse of the Tribunal's process"

> "The appellant suggests that the steps it then took were designed to *comply* with *Gardiner*. Instead, we take the view that it is plain they were taken to avoid the effect of that decision, knowing full well that a relevant conditional fee arrangement was in place. The object was to avoid disclosing that arrangement to the Tribunal in case that might affect, for example, the weight to be given to that evidence. In the circumstances, we see no reason to modify our provisional view that this attempt to present Mr Wilford's witness statement as purely factual evidence was an abuse of its process."

Duty of independence applies to factual evidence too

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- The concerns raised in *Gardiner* about the duty of independence relate not just to opinion evidence but **also the factual material** the expert provides

  > "It should have been plain from the reasoning in *Gardiner* that that decision affected experts, such as surveyors, disclosing information and giving evidence on factual issues and not simply matters of expert opinion."

- An expert giving purely factual evidence- unusual though that is- owes to the Tribunal the same duty of independence

  > "Expert opinion evidence often depends upon an expert identifying and assembling the factual material upon which his or her expert opinion is based. **The danger of non-disclosure of relevant information**, and the risk of that being **influenced by the financial interest** of an expert, or his firm, in the success of the client's case, is **common to both situations** and potentially affects the ability of the court or tribunal to place reliance upon that expert's evidence, in relation to either fact or opinion. As a matter of principle, it seems to us that it cannot be right for an expert to present even purely factual evidence, whether contested or not, without disclosing to the court or tribunal (and to other parties), that he is, or may become, entitled to remuneration dependent on the outcome of the proceedings in which that evidence is given, irrespective of the precise services to which that fee relates."

Non-disclosure to the Tribunal

- In light of *Gardiner*, the potential sensitivity of the contingency fee payable to Mr W's firm and the procedural history in the case, the Tribunal was "surprised and dismayed" that the appellant's team did not raise those issues with the Tribunal before the hearing
- But for having raised the matter of the status of Mr W's evidence, no reason to suppose Tribunal would have known that the firm in which Mr W was partner had an interest in the outcome of the appeal

- Ordinarily, the Tribunal should refuse to receive evidence from an expert where such an abuse of process has occurred

  (on a wholly exceptional basis, the Tribunal addressed Mr W's evidence in order to resolve one of the issues before it)

Another referral to RICS

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"It follows that we consider that we should draw the attention of the President of the Royal Institution of Chartered Surveyors to this decision. The Institution should have the opportunity to consider the implications of what happened in this case for the review it is carrying out of its Code of Conduct and Practice Statement for Surveyors acting as Expert Witnesses. The RICS may wish to consider **the extent to which its Practice Statement in relation to, for example, conditional fee arrangements applies**, or should apply, to a **surveyor who provides a factual witness statement** in litigation, and who does so acting in that capacity. We would expect professional bodies representing other experts who give evidence before this Tribunal to be addressing these issues as well. The Institution may also wish to consider whether the stance taken by Gerald Eve in this case involved a breach of its Code of Conduct or Practice Statement, having regard to the reasoning in *Gardiner*."

Procedure recap: general themes arising

- A stricter approach to compliance with rules of procedure, directions and orders
- The need for disputes to be resolved efficiently and at proportionate cost
- Both in interest of parties and wider public interest

Hammerson

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- *Hammerson UK Properties plc v. Gowlett (VO)* [2017] UKUT 0462 (LC)
- Non-compliance with UT's procedural rules, practice directions and case management orders
- Relevance to UT's own practice of principles considered by Supreme Ct in *BPP Holdings v HMRC* [2017] 1 WLR 2945 and Court of Appeal in *Denton v TH White Ltd* [2014] 1 WLR 3926
- Application of the same principles as considered by UT in *Simpsons Malt Ltd v Jones* [2017] UKUT 0460 (VTE's rules and practice directions)
- Extensions of time
- Failure to file grounds of appeal with notice of appeal- and within permitted time after further extension granted
- Whether the appeal should be struck out

(Denton)

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- 3-stage test in applications for relief from sanction under CPR 3.9(1)

  (1) Is breach serious or significant (as opposed to trivial/minor/insignificant? (extent of breach and consequences); any material effect on the litigation?
  (2) Why did failure or fault occur? Overlooking deadline not a good reason, but developments in the case rendering previous timetable unreasonable, likely to be
  (3) Consider all circumstances so as to deal justly with the application– relevant factors?
  Includes CPR 3.9(1)(a) and (b): need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders

Hammerson facts

- Appeal on ground of material change of circumstances
- Effect on value of opening of competing shopping centre
- High value case and ‘complexities of arguments’
- But no request for special procedure

- Time extension for filing grounds of appeal and statement of case
- Time line:

20 Sept: VTE decision
17 Oct: Notice of Appeal & request for extension
11 Nov: UT decision on extension (only to 17 Nov)
15 Nov: Further application for extension
23 Nov: Direction for oral hearing re strike out
1 Dec : Oral hearing
15 Dec: Final date of extension

Notability

- Example of UT application of Denton 3 stage test in practice (paras 55 – 59);
- Very useful practical guidance as to what is, and is not, required in grounds of appeal in a statement of case;
- Examination of what constitute good reasons.

Practical points

- Statement of Case
  - identify issues, in summary form basis of fact and law
  - include valuation and comparables
  - BUT NOT minute detail of facts, full evidence, detailed legal argument
- 28 days should be adequate (with safeguard in PD 6.2(4),(5))
- Short first extension usually granted if applied for with reasons, good or not so good (PD6.3)
- Crucial importance of applying for extension before expiry
- Tribunal practice on a second or further extension (hearing before a Judge)
- Good reason, as opposed to genuine reason for needing an extension?
- Practical guidance when appellant anticipates that case will be significantly different from case below (special procedure, sequential exchange of evidence)

Simpsons Malt

- *Simpsons Malt Limited v Jones (VO) [2017] UKUT 0460 (LC)*
- Five separate cases
- All appeals to UT against

  decisions of VTE to strike out; and

  refusals of VTE to re-instate
- Alleged non-compliance with VTE directions included:
  - Failures to contact VTE to indicate whether proceedings are still active (7 to 14 days before hearing date) PS/A2
  - Failure to re-serve statement of case under VTE pilot directions
  - Alleged failure to serve original statement of case

Overall general approach of UT to VTE procedures

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- UT expressly not unsupportive of VTE's efforts to manage its caseload effectively
- Not condoning breaches of orders or Practice Statements
- No diminishing of "need for robust case management regime"

Specific issues

- Appropriateness of automatic strike out for ‘substantial failure’ to provide statement of case (paras 9 & 10, PS/A7)
- Differences between strike out powers under Reg 10(1), Reg 10(3)(a), (b) and (c) and corresponding rights to apply to re-instate under Reg 10(5)
- Differences between:
  - consideration by VTE of application to re-instate (relief from sanctions); and
  - consideration by UT of appeal against strike out
- Duty to give decision notice and reasons (Regs 36(2) and 37(1)
- Lawfulness of ‘exceptional reasons’ criteria used in VTE approach and stated in Consolidated Practice Statement 2017
- Duty to give decision notice and reasons (Regs 36(2) and 37(1))
- Interpretation of various Practice Statements and the pilot scheme

The result

- All appeals were allowed (though due to faults in VTE decision making- so beware failure to comply with procedures without good reason and the limited role of UT on appeal)

- Automatic strike out for ‘substantial’ failure to provide statement of case is **inappropriate** (para 34)

- Use of “Exceptional reasons” as sole criterion in discretionary strike out decision or application to re-instate is **unlawful**– Civil Court principles apply

- In some cases no procedural failings at all by Appellant
- In others, failure by VTE to provide reasons

Giraffe Concepts

- *Giraffe Concepts Ltd v David Jackson (VO)* [2018] UKUT 344 (LC)
- Reference to *Simpsons Malt* and *Hammerson v Gowlett*
- Ref *Hammerson*- once time been extended to allow a statement of case to be filed after- rather than with- notice of appeal- Tribunal requires a **good explanation** for any further extension of time
- No explanation other than appellant's preference to negotiate with VO rather than incur expense of preparing SC
- That expense would have been modest given the limited scope of the appeal
- The expectation that the appeal could be settled by agreement with the VO was a "risky approach" and was not a good reason for the delay
- Tribunal left unable to make any progress in determining the appeal- no statement of case 5 months after appeal filed- serious breach of Tribunal's rules and directions, "only course open to the Tribunal, as it warned in *Hammerson v Gowlett*, is to strike out the appeal"