



EXPERT TESTIMONY: A YEAR IN REVIEW 2012

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Disclaimer

This publication relies heavily on the content of the judgments published by the court; as such we reproduce the text written by the presiding judge, magistrate or registrar. We acknowledge we are not the authors of that content.

The nature of our specialist field and our work allows us considerable exposure to litigation law and procedure, the practitioners and the rules of evidence. We are, however, not lawyers. Our comments address areas of practice for the expert in the context of legal proceedings; any reference to legal issues or advice is purely incidental.

Any views expressed in this publication are those of the editors and not necessarily those of FTI Consulting.

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Executive summary

Introduction

Welcome to the inaugural edition of *Expert Testimony: A Year in Review*, Hong Kong edition.

Because good practice for experts will always be influenced by the requirements of litigation, expert witnesses should heed the views of the judiciary and stay abreast of developments in the case law. This report will help by reviewing the role of experts in Hong Kong court proceedings and examining comments made by the judiciary in various judgments. The judgments in these cases highlight interesting lessons for the expert, in terms of both preparing expert reports and appearing in court.

There is no shortage of litigation in Hong Kong, and 2012 saw more international law firms establishing offices in the region. As China's economic growth continues and the legal system evolves, the opportunities for investment continue to present challenges for individuals, companies and governments navigating Asia. Economic boom and

economic crises in the market similarly affect the demands upon the courts.

Whilst Hong Kong has no shortage of legal actions and disputes, the pool of appropriately skilled and experienced experts is limited. Expert witnesses traditionally have been appointed based on their knowledge of an issue, rather than their training or knowledge of the discipline itself. In practice, both are important.

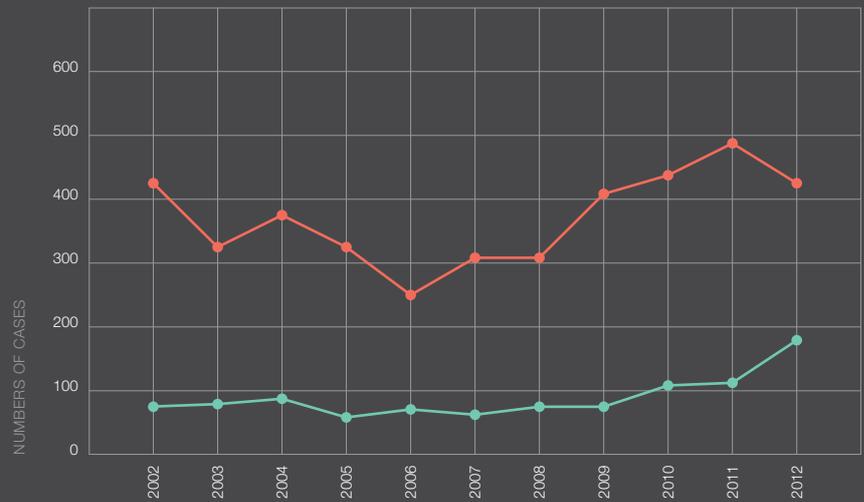
Nowadays, the expert witness role is emerging as a practised discipline in its own right, particularly in the areas of accounting, finance and valuation. Historically, the expert witness who demonstrated a proficiency in testifying had an advantage, as the general consensus in the legal community was that a lack of prior experience made an expert vulnerable on cross-examination. But there

is always a "first time", and in our view a well-qualified and skilled expert who has been trained in the discipline of expert witness work is less of a litigation risk than an untrained expert.

A couple of notes about what you will not find in this review. We recognise that litigation is not the only area that relies on expert witnesses — arbitration, mediation and other tribunals also employ their skills. However, the limited availability of published awards and case material has necessitated that we restrict our review to the realm of the courts. In addition, there are many cases where experts perform their function adequately, without mention by the court. Judgments that do not mention an expert witness or note that evidence was adduced in the matter are not included.

Caseload of the Court of First Instance of the High Court — criminal jurisdiction

- Criminal cases
- Confidential miscellaneous proceedings

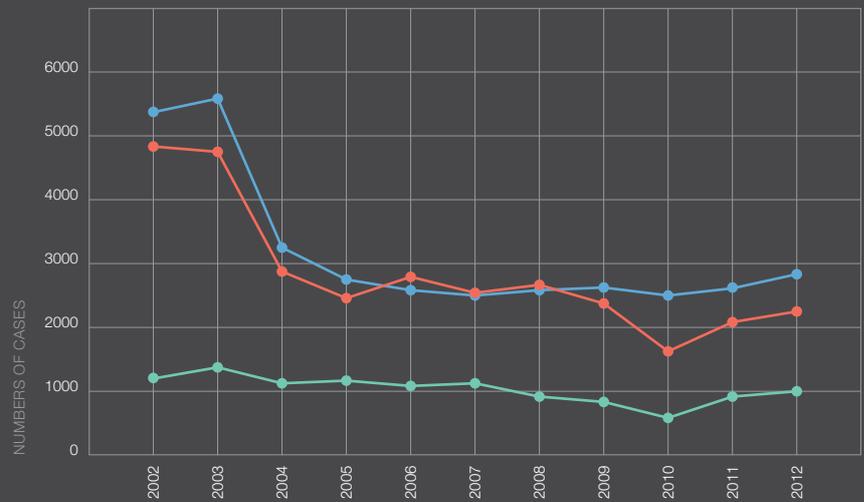


Note: Figures for 2012 shown in the chart above are annualised

Source: Hong Kong Judiciary Annual Report 2012

Caseload of the Court of First Instance of the High Court — civil jurisdiction

- High court actions
- Miscellaneous proceedings
- Personal injuries actions



Note: Figures for 2012 shown in the chart above are annualised

Source: Hong Kong Judiciary Annual Report 2012

Survey methodology

The matters researched for this study were sourced from the Hong Kong Legal Information Institute (HKLII) database for 2012.

We searched the database for references to the keyword “expert” and identified judgments in more than 400 matters (both civil and criminal). Of these matters, 269 were excluded, as evidence was not required or not permitted to be adduced at court.

We reviewed the remaining judgments for comments made by the judiciary regarding the expert witnesses or evidence, and shortlisted 21 matters as being of particular interest to both practising expert witnesses and those who instruct them.

Because our knowledge of the issues in dispute is limited to what is disclosed in the judgments, we rely heavily on the content of the judgment and refrain from assessing the merits of the issues raised by the judiciary.

The judgments reviewed related to a wide range of disputes and included both

civil and criminal matters. Of the cases reviewed, 24 percent involved criminal matters, and the rest concerned civil matters including personal injury, family court proceedings and commercial disputes.

The specialists who provided expert witness services in criminal cases were largely drawn from the accounting and financial profession and the medical profession, making up 38 percent of the pool.

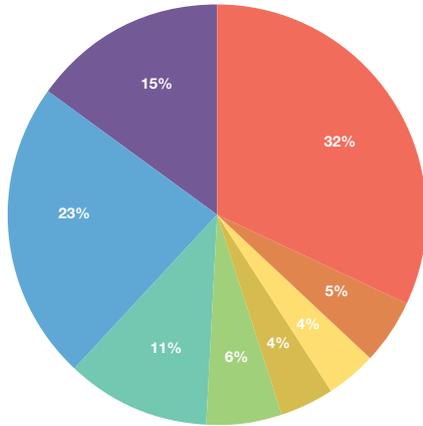
The “other” category was the next largest group by percentage, comprising 32 percent. This group included some of the more unique aspects of expert witness testimony, such as locksmithing, audio forensics, firearms, DNA profiling, forensic fire analysis and even gambling.

The statistics show criminal that cases have a lower percentage of expert witness

evidence. This may be due to the higher standard of proof applied to criminal cases and hence the reliance on direct factual evidence carrying greater weight in terms of prosecution. It may also reflect a lower case load than in civil procedures.

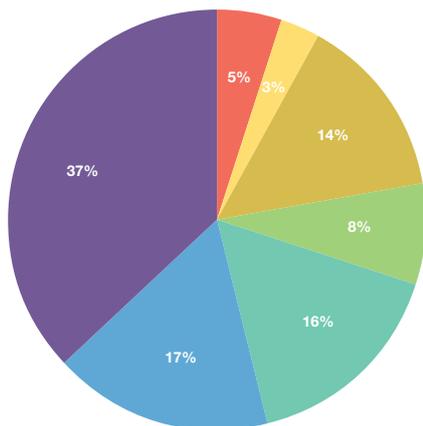
The experts who gave evidence in civil proceedings were drawn from over 25 different areas of expertise. Most came from the ranks of traditional expert witness professions such as accountants, land/building surveyors, doctors and lawyers, as shown in the chart on the next page.

Some of the more unique fields of expertise included computer programming, occupational safety, accident surveying and architecture.



Criminal — fields of expertise

- Medical
- Accounting/Financial
- Environmental
- Accident surveying
- Handwriting
- Fingerprinting
- Drugs
- Other



Civil — fields of expertise

- Medical
- Business/Property valuation
- Law
- Accounting/Financial
- Landing/Building surveying
- Handwriting
- Other

Themes identified in our review

The 21 cases we reviewed highlight the issues and challenges of using expert witnesses. Most of these fell into six broad categories:

- 1 Expert independence and expert shopping
- 2 Evidence outside of instructions or expertise
- 3 Admissibility and procedural issues
- 4 Rules of evidence
- 5 Valuation and damages approach
- 6 Experts' qualifications and suitability

1. EXPERT INDEPENDENCE AND EXPERT SHOPPING

In several of our profiled cases, judges questioned whether the experts were truly independent; they felt that some expert witness had undermined their credibility by not being objective. In one personal injury case, **ZAHID ANWAR V. SINO PLAN DEVELOPMENT LTD**, the judge criticised doctors whose testimony relied on old information about the plaintiff's physical condition. By not performing new tests, the doctors limited their own ability to be objective about the plaintiff's injuries and recovery. The judge noted that "the paramount duty of the expert is to the

court, not to the client who has engaged him...He is not a mouthpiece for his client but must conduct a forensic examination and critically weigh the objective facts before offering his opinion to the court".

The Code of Conduct for expert witnesses under the Rules of the High Court states that: "An expert witness has an overriding duty to help the court impartially and independently on matters relevant to the expert's area of expertise". The guidelines specify that the expert witness should not be an advocate for one side of the dispute.

In the *Ikarian Reefer* case (1993), more than a dozen navigation experts, metallurgists,

fire experts and others presented testimony that attempted to prove or disprove that arson caused a fire that destroyed a ship. Cresswell, J, early in the case, gave the experts some precedent-setting advice: they must appear to be objective rather than advocate for one side or the other, and must present only the information that falls within their respective realms of expertise. In short, experts must stick to the facts, based only on what they know, and both be and appear objective.

It follows that the court does not approve of expert shopping. In **ACCURATE CONTRACTORS & RENOVATORS CO. V. THE INCORPORATED OWNERS OF**

BEVERLY HEIGHTS, To, J saw the plaintiff's expert witness as obviously biased in the plaintiff's favour and rejected his evidence. In **YU WAI YIN V. BALS HONG KONG LTD** Master Chow rejected the plaintiff's application to change experts on the basis that the plaintiff was opinion shopping.

This principle of independence has other important implications for expert witnesses. In one 2012 case, **KONE ELEVATOR LTD V. CITYBASE PROPERTY MANAGEMENT LTD.**, judges criticised one of the parties for telling their expert witnesses to withhold information that might be favourable to the other side. Expert witnesses, the judge noted, should not be given instructions that limit their ability to provide a complete opinion.

2. EVIDENCE OUTSIDE OF INSTRUCTIONS OR EXPERTISE

Other cases demonstrate the problems that result when an expert testifies beyond his area of expertise. For example, in **DBS BANK (HONG KONG) LTD V. SIT PAN JIT**, an investor sued a bank over what he claimed were misrepresented investments that lost value. The bank's expert witness presented 100 pages of testimony including unsolicited opinions that went well beyond his remit; the court ordered the jury to disregard much of this testimony.

An expert witness should stick to the facts within his realm of knowledge — whether science, business, trade, medicine or another field — and leave the analysis and opinions to the courts. Personal beliefs, general knowledge and “common sense” have no place in an expert witness' formal presentation. Experts must clearly state the facts and

assumptions that inform their testimony and let the court know if a particular question is outside their area of expertise.

Another case — **AACHEN (ASIA PACIFIC) CONSULTANTS LTD V. KHOO EE LIAM** — showed that judges will censure a plaintiff or defendant whose expert witness provides evidence that is not relevant or helpful. Witnesses should not offer opinions unless the court asks for them, and should not debate issues of law.

3. ADMISSIBILITY AND PROCEDURAL ISSUES

In a medical negligence case, **KWAN YUEN MEI V. LEE, SEE CHING AND OTHERS**, judges dismissed evidence from expert witnesses because they did not follow proper procedures. The expert did not comply with the procedural requirements in filing an expert report; a nurse provided testimony that should have been given by a doctor. In this particular matter, the plaintiff represented herself and did not have legal advisors, hence she was unaware of court requirements.

In some circumstances (such as in personal injury proceedings), judges prefer the parties to engage a joint single expert rather than each appoint its own. As the judge explained in **TANG TAK PING V. KAI SHING CONSTRUCTION CO. AND ANOTHER**, in this way the court seeks to reduce costs and increase the efficiency of expert testimony. Here, the plaintiff had appointed its own psychiatric expert without leave from the court. The judge accordingly precluded the plaintiff's expert from appointment as the single joint expert and the plaintiff was unable to recover his costs for preparing his expert report.

The Civil Justice Reform of 2009 introduced a number of procedural rules which affect every expert witness. Clearly, expert witnesses should acquaint themselves with the formalities of the court and comply with them. Otherwise, an expert report may be rendered inadmissible.

4. RULES OF EVIDENCE

Factual witnesses testify only on matters of first-hand knowledge or experience and do not give opinions. However, expert witnesses' training, skills and knowledge do give them more leeway to help the courts understand some of the technical fine points of a case, but only to a point. They are not free to stray beyond their area of expertise when they advise the court. Judges have dismissed “expert opinions” that rely too much on information from other experts, or when the testifying expert is clearly out of his league.

In a child custody case, **CCMJ V. SSM**, judges threw out testimony from a dentist who served as an expert witness but had never examined the child himself; instead, the witness referenced exams by other dentists. The testifying experts must base their findings on the facts of the case and support it only with first-hand knowledge or experience. An expert's report should also clarify if a fact is based on “assumption” or “observation”.

In another case — **GOOD FAITH PROPERTIES LTD AND OTHERS V. CIBEAN DEVELOPMENT** — judges placed more weight on whether evidence was relevant to the case, rather than whether its presentation was in strict compliance with the rules, in deciding whether it was admissible.

5. VALUATION AND DAMAGES APPROACH

Some of our cases highlighted the challenges of establishing how much a plaintiff should receive in damages — a process that can rely on experts to determine the value of both business and property.

In these cases, the experts used a methodology called the “comparables-based approach”, which looks at the market price of comparable assets that have been recently traded or sold. Adjustments are made if appropriate. This is a fairly straightforward process that relies on independent estimates of market value, and many courts accept it.

However, judges have sometimes questioned whether the “comparable” assets were a close enough match to those in the case. In some cases, judges preferred an approach that filtered potential comparables and applied only those that were a close match, rather than using a broad range of comparables with adjustments — which might be subjective — to account for differences. In **LUCKY SKY ASIA PACIFIC LTD V. LUO SHU FAN**, Master Lai found that the plaintiff’s estimate of the value of his property was more realistic than the defendant’s, which

looked at many other properties that were not comparable. The master compared the defendant’s information to “asking blind men to feel parts of an elephant and then imagine what an elephant is”. In a case involving the well-known Yung Kee restaurant, Harris, J rejected a comparables-based approach in favour of one using discounted cash flow, because, he said, the comparable asset was “wholly unconvincing”. Even if suitable comparables are available, judges still may prefer to use more than one valuation methodology, as they did in two of our featured cases: **LEHMAN & CO. MANAGEMENT LTD V. EFFICIENT LTD** and **KAM KWAN SING V. KAM KWAN LAI**. Using more than one approach provides a range of outcomes and helps ensure that the proposed damages are realistic and reasonable.

The courts have also criticised experts who have ignored the facts of the case and shaped their assumptions according to their clients’ instructions. Judges have warned valuation and damages experts not to let a client’s wishes distract them from the facts of the case and the real value of the asset. Similarly, judges expect experts to look clearly at all information about a comparable asset’s value, and determine whether it’s realistic before they calculate damages. This was the case in **MGA ENTERTAINMENT INC. V. TOYS & TRENDS**.

In some cases, courts must determine damages based on hypothetical circumstances. This means that expert witnesses sometimes must use a different basis for an asset’s value than they would for a commercial purpose — another reason for them to be savvy about the litigation process.

6. EXPERTS’ QUALIFICATIONS AND SUITABILITY

Courts regularly review the education, professional history and courtroom experience of anyone purporting to be an “expert witness”. Those who misrepresent themselves jeopardise their clients’ interests. This is what happened in **HUI LING LING V. SKY FIELD DEVELOPMENT**, when the court found out that an expert witness’ qualifications had been questioned in a previous case. The judge found that the expert had exaggerated his professional qualifications and experience. Not surprisingly, the court resolved the matter in favour of the opposing party’s expert.

Only well-qualified professionals, with solid experience and verifiable credentials, should serve as expert witnesses in court. Anything less jeopardises the credibility of an expert’s testimony and the weight of his opinions. Expert witnesses, therefore, should be prepared to defend challenges to their credentials.

Summary of cases by issue

	LACK OF INDEPENDENCE	EVIDENCE NOT WITHIN OR OUTSIDE SCOPE	EXPERT SHOPPING	CRITICISM OF PROCESS	LIMITED INSTRUCTIONS	ADMISSIBILITY OF EVIDENCE	PROCEDURE FOR ADDUJING EXPERT EVIDENCE	COMPLIANCE WITH COURT RULES	RELEVANCE OF EXPERT EVIDENCE	DISTINCTION BETWEEN FACTUAL AND EXPERT EVIDENCE	VALUATION METHOD	QUALIFICATION OF EXPERT	CRIMINAL	PAGE NUMBER
ACCURATE CONTRACTORS & RENOVATORS CO V. THE INCORPORATED OWNERS OF BEVERLEY HEIGHTS [2012] HKCFI 1882; HCA2482/2006 (29 NOVEMBER 2012)	✓	✓												15
YU WAI YIN V. BALS HONG KONG LTD [2012] HKCFI 1634; HCPI643/2011 (22 OCTOBER 2012)			✓											16
ZAHID ANWAR V. SINO PLAN DEVELOPMENT LTD [2012] HKCFI 1355; HCPI370/2009 (31 AUGUST 2012)	✓			✓										17
SUN CROWN TRADING LTD V. HOLYROOD LTD [2012] HKCFI 288; HCA1158/2007 (1 MARCH 2012) AND GATEWAY INTERNATIONAL DEVELOPMENT LTD V. HOLYROOD LTD [2012] HKCFI 291; HCA1159/2007 (1 MARCH 2012)	✓													18
KONE ELEVATOR (HK) LTD V. CITYBASE PROPERTY MANAGEMENT LTD [2012] HKCFI 1022; HCA1898/2008 (4 JULY 2012)	✓	✓			✓									19
DBS BANK (HONG KONG) LTD V. SIT PAN JIT [2012] HKCFI 1767; HCA382/2009 (9 NOVEMBER 2012)		✓												22
FU KOR KUEN PATRICK AND ANOTHER V. HKSAR [2012] HKCFA 39; [2012] 5 HKC 189; FACCA/2011 (24 MAY 2012)		✓				✓								24
AACHEN (ASIA PACIFIC) CONSULTANTS LTD V. KHOO EE LIAM [2012] HKCFI 1471; HCA4354/2003 (25 SEPTEMBER 2012)							✓							26
KWAN YUEN MEI V. LEE, SEE CHING AND OTHERS [2012] HKCFI 1532; HCPI570/2009 (9 OCTOBER 2012)		✓				✓			✓					29

	LACK OF INDEPENDENCE	EVIDENCE NOT WITHIN OR OUTSIDE SCOPE	EXPERT SHOPPING	CRITICISM OF PROCESS	LIMITED INSTRUCTIONS	ADMISSIBILITY OF EVIDENCE	PROCEDURE FOR ADDUJING EXPERT EVIDENCE	COMPLIANCE WITH COURT RULES	RELEVANCE OF EXPERT EVIDENCE	DISTINCTION BETWEEN FACTUAL AND EXPERT EVIDENCE	VALUATION METHOD	QUALIFICATION OF EXPERT	CRIMINAL	PAGE NUMBER
YEUNG GA WAI V. LAU MING SHUM [2012] HKCFI 1094; HCA798/2004 (19 JULY 2012)							✓		✓					31
TANG TAK PING V. KAI SHING CONSTRUCTION CO AND ANOTHER [2012] HKCFI 109; [2012] 1 HKLRD 1093; [2012] 3 HKC 323; HCPI539/2011 (6 FEBRUARY 2012)							✓							32
LAU YUET MING V. HUNG LING KWOK AND ANOTHER [2012] HKCFI 320; HCPI300/2011 (7 MARCH 2012)									✓					34
CCMJ V. SSM FORMERLY KNOWN AS SKL [2012] HKFAMC 56; FCMP67/2010 (5 OCTOBER 2012)							✓	✓		✓				36
MIMI KAR KEE WONG HUNG V. SEVERN VILLA LTD AND OTHERS [2012] HKCFI 30; [2012] 1 HKLRD 887; HCMP2192/2011 (12 JANUARY 2012)										✓				38
GOOD FAITH PROPERTIES LTD AND OTHERS V. CIBEAN DEVELOPMENT						✓								40
KAM KWAN SING V. KAM KWAN LAI AND OTHERS [2012] HKCFI 1672; [2012] 6 HKC 246; HCCW154/2010 (31 OCTOBER 2012)	✓				✓						✓			43
LEHMAN & CO MANAGEMENT LTD V. EFFICIENT LTD AND ANOTHER [2012] HKCFI 1876; HCCW377/2010 (28 NOVEMBER 2012)							✓	✓			✓			45
LUCKY SKY ASIA PACIFIC LTD V. LUO SHU FAN [2012] HKCFI 1370; HCA842/2010 (4 SEPTEMBER 2012)							✓				✓			47
MGA ENTERTAINMENT INC V. TOYS & TRENDS (HONG KONG) LTD AND OTHERS [2012] HKGA 348; [2012] 5 HKC 372; CACV104/2011 (8 AUGUST 2012)											✓			49

	LACK OF INDEPENDENCE	EVIDENCE NOT WITHIN OR OUTSIDE SCOPE	EXPERT SHOPPING	CRITICISM OF PROCESS	LIMITED INSTRUCTIONS	ADMISSIBILITY OF EVIDENCE	PROCEDURE FOR ADDUJING EXPERT EVIDENCE	COMPLIANCE WITH COURT RULES	RELEVANCE OF EXPERT EVIDENCE	DISTINCTION BETWEEN FACTUAL AND EXPERT EVIDENCE	VALUATION METHOD	QUALIFICATION OF EXPERT	CRIMINAL	PAGE NUMBER
HUI LING LING V SKY FIELD DEVELOPMENT LIMITED [2012] HKCFI 653; HCA35/2007 (8 MAY 2012)												✓		52
HKSAR V. MUHAMMAD AKRAM [2012] HKDC 1251; DCCC423/2012 (10 SEPTEMBER 2012)													✓	55

The cases:

Expert independence and
expert shopping

Expert independence and expert shopping

ACCURATE CONTRACTORS & RENOVATORS CO V. THE INCORPORATED OWNERS OF BEVERLEY HEIGHTS [2012] HKCFI 1882; HCA2482/2006 (29 NOVEMBER 2012)

The expert “... was demonstrably biased and a typical hire gun. I do not accept his evidence”

THE ISSUE

This case involved a dispute over outstanding building renovation costs, and whether the work met the terms of the contract. The plaintiff was a registered general building contractor and the incorporated owners of Beverley Heights in Kowloon Tong were the defendant.

In October 2005, the plaintiff and defendant entered into a contract for renovating Beverley Heights. Disputes between the parties arose over whether certain work had been satisfactorily completed and over the amounts payable under the contract. The renovation had been completed seven years before the hearing.

Both the plaintiff and defendant retained quantum experts.

The plaintiff provided figures for six claims; To, J dismissed five of them because he said the plaintiff could not prove that the claims had been made properly. The plaintiff's remaining claim was for money that he said he was owed for work already completed, and for the retention money not released at the end of the defect liability period.

The defendant counter-claimed for the money it paid another contractor, who corrected three jobs that the plaintiff had not done properly.

To, J said the plaintiff's quantum expert witness was obviously biased in favour of the plaintiff.

To, J stated:

“He [the plaintiff's quantum expert] was unable to explain the basis of his assessment of the plaintiff's ‘honeycomb works claim,’ On the other hand, in respect of the incorporated owners' counterclaim, he gave a manifestly and unrealistically low assessment of the cost of remedial work which was far lower than the plaintiff's contract price under the contract. He was asked to give expert opinion on quantum. Yet, he declined to give an assessment of the cost of work for repairing the retention wall defect, saying that it was improvement work and not remedial work. The nature of the remedial work was exactly the same as that of the

original work. He was attempting to give opinion on liability and exceeded his scope as a quantum expert. He was demonstrably biased and a typical hire [sic] gun. I do not accept his evidence”.

WHAT IT MEANS FOR EXPERTS

The Code of Practice for Expert Witnesses, issued by the court, makes it clear that the expert has an overriding duty to assist the court, impartially and without advocating for a party. In this case, the expert failed to address the very issue for which he was engaged: the quantum issue. He also went outside his scope by opining on liability. Experts must not comment on who is at fault or adapt evidence to suit the party that engaged them. The expert's duty is to help the court on matters within their expertise. This duty overrides any obligation to the person who instructs the expert or pays the expert's fee.

YU WAI YIN V. BALS HONG KONG LTD [2012] HKCFI 1634; HCPI643/2011 (22 OCTOBER 2012)

“Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it”

THE ISSUE

This was a personal injury case in which the plaintiff sought leave from the court to change her medical expert.

BACKGROUND

The plaintiff worked as a senior sales advisor working in a furniture shop owned by the defendant when she injured her back. She sustained the injury at work on 3 November 2008. Her colleagues were moving a large display case in the shop, which happened to press against her back.

The plaintiff's employees' compensation claim was settled on 3 October 2011. She had also commenced an action for a common law personal injuries claim in 2011 and was due to file a revised statement of damages. The court had given leave for medical expert reports, which came from Dr Peter Ko dated 15 May 2010 and Dr Lung Ting Kwan dated 5 April 2011. Both doctors had provided a medical expert report at the employees' compensation hearing.

Of her own volition, in March 2012 the plaintiff underwent an MRI examination on her lower back, the results of which found that she suffered root nerve compression. The plaintiff sent the hospital report to Dr Lung asking for a further opinion. Dr Lung reviewed the MRI report and indicated he had nothing to add to his written report provided in April 2011.

The plaintiff wrote to the defendant requesting Dr Lung be replaced. The defendant refused and suggested a joint supplemental report for comments on the

MRI report be prepared by both Dr Lung and Dr Ko. The plaintiff disagreed.

The plaintiff then sought a further expert report without the leave of the court from Dr Wong See Hoi. Dr Wong's report was dated 17 May 2012 and concluded the plaintiff's lower back pain was consistent with the MRI result. His report stated, however, that there was an absence of neurological deficit and that it was a “controversial case”.

The plaintiff then sought leave from the court for a joint orthopaedic report, substituting Dr Wong for Dr Lung. The defendant opted for the status quo and maintained that the joint report should be prepared by Dr Lung and Dr Ko.

Perhaps not surprisingly, Master Chow rejected the plaintiff's application to change experts on the basis that the plaintiff was opinion shopping.

“The plaintiff's application warrants a classic case of forum shopping and I am not satisfied that the plaintiff shall have a second chance to seek favourable opinion to substantiate her case.”

In reaching his conclusion on the issue, Master Chow revisited the legal principles established in *LAW CHUNG FAI V. LAM MING KUEN* [2010] HKCFI 762; HCPI96/2008 (13 September 2010). That case was also a personal injury matter. Bharwaney, J, in considering an application for a change in experts applied the reasoning set out in *CHINACHEM CHARITABLE FOUNDATION LTD V. CHAN CHUN CHUEN AND ANOR*

[2009] 5 HKC 190 stating the observations applied equally to personal injury cases.

The principles applied in determining an application to change an expert witness are whether or not to such a change would mean:

“the case is dealt with expeditiously; to ensure reasonable proportionality having regard to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party; to ensure procedural economy in the conduct of the proceedings; and to ensure fairness between the parties.”

WHAT IT MEANS FOR EXPERTS

Opinion shopping occurs when a party is free to choose his or her own expert and consult as many experts as necessary until he or she finds one that is favourable to the case. The court may not always be aware of the number of experts consulted because of litigation privilege.

When considering an engagement to act as a substitute expert, or where an expert report has already been provided in that matter, a practitioner should look to the substance of the reasons for the change.

The court will closely examine the opinions put forward by the substitute experts and make an assessment of those grounds as compared with those set out in the report of the original and/or opposing experts. A substitute expert's opinions are likely to be admitted by the court only if they represent objective and unbiased points of view.

ZAHID ANWAR V. SINO PLAN DEVELOPMENT LTD [2012] HKCFI 1355; HCPI370/2009 (31 AUGUST 2012)

“The expert is not an advocate for a party”

THE ISSUE

This was a personal injuries action taken by the plaintiff for damages, loss of earnings pre- and post- trial and medical expenses.

The plaintiff sustained injuries in an accident at work on 10 April 2006. He fell from the top of a container on which he was working. The plaintiff was taken by ambulance to the hospital, suffering injuries to his neck, left shoulder, back, right wrist and left hip. He also suffered a head injury when he fell. He was discharged on 13 April 2006.

Evidence submitted at the trial included surveillance evidence as well as various medical expert reports and testimony. The medical evidence included an orthopaedic expert report by Dr Chan Chi King, engaged for the plaintiff, and Dr Lee Po Chin, engaged for the defendant. The plaintiff was examined by Dr Lee on 12 October 2006 and Dr Chan examined him on 1 November 2007. Further, neurological experts' evidence was also submitted by Dr Brian Choa for the plaintiff and Dr Edmund Woo, for the defendants.

Bharwaney, J was critical of the orthopaedic experts in that the joint report dated 24 April 2010 had been prepared without the benefit of a further joint examination of the plaintiff. Both experts relied on the findings of their own physical examination conducted in October 2006 and November 2007. The judge stated this was an unsatisfactory state of affairs given the passage of time, and further noted that the experts should have been asked to conduct a joint re-examination of the plaintiff before compiling

the joint report. Additionally, the medical experts had opposing views as to the physical state of the plaintiff. Mr Lee, for the defendant, gave evidence that the plaintiff tended to exaggerate his symptoms and was able to return to work in his former occupation. Dr Chan, acting for the plaintiff, gave evidence that the plaintiff could not return to strenuous lifting work and should seek a job with light duties.

During the trial, video evidence was shown of the plaintiff lifting heavy cartons onto a truck. Bharwaney, J commented that there was no doubt that the plaintiff suffered multiple injuries when he fell from the container, however he was “not a credible witness and that he has greatly exaggerated his current difficulties”.

Bharwaney, J also made comments as to the independence of the expert evidence:

“Experts are instructed to assist the court by offering their expert opinion on areas which are within their specialist experience and which are not matters of common knowledge. That expert opinion has to be based on the objective evidence available to and ascertainable by them. The paramount duty of the expert is to the court, not to his client who has engaged him and by whom he is to be paid. There is no doctor-patient relationship between him and his client. He is not a mouthpiece for his client, but must conduct a forensic examination and critically weigh the objective facts before offering his opinion to the court”.

WHAT IT MEANS FOR EXPERTS

Although experts are engaged and paid by their clients, their primary responsibility is to the court. The Rules of the High Court provide that the expert witness' overriding duty is to help the court and that this duty supercedes the expert's contractual duty to the client. Expert witnesses are expected to understand that they must present an impartial and objective opinion based on the facts.

The case law also provides guidance on the court's expectation in the giving of opinion evidence. Cresswell, J summarised the duties and responsibilities of the expert witness in the NATIONAL JUSTICE COMPANIA NAVIERA S.A. V. PRUDENTIAL ASSURANCE CO LTD, IKARIAN REEFER, THE (1995) 1 LLOYD'S REP. 455:

“Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation”.

“An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise”.

Although an expert is engaged by a client, and that client pays the expert's fees, it is a condition of that engagement that the expert must approach the matter with independence, and that the outcome of the expert's opinion is not dependant on the fact that the client pays the expert.

SUN CROWN TRADING LTD V. HOLYROOD LTD [2012] HKCFI 288; HCA1158/2007 (1 MARCH 2012) AND GATEWAY INTERNATIONAL DEVELOPMENT LTD V. HOLYROOD LTD [2012] HKCFI 291; HCA1159/2007 (1 MARCH 2012)

THE ISSUE

This case involved an alleged breach of the terms of two sale and purchase agreements. Each of the two plaintiffs had signed an agreement to purchase a flat in a luxury residential property development on Peak Road in Hong Kong from the defendant, who was the developer.

The alleged breach occurred because the defendant had started the project without enough money. He borrowed heavily to finance the construction project, defaulted on the debt and was unable to pay the building contractors. To obtain enough money to finish his development, the defendant did just enough work to obtain the occupation permit from the Buildings Department. Once that happened, the contract terms forced the plaintiffs to fully settle for the agreed purchase price. However, much work still remained to be done on the flats. The plaintiffs took possession of properties that were constructed to a defective standard (“practically incomplete”). Moreover, the rest of the development was substantially unfinished; it would remain a building site for several years.

Because their flats were defective and the surrounding area was under construction, the plaintiffs could not find

tenants. They lost the rental income and paid additional sums to bring the flats up to a suitable standard. The plaintiffs claimed damages for their losses; both parties adduced expert surveyor evidence to quantify their losses for the court.

The plaintiffs’ claim was based on the rental income they would have received if their flats had been constructed properly. Both parties retained experts in property valuation to opine on this issue. The plaintiffs instructed Mr Thomas Tang of CBRE, while the defendant instructed Miss Ellen Lo of Dudley Surveyors. Both experts agreed that the fair market rental should be assessed by examining a range of directly comparable rental transactions for other properties at the same development site. However, disputes arose over which comparables to include. Miss Lo’s analysis included comparables from time periods outside the range of the relevant dates of assessment, including one transaction that bore no resemblance to other tenancies entered into during the relevant period. In an effort to show that the surrounding construction had only a modest effect on rent levels, Miss Lo also looked outside the development and studied how a two-year refurbishment project affected rental levels at another residential property, which bore little resemblance to the development site. She used these comparables to argue that

the plaintiffs were entitled to less money. Although Carlson, J did not question Miss Lo’s independence, he remarked that while he did not doubt her expertise, his “confidence in her was disturbed by her willingness to wander far and wide ... and her willingness to have a second look at the off-site comparables after it had been agreed that these would be disregarded”.

Ultimately Carlson, J disregarded Miss Lo’s opinions and adopted Mr Tang’s assessment of the flats’ rental value.

WHAT IT MEANS FOR EXPERTS

Expert witnesses must keep in mind that their duty is to the court and ensure that the opinions they express are independent and unbiased. As discussed above in **ZAHID ANWAR V. SINO PLAN DEVELOPMENT LTD [2012] HKCFI 1355; HCPI370/2009 (31 AUGUST 2012)**, experts must not only be independent, they also must appear independent.

In particular, if they are using comparables to establish the value of a claim, experts should select only those that offer an appropriate and impartial guide to the value of the subject asset. This judgment illustrates that the court may reject their evidence if they fail to do so.

KONE ELEVATOR (HK) LTD V. CITYBASE PROPERTY MANAGEMENT LTD [2012] HKCFI 1022; HCA1898/2008 (4 JULY 2012)

THE ISSUE

This was a dispute between a lift and escalator manufacturer providing maintenance services (Kone, the plaintiff) and a property management company (Citybase, the defendant) over a maintenance contract at a residential property development known as Kingswood Ginza at Yuen Long in the New Territories.

Kone was contracted to provide comprehensive maintenance services for lifts and escalators at the property for a two-year period ending 30 June 2008. The contract terms required that Kone give Citybase a performance bond equivalent of 12 months' service fee (approximately HK\$850,000) to *"settle any claim in full for any loss due to malpractice of comprehensive maintenance included in the Contract"*.

In March 2008, Kone tried unsuccessfully to renew the contract with Citybase, which awarded it instead to the lowest bidder, OTIS. The plaintiff and OTIS jointly inspected the lifts and escalators for defects, both before and on the takeover date. Following these inspections, OTIS prepared a list of defects that it wanted Kone to fix. Kone denied that most of these defects existed and said it had fixed all of the genuine defects before the takeover.

OTIS provided Citybase with estimates (of approximately HK\$770,000) for what it would cost to fix the alleged defects. Citybase told OTIS to fix the problems and took the equivalent sum from the Kone performance bond. Kone took Citybase to court to get that money back.

Both parties engaged engineering experts. The plaintiff instructed Mr Yu Wing Law, former chief electrical and mechanical engineer of the Electrical and Mechanical Services Department of the Hong Kong government. The defendant instructed Dr Albert So of the Department of Building and Construction of City University of Hong Kong.

Mr Recorder H Wong SC praised Mr Law and stated:

"... I am particularly impressed by the evidence of Mr Law, the plaintiff expert. He is, in my judgment, a role-model of what a good expert witness should be like. His evidence was clear, fair and balanced. When a point arose which went beyond his expertise, he would point out to me and alert me of his deficiency in regard to the particular matter (for example, at one point at trial, he told me that he was not an electrical man, and was not familiar with how a certain part of a circuitry actually worked). I have been very much assisted by his expert evidence on various technical matters Mr Law's expert report is detailed and clear and I commend him for that."

However, Mr Recorder Wong said that Dr So's evidence was not "as fair and balanced" as that of Mr Law. He was instructed to only comment on the replaced components to the overall safety standard of the lifts and escalators, and the necessity of the replacement some 12 months after they were installed. What Dr So saw at the inspection on 23 May 2009 were components that had been

replaced not in June 2008, but in October or November 2008. Dr So appeared to have been instructed with a limited mandate. In the summary of the case, the judge noted that Dr So said that he was asked only to comment on how the new parts made the escalators and lifts safer. The judge also noted that Dr So had limited ability to assess whether certain parts required replacement at the takeover date, because, as he admitted, he did not inspect the parts until nearly a year later. The parts had been used for several months after the takeover date before being replaced; the judge said this created a problem.

In addition, Mr Recorder Wong, SC criticised the defendant for not allowing both the plaintiff's and the defendant's experts to examine the actual replaced components. While the defendant's expert was permitted to examine the actual parts, the plaintiff's expert was forced to base his assessment on photographs of the parts enclosed in correspondence between OTIS and Citybase. Mr Recorder Wong SC stated that this was "a very unfair way of conducting litigation, and I cannot help expressing my great disapproval of it".

Mr Recorder Wong found that Kone was not responsible for the alleged defects (except for those that Kone readily accepted) and ordered the defendant to give the funds withdrawn from the performance bond back to Kone.

WHAT IT MEANS FOR EXPERTS

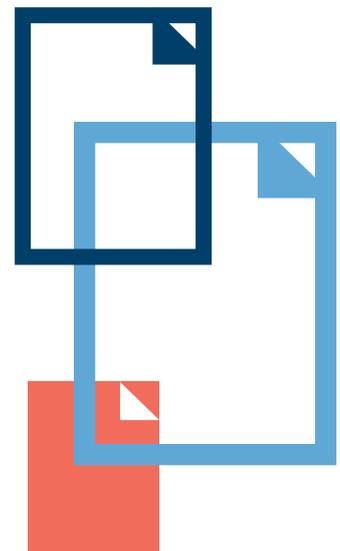
Mr Recorder Wong, SC's comments are a reminder that parties in a court case should tell their experts to address all of the relevant issues defined by the

court, and not limit their ability to opine completely on the relevant matters.

Similarly, experts must be aware that the Code of Conduct for Expert Witnesses requires that they be honest about any factors that could result in an incomplete or inaccurate report. Experts must clearly describe any limitations they faced when they prepared their reports, and how these limitations might have affected their conclusions. Further, if an issue falls outside

an expert's area of expertise, this should also be stated in the report. The judge's comments in this case showed that the judiciary is likely to respect the opinion of experts who are honest about their qualifications and the limits of their research.

It is also clear from this judgment that the courts will not look favourably on parties that do not give the opposing parties' experts equal access to the relevant information or evidence.



The cases:

Evidence outside instructions or expertise — usurping the role of the court

Evidence outside instructions or expertise — usurping the role of the court

DBS BANK (HONG KONG) LTD V. SIT PAN JIT [2012] HKCFI 1767; HCA382/2009 (9 NOVEMBER 2012)

“Meeting the ends of justice”

THE ISSUE

In this case, the plaintiff asked the court to strike out certain parts of the defendant’s expert report. Essentially, the plaintiff claimed that those parts of the expert report fell outside the scope of the order of Master de Souza and were “inadmissible, irrelevant, unnecessary and/or sufficiently probative”.

BACKGROUND

The dispute centred on the defendant’s investment in 10 Equity Linked Notes (ELNs). The defendant had a securities account with the bank from 2007 to 2008. When the global financial crisis occurred, the defendant’s investment lost value and the bank told him to make up the shortfall since he had borrowed to purchase the investments. The defendant refused because he said the bank’s advisor who sold him the ELNs misrepresented the risks. The defendant claimed the advisor had told him that the ELN’s investment was safe, conservative and traditional; that the investment was no more risky than investment in mutual funds and that it would yield a positive return at the end of the investment.

In May 2012, Master de Souza allowed the plaintiff and the defendant to adduce expert evidence. Paragraph 5 of the order reads:

“The Expert Report shall cover the following issues:

- a. The risk-return characteristics of each of the 10 Equity Linked Notes;**
- b. The risk of using leverage to purchase Equity Linked Notes.”**

The defendant’s expert submitted a report of more than 100 pages. The plaintiff proposed to strike out parts of the defendant’s expert report because the expert went beyond what the court had asked him to do. The expert opined on which investments would be better or safer for the defendant, and for the general public. The court had asked for an opinion only on the ELNs. Those parts of the expert report that are alleged to be outside the scope of instruction are called “impugned evidence”, meaning the evidence is challenged as to its admissibility. Mr Registrar Lung summarised the legal principles and relevant case law dealing with the impugned evidence in this report:

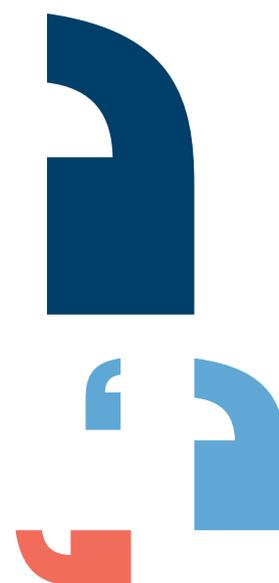
- Unless the parties agree no expert evidence may be adduced at trial without leave from the court, stated in the Rules of the High Court, Order 38 r6; (see FUNG CHUN MAN V. HOSPITAL AUTHORITY HCPI 1113/2006 by Bharwaney, J on 24 June 2011).
- Proper directions should be given for expert evidence to avoid delays to proceedings and wasted costs (FAITH BRIGHT DEVELOPMENT LIMITED V. NG KWOK KUEN [2010] 5 HKLRD 425 at 430-431).
- The parties and their legal representatives have a duty to assist the court in formulating the appropriate directions for experts and the experts should strictly adhere to those directions and try their best to comply (CHOK YICK INTERIOR DESIGN & ENGINEERING CO. LTD V. LAI CHI LUN t/a CHI HUNG CONSTRUCTION ENG CO. HCA 1480/2008 by Lam, J. On 5 May 2010).
- The court will refuse admission of evidence where the proposed expert evidence is plainly inadmissible or irrelevant. If the court cannot form as to relevance or the evidence is clearly relevant, it should grant

leave for the evidence to be adduced at the trial. The evidence is relevant if it is helpful to the court in arriving at its decision on one or more of the issues to be resolved (WONG HOI FUNG V. AMERICAN INTERNATIONAL ASSURANCE CO. (BERMUDA) LTD & SHRILA CHAN HCA 4576/2001 on 8 October 2002).

- In a dispute over whether expert evidence should be adduced at trial, the court has to examine the pleadings to determine whether the proposed expert evidence is required in the pleaded case (YEUNG GA WAI V. LAU MING SHUM HCA798/2004 delivered on 19 July 2012).

WHAT IT MEANS FOR EXPERTS

Most witnesses who give testimony are permitted to provide only personal knowledge or observations about a controversy. But expert witnesses are different because they must provide an opinion. The expert's evidence should not go beyond what the court has asked, so as to allow the judge or jury reach their own independent conclusion. However, they are permitted to opine on certain specified facets of the case and should not stray outside those guidelines. This case provides a timely reminder that, although the principles of evidence allow experts to give their opinions, these opinions must be based on proven facts to be admissible.



FU KOR KUEN PATRICK AND ANOTHER V. HKSAR [2012] HKCFA 39; [2012] 5 HKC 189; FCC4/2011 (24 MAY 2012)

THE ISSUE

The District Court had convicted two individuals of false trading in the securities market under the Securities and Futures Ordinance. This case was their final appeal.

The appellants traded derivative warrants with each other to benefit from a commission rebate incentive plan from the warrant liquidity provider (or market maker). The rebate was greater than the defendants' transaction cost, so they made a profit on each trade without actually selling the warrants to their clients. This practice, called "commission farming", allowed them to make money through the rebates. The appellants purchased warrants from the liquidity provider, traded them extensively during the day (mostly between themselves) and then resold them before the end of the day (usually back to the liquidity provider) for a similar price. Over a year they traded 20 different warrants, made over HK\$300 million worth of trades, and amassed about HK\$1 million in commissions for themselves.

The District Court convicted them of an offence under s295 of the Securities and

Futures Ordinance, alleging that they carried out trading activities that intentionally created a false or misleading appearance of active trading (or were reckless as to whether their acts had such an effect).

In their appeal, the traders argued that the trading's primary purpose was to make money, not to create this false or misleading appearance, so no offence had been committed under s295.

In the District Court, the trial judge concluded that the primary purpose of the "circular" trading was commission farming. But the prosecution argued that the false appearance of active trading did something else: it allowed the appellants to sell back the warrants at the end of the day without losing money. Because their feigned "trading" protected the appellants' financial positions, it constituted an offence under s295. The trial judge accepted this reasoning, and the individuals were convicted and sentenced to imprisonment. In reaching his decision, the trial judge stated that the relevant questions could be "resolved by taking a common sense approach without the help of an expert"

and that the expert evidence in the trial was "reduced to a matter of academic interest".

The appellants tried to appeal their convictions, but the Court of Appeal allowed them to appeal only their sentences. The appellants then turned to the Court of Final Appeal to attempt to get their convictions overturned.

The Court of Final Appeal considered a key issue: the reason the traders carried out their activities and whether they intentionally created a false picture.

The court listened to three experts on securities trading, one retained by the prosecution and one for each of the two appellants. In their evidence, the experts commented on the purpose of the trading activities in question. The court threw out their testimony because the experts commented on the appellants' state of mind, something beyond their expertise and beyond what the court asked them to do. Gleeson, NPJ stated:



There are some cases in which the state of mind of a person may properly be the subject of expert opinion. In such cases, the relevant field of expertise might be psychiatry, or some other branch of behavioral science. Ordinarily, however, it is otherwise. An expert in firearms may be able to give useful evidence in a case of homicide, but such evidence would not include an opinion as to whether the accused discharged a weapon with intent to kill. **The legitimate evidence of the expert may be of relevance to the judgment of a judge or jury about the issue of intention, but any opinion of the expert on that point would almost certainly be based at least in part upon inferences of fact and matters of judgment outside his or her field of expertise.** Similarly, an expert in the securities market may be able to give **evidence which is relevant to a decision** about the intention, or purpose, with which a trader acts. Such evidence may disclose information about conditions or forces in a market that would not otherwise be apparent to a tribunal of fact. It may throw light on possible influences or consequences of conduct. It may provide circumstantial material that is useful, perhaps necessary, for a judgment about the state of mind with which a trader acted. **However, the witnesses in the present case went further than that. They gave their opinions about the purpose or purposes with which the appellants acted.**



Interestingly, while the court did not admit the experts' views on the purpose of the "circular" trading, their evidence was held to contain information relevant to the decision of the court as to purpose. Litton NPJ stated:

"What we do know is that the prosecution's expert, Mr Clive Rigby, when he made his first report, said that the sole purpose of the appellants' operations was commission-farming. Such expression of opinion was inadmissible evidence, as I shall endeavour to explain later on. Nevertheless, such expression of opinion was presumably based upon facts and assumptions concerning the market in derivative warrants known to Mr Rigby, drawing on his expert knowledge of market conditions."

The Court of Final Appeal found that "there was of course an appearance of active trading, and in one sense an illusion

of liquidity, on the days the appellants performed their operation. **It was the result of such operation — the inevitable result. It was not the purpose of the operation**". The court concluded that the defence in s295(7) therefore applied, and overturned the conviction.

WHAT IT MEANS FOR EXPERTS

This case demonstrates why experts should opine only on issues that fall within their expertise, and shows what happens when they stray. In the judgment of the Court of Final Appeal, Litton, NPJ stated that it "is important that expert witnesses adhere to their code of conduct. When they express an opinion they must state clearly the facts, matters and assumptions on which such opinion is based, thus enabling the court to see whether such expression of opinion is within their field of expertise". Litton, NPJ quoted passages from the experts' testimony that shows they went beyond their expertise and opined on matters that were for the court to determine:

"... their reports and testimony seem riddled with inadmissible evidence: For example: "my personal disbelief in the possibility of the circular trading being coincidental rather than prearranged"; "the rebates create this arbitrage opportunity so, in my view, the purpose was to exploit this arbitrage opportunity", etc. The function of the experts was to put forward facts and matters concerning the derivative-warrant market, from which the court might draw an inference concerning the defendants' subjective intention and purpose. Full stop. Here, the experts appear to have strayed well beyond their field of expertise. This might well have been the reason why the judge ultimately pushed aside the expert evidence and drew upon "common sense".

AACHEN (ASIA PACIFIC) CONSULTANTS LTD V. KHOO EE LIAM [2012] HKCFI 1471; HCA4354/2003 (25 SEPTEMBER 2012)

“... experts cannot usurp the function of the court in deciding on the facts and on questions of law ...”

THE ISSUE

The case is a dispute over the non-payment of consultancy fees. The plaintiff was a general business consultancy company in Hong Kong that provided services in corporate finance, acquisitions and investment. Mr Andrew A Chen was described as a director of the plaintiff. In November 2003, the plaintiff commenced proceedings against the defendant for the recovery of a sum of AU\$4,322,468.30, under a Mandate Agreement dated 5 December 1997.

The defendant claimed he was entitled to rescind the Mandate Agreement, and hence was not liable to pay the outstanding fees. The fee for the advice was a payment calculated by reference to 10 percent of the net tangible asset value of the listed company.

BACKGROUND

Golden Glory International Ltd (Golden Glory) owned 86.2 percent of the PRC company, Beijing Badaling Cable Car Company Ltd, which operated a cable car business in mainland China. Golden Glory was 100 percent owned by HCK China Investment

Ltd, a company domiciled in the British Virgin Islands and beneficially owned by the defendant and his wife. The defendant sought advice from the plaintiff in relation to finding a suitable corporate vehicle in which to inject his interests in the cable car business for listing purposes and subsequently raise funds from the public. The defendant entered into the Mandate Agreement which provided that the plaintiff would source an Australian listed company for the defendant's acquisition.

Essentially the transaction proposed by the plaintiff under the Mandate Agreement was a reverse merger arrangement with a back-to-back transaction for the exchange of assets. The assets of Investment Austasia Ltd (IAL) would be sold to its parent, the Wah Nam Group Ltd, and the defendant would purchase the bare shell of IAL and inject the shares in Golden Glory.

There were complications in the arrangements when the listed company was found not to be suitable and could not be traded on the Australian stock exchange. As a result the defendant had served a notice on the plaintiff on 23 October 2002 to rescind the Mandate Agreement.

In November 2003, the plaintiff commenced proceedings against the defendant for the recovery of the unpaid fees under the Mandate Agreement.

The defendant claimed that the Mandate Agreement was illegal and unenforceable and void as neither the plaintiff nor Chen were registered as an investment adviser or an investment representative, as required under sections 49 and 50 of the Securities Ordinance. Further, Chen failed to disclose he was an undischarged bankrupt and was not a director of the plaintiff.

Chan, J concluded that the defendant had avoided the Mandate Agreement under section 143 (5) of the Securities Ordinance. The Mandate Agreement having been rescinded and avoided by the defendant, the plaintiff is not entitled to payment of the fee and the defendant is entitled to repayment of the amounts he had paid in advance to the plaintiff. In relation to the expert evidence adduced in this case, Chan, J stated:

“ ... it is highly undesirable that at the time when the parties sought leave from the court to produce such evidence, they did not procure the order for leave to specify the issue or issues on which the experts were to give evidence. This resulted in a lengthy report from the defendant's expert on different issues, most of which are inadmissible and unhelpful to the court. In particular, the report deals with matters which are properly questions to be decided by the court, on the nature of, and ambit of the plaintiff's duties under, the Mandate Agreement, whether the plaintiff was negligent and in breach of its duty to act in the interests of the defendant, and on how the expert himself would have structured and proceeded with the Acquisition. It is recognised that in an appropriate case, expert evidence addressing the risks and special considerations to be borne in mind in fields of expertise in which the court may require assistance may be required. However, experts cannot usurp the function of the court in deciding on the facts and on questions of law such as the extent of the legal duty in any given situation, and whether there is breach. The expert report of Mr Chong has only been of very limited help. ”

WHAT IT MEANS FOR EXPERTS

Both the case law and the rules of evidence require that proposed evidence be relevant to the issue in dispute.

That the expertise is relevant to the issues being opined needs to be clearly expressed as part of the expert's report.

In this case, Chan, J comments that the instructing parties failed to narrow the issues in dispute for the experts to address. As a result, the defendant's expert strayed into areas that were irrelevant and unhelpful to the court. Experts must take care when expressing opinion beyond their area of expertise. A financial risk expert should avoid expressing legal opinions. Clear instructions are vital if experts are to carry out their work within the requirements of their expertise.

The expert's duty is to provide the court with what is necessary to reach its own conclusion on the basis of the facts produced in evidence.

As quoted by Davies, J in *DAVIE V. LORD PROVOST, MAGISTRATES AND COUNCILLORS OF THE CITY OF EDINBURGH* [1953]:

“Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court ... Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions,

so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury”.

Experts must take care not to debate the facts or offer their view as to issues of negligence or liability, as these issues are clearly within the court's function. The instructions provided to the expert must be specific enough to ensure the opinions being sought are directly relevant and helpful to the court.

The cases:

Admissibility — procedural

Admissibility — procedural

**KWAN YUEN MEI V. LEE, SEE CHING AND OTHERS [2012] HKCFI 1532; HCPI570/2009 (9 OCTOBER 2012)
(CONSOLIDATING KWAN YUEN MEI V. LAU SUI YUEN [2012] HKCFI 1531; HCPI569/2009 (9 OCTOBER 2012))**

Experts must be both experienced in the specialty and knowledgeable about court procedures

THE ISSUE

This is an appeal by the plaintiff against the court's decision to dismiss her claims for medical negligence against the defendants in both the actions cited above. The actions were dismissed by the court as the expert medical reports submitted did not support the plaintiff's claims.

BACKGROUND

Medical negligence claims are subject to a test that arose from the British case **BOLAM V. FRIERN HOSPITAL MANAGEMENT COMMITTEE**. This case held that in claims for medical negligence the law imposes a duty of care, but the standard of that care is a matter of medical judgment.

The BOLAM test states that: "If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent".

The plaintiff therefore needed to show that there was a duty of care between the doctor or nurse and the patient, and that the act or omission of the doctor or nurse breached the duty of care, in order to establish a case for medical negligence. Essentially it is the standard of care that is at issue. The test applied is the standard of the ordinary skilled doctor or nurse exercising and professing to have that special skill. So a medical practitioner is not

negligent if he or she acted in accordance with a practice accepted by a reasonable body of practitioners in the relevant field.

The plaintiff relied on four medical expert reports:

- 1)** a report dated 11 March 2011 by Professor Lee;
- 2)** an assessment report dated 30 June 2011 by Dr Wan;
- 3)** a medical care report dated 22 December 2011 by Ms Yeung; and
- 4)** a case review letter dated 19 July 2012 by Dr Gong.

The plaintiff represented herself as she was unable to afford legal representation and her repeated applications for legal aid had been rejected. The experts were either not instructed by persons with knowledge of the Rules of the High Court and/or failed to acquaint themselves with the proper procedure.

None of the reports submitted complied with the formalities of expert reports as they did not include a declaration by the relevant expert to verify that he or she had read the code of conduct and agreed to be bound by the provisions in Order 38 rule 37C of the Rules of the High Court.

None of the reports submitted were verified by a statement of truth as required by Order 41A rule 2 and were therefore not admissible as evidence. Additionally, there were other issues with the reports in terms of addressing the BOLAM test.

Professor Lee's report listed the various effects and side effects of the medicine, but failed to opine as to the effect on the deceased, of either the prescription or withdrawal, of the medication.

Dr Wan's report did not refer to professional practice or address whether the standard of care was below that of an ordinary skilled doctor. Dr Wan's report also failed to specify (i) the documents relied on in the report; (ii) his background, qualifications and experience; and (iii) the reasons and the academic basis in support of his conclusions. Ms Yeung was a nurse and not a doctor, and hence was not qualified to comment on the practice of the medical profession.

Dr Gong's report also failed to specify (i) the documents relied on in the report; (ii) his background, qualifications and experience; and (iii) the reasons and the academic basis in support of his conclusions. Additionally this expert evidence was submitted after the hearing by the Master that struck out the medical evidence submitted by the plaintiff.

WHAT IT MEANS FOR EXPERTS

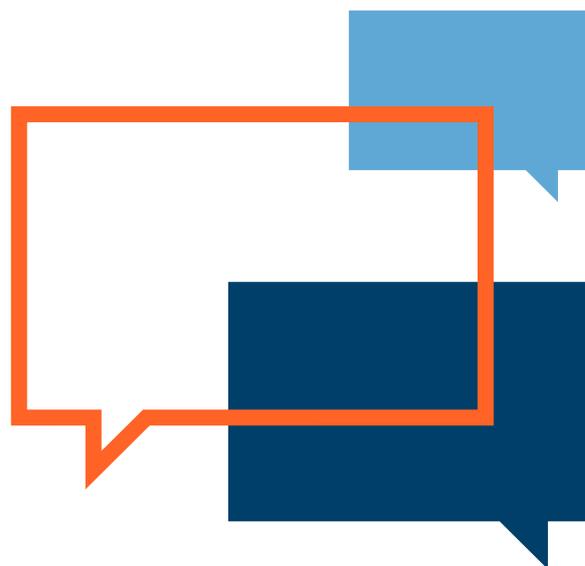
Following the Civil Justice Reform, which came into effect on 2 April 2009, the Rules of the High Court provide a more detailed set of procedures to be adopted and followed when engaging expert witnesses. The requirements of the court are set out in Appendix D of Rule O38.

The Rules of the High Court require an instructing party to provide a copy of Appendix D to any expert it engages, along with any instructions. The expert report must contain a declaration that the expert witness has read and understood the Code of Practice and that his or her duty is to the court and not to the litigating party. Furthermore, under Rule O41A of the Rules of the High Court, an expert report must be accompanied by a statement of truth signed by the expert.

This case reinforces the point that compliance with the formal requirements of the code (i.e., the inclusion of the requisite declaration) must be adhered to in order to make an expert's report admissible.

Experienced experts are more likely to be familiar with the court's requirements than those experts who have not previously prepared reports for court or provided testimony.

To be an expert witness does not simply require professional qualifications. Specialist knowledge comes from experience in the matters in the particular discipline as well as the appropriate qualifications. Not all appropriately qualified persons make good expert witnesses.



YEUNG GA WAI V. LAU MING SHUM [2012] HKCFI 1094; HCA798/2004 (19 JULY 2012)

“... However, the dispute between the parties is not on the foreign law, but the purpose on which the payment was made by the plaintiff ...”

THE ISSUE

This case included an interlocutory summons by the defendant to adduce expert evidence on Chinese law. The plaintiff opposed this, and the court had to decide whether the defendant’s proposed expert evidence was relevant to the case.

BACKGROUND

The issue in this case was whether funds given to the defendant constituted a loan or an equity investment. By an oral agreement, the plaintiff paid HK\$1.8 million to the defendant to purchase a 10 percent share of a hotel operation in the People’s Republic of China. The plaintiff claimed that he received neither the shares, nor his money back, so the defendant had breached their agreement.

The defendant admitted that he had received HK\$1.8 million from the plaintiff and had invested it in the hotel operations. However, he claimed he could not return the investment because the hotel had lost money, shut down and had been sold for CN¥9.6 million in the liquidation.

As the hotel operations lost money and depleted its shareholders’ investments, Chinese law specified that the proceeds of the sale go first to retire the current liabilities and then to shareholders or to repay shareholders’ loans.

The defendants wanted to adduce expert evidence that would show that the plaintiff’s investment would be considered a loan under Chinese law and thus to establish its priority for receiving money from the sale of the hotel assets. The court had to decide the purpose behind the payment made by the plaintiff.

Mr Registrar Lung concluded that since the defendant was neither the hotel’s liquidator nor its management company, he was not permitted to base his defence on laws that decided how liquidated assets were distributed. Mr Registrar Lung found that the defendant’s proposed expert evidence was not relevant to the case, as established in *WONG HOI FUNG V. AMERICAN INTERNATIONAL ASSURANCE COMPANY (BERMUDA) LIMITED & SHRILA CHAN HCA 4576/2001*. He consequently dismissed the application.

Mr. Registrar Lung considered that the relevant question to be addressed was: “The purpose on which the payment was made by the plaintiff”.

WHAT IT MEANS FOR EXPERTS

The court will only accept expert evidence that is relevant to the case. Experts are entitled to opine only on the relevant topic. They are not entitled to give evidence on the facts of the matter.

Courtroom rules specify that when the proposed expert evidence is plainly inadmissible or irrelevant, the court should exercise its discretion to refuse to admit it. But if the proposed evidence is clearly relevant or the court can’t decide if it is relevant, then it should permit the evidence to be adduced.

To be admitted, expert evidence must meet two criteria. It must be:

- 1) Admissible as “expert evidence” for the purpose of section 58 of the Evidence Ordinance Cap 8; and
- 2) Relevant to the issue to be resolved.

TANG TAK PING V. KAI SHING CONSTRUCTION CO AND ANOTHER [2012] HKCFI 109; [2012] 1 HKLRD 1093; [2012] 3 HKC 323; HCPI539/2011 (6 FEBRUARY 2012)

Obtaining an expert's report without agreement of the other party and without leave of the court may disqualify that expert

THE ISSUE

This case is a fairly good summary of the general rules for adducing expert evidence in personal injury proceedings.

The plaintiff claimed for personal injuries damages when he fractured his spine after a fall from height during work. In the course of the proceedings, a joint orthopaedic expert report was prepared. Both experts agreed that no further examination of the plaintiff by other specialists was required. Nevertheless, the plaintiff obtained a psychiatric expert report from a doctor and an expert psychiatrist's report.

THE BACKGROUND

The plaintiff's solicitors invited the defendant to undergo a joint psychiatric examination either by a single joint expert or by two experts. They stated that in the absence of a reply, they would proceed to instruct their own expert to conduct an examination and prepare a report. The defendant's solicitors replied that the psychiatric report prepared by Dr Chiu was sufficient for the proceedings and that the plaintiff should obtain leave from court before adducing an expert psychiatric report. The plaintiff's solicitors responded that they would obtain an expert psychiatric report and would seek leave from the court if so required. The defendant's solicitors informed the personal injury master of the developments. The master directed that

the decision to obtain such a report be reserved for the personal injuries judge.

Bharwaney, J, the personal injuries judge, directed the parties to jointly appoint and instruct Dr Chung as the single joint psychiatric expert in this case to examine the plaintiff and to prepare a report on his condition, its cause and his future prognosis. He ordered that the cost of the expert report prepared by Dr Chiu not form part of the plaintiff's cost of the action and that only 50 percent of the costs of the hearing be included as costs in the cause. Dr Chiu was disqualified from acting as the joint expert in the matter. In his summation of the issues Bharwaney, J, referred to the court's approach to manage medical evidence in personal injury cases, stating a joint approach has the following virtues¹:

1) avoidance of different observations on different occasions, or disputes on observations under single examination;

2) discussions amongst the experts to narrow down the issues;

3) specifying matters agreed and matters not agreed and the reasons for any non-agreement;

4) avoidance of numerous supplemental reports commenting on the reports of the other side; and

5) minimising the need to call the experts to deal with matters which could have been dealt with under (1) to (4) above.

The underlying objectives of the Civil Justice Reform were to ensure:

- The cost-effectiveness of proceedings.
- That each case is dealt with expeditiously.
- Reasonable proportionality with regard to the amount of money involved, the importance of the case, the complexity of the issues and each party's financial position.
- Procedural economy in the conduct of the proceedings.
- Fairness between the parties.

In addition, the expert evidence submitted must be in a recognised discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate.

These objectives and the joint approach are reflected in the protocol for commissioning expert reports set out in Section I of the Personal Injuries List Practice Direction PD18.1. Of particular relevance are the general provisions §§69-71:

¹ See FUNG CHUN MAN V. HOSPITAL AUTHORITY (HCPI 1113/2006, 24 June 2011) at §6 and MOK KING SUN V. TURN ROUND COMPANY LTD (HCPI865/2007, 25 March 2009) at §26.

69. “As a general rule, leave of the court or consent of the parties is required before any expert evidence can be adduced at trial.

70. A party who obtains expert evidence before obtaining leave, other than from a single joint expert or pursuant to joint examination and joint expert report with the expert(s) of the other party or parties, does so at his own risk as to costs and/or eventual refusal of leave to adduce such expert evidence.

71. As soon as it is realised there exists a need or an anticipated need for adducing expert evidence at trial or if parties failed to reach agreement on arranging joint examination and/or compiling joint expert report by the parties’ respective experts before or after the commencement of proceedings or if no agreement can be reached as to directions on obtaining expert evidence and/or for permission

to adduce expert evidence, a party shall apply (by inter partes summons or by restoring the case for Check List Review Hearing) or the parties shall jointly apply (by Consent Summons to expedite or restore the hearing of the Check List Review) to the personal injuries master as soon as possible upon the commencement of or in the course of proceedings, as the case may be, for directions on obtaining expert evidence and/or for permission to adduce expert evidence”.

The judgment emphasises that the party who obtains an expert’s report without agreement of the other party and without leave of the court runs the risk of disqualifying that expert from appointment by the court as the single joint expert (as occurred in this proceeding). The risk may not be high at the beginning of proceedings. However, if application for expert evidence to be adduced is made late in the day and when trial is imminent, the court may

refuse the application or may only allow the appointment of a single joint expert.

Another point to note is that the party who obtains an expert’s report without agreement of the other party and without leave of the court risks losing his right to claim privilege over such a report, if leave is later granted to appoint the same expert as the two joint experts to examine the plaintiff and to report on the case.

WHAT IT MEANS FOR EXPERTS

The consequences of preparing an expert report on behalf of a party that does not have leave to adduce expert evidence may be that the expert is disqualified from further action in the matter should the court agree to appoint joint experts. Further, where an expert report has been prepared without leave of the court, and that expert is later appointed as a joint expert, privilege on the earlier report may be waived. Experts should consider carefully their future role in the proceedings when preparing an expert report without the leave of the court.

LAU YUET MING V. HUNG LING KWOK AND ANOTHER [2012] HKCFI 320; HCPI300/2011 (7 MARCH 2012)

The expert evidence “... must be in a recognised discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate”

THE ISSUE

In this personal injury case, the plaintiff was a passenger on a coach that was involved in a road accident, this accident resulted in the plaintiff becoming disabled. After the accident, the plaintiff was wheelchair bound and needed a live-in caregiver and a new home that would accommodate his disability.

The plaintiff sued the coach driver and his employer, and claimed, *inter alia*, costs for the caregivers’ past and future services and for a new home. Rehabilitation experts were engaged to assess how much this new residence would cost. The plaintiff asked for permission to allow a surveyor to estimate the cost; the defendant opposed it. Master Ng had to decide whether the surveyor’s testimony was needed to help the judge determine damages.

Master Ng considered that the case did not require expert advice from a surveyor. In a personal injury lawsuit, the court is not concerned with the rental or purchase price of a specific property at a particular time,

unlike civil cases involving breach of sale agreements or similar issues. In essence, the court’s function is to establish the plaintiff’s accommodation needs and the level of damages required to pay for them. Master Ng concluded that it was pointless for an expert to perform an extensive valuation exercise based upon selected comparables that were not currently on sale. Instead, she said, the court should look at the freely available information online, on reputable real estate agents’ websites, about what it costs to rent or buy one of these properties. Master Ng concluded that this information was factual enough and an expert’s opinion was not necessary.

Master Ng affirmed the principle that expert evidence should be necessary, relevant and of probative value. In determining relevance, the guiding principle is that the evidence must help the court resolve the issue(s) in dispute or at trial. If the court can do this without expert evidence, then the evidence is not necessary and should not be introduced.

Further, the expert evidence must be used in the most effective and economic manner consistent with the objectives of the Civil Justice Reform. While Master Ng agreed with the plaintiff that the cost for the expert advice was not disproportionate to the size of the claim, she declared that publicly available data could be obtained at no cost.

WHAT IT MEANS FOR EXPERTS

The case law on expert evidence shows that this evidence must be relevant to the issues(s) to be resolved,² and/or must supplement what the jury already knows or can easily find out.³ In addition, the costs of expert evidence must be proportionate to the amounts in dispute, especially since Civil Justice Reform sought to make civil litigation more cost effective.

Master Ng referred in her judgment to Bharwaney, J’s summary of the criteria that expert evidence: “... must be in a recognised discipline, reasonably required to enable the court to resolve the issues in dispute, and proportionate”.⁴

² See, for example, WONG HOI FUNG v. AMERICAN INTERNATIONAL ASSURANCE CO. (BERMUDA) LTD. AND ANOTHER [2002] HKCFI 374; [2002] 3 HKLRD 507; [2002] 4 HKC 225; HCA4576/2001 (8 October 2002).

³ As described in the judgment in R v Bonython [1984] 38 SASR 45 in the Supreme Court of South Australia.

⁴ See FUNG CHUN MAN V. HOSPITAL AUTHORITY HCPI 1113/2006 (24 June 2011). Also referred to in the judgment in TANG TAK PING V. KAI SHING CONSTRUCTION on P.33.

The cases:

Rules of evidence

Rules of evidence

CCMJ V. SSM FORMERLY KNOWN AS SKL [2012] HKFAMC 56; FCMP67/2010 (5 OCTOBER 2012)

“The difference between a factual witness and an expert witness”

THE ISSUE

In this case, a father sought custody of a child born as a result of his cohabitation with the respondent, who he said was unfit. The mother left the father and moved in with her parents when the child was six months old. At the time of the hearing the child, whom the court referred to as “N”, was three years and 10 months old.

The case took about two years to come to trial. During the interlocutory proceedings the father introduced evidence that attempted to prove that the mother was unfit to care for the child. The hundreds of exhibits included letters, photographs and documents; mobile text messages and emails; lawyers’ correspondence; school notices; memos; reports from dentist Dr W Lam; a report about N by Dr S Lam of Essence Rehabilitation Centre; note of memo by Professor Li of the Department of Paediatrics, Prince of Wales Hospital; medical receipts; numerous photographs; a report by Dr Leung; and a report by Dr Cheng, the child’s paediatrician.

At no stage during the lengthy proceedings did the father’s counsel apply to the court to adduce this expert evidence. The reports from the two dentists — Drs W Lam and S Lam — were submitted as exhibits for the father’s case, but neither doctor was called to testify. The court found a number of procedural issues with the father’s

expert evidence, and the reports of Dr W Lam and Dr S Lam were not accepted.

There were a number of issues with the expert evidence. The contents of both reports from Dr W Lam and Dr S Lam were not accepted by the court on procedural grounds.

Order 38, rule 36 of the Rules of the District court specifies that expert evidence can be adduced at a trial or hearing only if the parties agree and have leave from the court. Further, the court’s permission is required to instruct an expert in family proceedings relating to children.

The reports from Drs W Lam and S Lam were not admissible because they did not include a statement of truth or a declaration that the expert’s duty was to the court, so they did not comply with Order 38 rule 37A and 37C. While Own, J considered the reports on a factual evidence basis, the doctors were not asked to testify about their contents and had no evidential value in the proceedings. One of the father’s many allegations was that the child had poor dental hygiene because the mother did not care for him properly. Dr Leung was called to testify on his report. Dr Leung confirmed he had consultations with the child and reviewed medical records, medications, photos of previous teeth cleanliness and reports from specialists. Dr Leung testified that the father had told him the child’s stained teeth had

improved after brushing, and that he had seen photographs taken before the cleaning and brushing. Dr Leung cited the findings of Dr W Lam, who was allegedly the person who examined the child’s stained teeth, but said he did not examine the child himself.

Own, J rejected Dr Leung’s evidence and said:

“I cannot accept such evidence. Dr Leung is in effect adducing secondary evidence from Dr W Lam’s assessment [sic] of N’s stained teeth without himself actually checking and seeing those teeth stains as appeared in the photographs shown to him by the father. In effect Dr Leung was accepting the photographs as truth without himself directly seeing the teeth stains and also he was accepting the alleged stains were cleansed off by the effort of the father. This is in essence hearsay”.

On the other hand Dr Cheng, the child’s paediatrician, also testified on the child’s stained teeth. The court accepted his evidence and treated him as a factual witness, since he had personally witnessed the problem. But the court later rejected his other testimony about the child’s physical appearance because he had been called as a witness of fact and not as a medical expert.

WHAT IT MEANS FOR EXPERTS

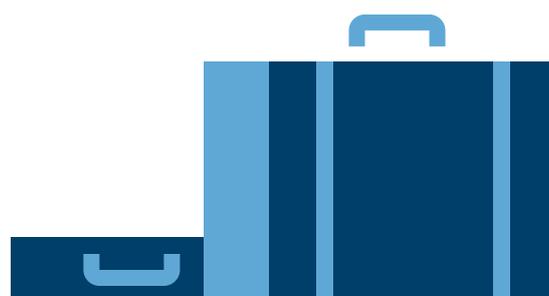
The general rule is that witnesses of fact who are not experts provide testimony as to what they have seen or heard, or have direct knowledge about. They cannot testify about something they were told by someone else, or did not witness first-hand; this is hearsay evidence. Factual witnesses also can't opine as to how or why something occurred.

In the role of a factual witness, an expert cannot adopt the findings of another witness or expert; only first-hand experience and knowledge of the facts are permitted. But in the role of expert witness, he or she can rely on experience, training and skill to draw a conclusion and express an opinion to help the court search for the truth. While experts are often called as factual witnesses, they should realise that their opinions don't

matter when they assume that role. Section §58 of the Evidence Ordinances provides:

“Where a person is called as a witness in any civil proceedings a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived”.

Expert witnesses must also follow court rules and procedures. Those who don't follow the rules when they submit reports risk having the evidence rejected. Expert witnesses are expected to know the legal system, the rules of evidence and the court, and courtroom protocols.



When is an expert not an expert?

MIMI KAR KEE WONG HUNG V. SEVERN VILLA LTD AND OTHERS [2012] HKCFI 30; [2012] 1 HKLRD 887; HCMP2192/2011 (12 JANUARY 2012)

THE ISSUE

The proceedings were commenced as a result of an action to remove Mimi Kar Kee Wong Hung (the plaintiff) from the board of Applied Development Holdings Limited (ADHL), the family-controlled public company. By virtue of her removal she lost the right to reside at a property on Severn Road. The plaintiff issued the originating summons to seek a declaration that she was the beneficial owner of that property. In turn, Severn Villa Limited and ADHL (the defendant companies) took out a summons against the plaintiff to remove her from these premises.

The court consolidated the various actions and this judgment deals with an application to appeal an interlocutory order made in a lower court that dismissed an Expert Evidence Summons and a Disclosure Summons.

THE BACKGROUND

The plaintiff and the third defendant used to be married; together they founded an electronics business which became the listed group of companies led by ADHL. The plaintiff served as the chairman and an executive director of ADHL from May 2005 to June 2010.

In 1989, a plot of land in Santa Monica, California, was purchased and four townhouses were constructed on the land. The plaintiff was the registered owner of the property in Santa Monica until its sale, at a profit, in 2001. A substantial part of the

proceeds of sale were used to acquire four units in Severn Villa at No. 3 Severn Road, Hong Kong. The balance of the purchase price was funded by mortgage loans. SVL, a wholly owned subsidiary of ADHL, is the registered owner of the property. Since 2003, the plaintiff has resided in Severn Villa.

The plaintiff alleges that she funded the Santa Monica property by way of a deposit from her personal funds and loans advanced by ADHL. The defendant companies assert that although the Santa Monica property was purchased through the plaintiff, this was done for the ADHL group. The purchase of the property at Severn Villa was a separate investment. The plaintiff resides in the property as part of her benefits as an executive director of ADHL.

The internal accounting records of ADHL were important for the resolution of the disputes between the parties in the consolidated proceedings. The plaintiff issued a summons for specific discovery seeking documents recording directors' current accounts, credit and loan transactions and inter-company transactions of the defendant companies. In response to the summons the financial controller of the defendant companies filed a number of affirmations for use in the trial along with supporting documents by way of exhibits. Some of the documents were redacted as the defendants' asserted certain entries were not relevant to the issues to be tried.

The plaintiff issued a summons seeking to exclude two of the affirmations the financial controller submitted on the

grounds that they amounted to expert accounting evidence for which no leave had been granted by the court. Alternatively, the plaintiff sought leave to call her own accounting expert (the expert evidence summons). The plaintiff issued a further summons seeking a list of all documents referred to in the affirmations and the unredacted copies of the accounting documents exhibited (the disclosure summons). The financial controller confirmed that the redacted parts were irrelevant to the issues being tried.

The essential question under the expert evidence summons was whether the affirmation by the financial controller constituted expert evidence. Counsel for the plaintiff argued that the witness, ADHL's financial controller, who is a qualified accountant, presented a detailed and extensive analysis of ADHL's accounting records and financial statements. He emphasised that the financial controller had no personal knowledge of the transactions concerned as she had joined ADHL after the events at issue. The affirmations set out her opinions, as a qualified accountant, as to how the court should interpret the books and records of ADHL and other subsidiaries regarding the transactions at issue, and the conclusions she suggested should follow from those opinions.

Furthermore, counsel for the plaintiff contended that the facts upon which opinion evidence is based must be proved by admissible evidence before the court, and if the opinion relies on assumptions they must be verified. In support of the

disclosure summons, counsel complained that the defendant companies disclosed incomplete financial records with many redactions, and hence the plaintiff's forensic expert, Mr L, could not verify the content of the affirmations. Counsel acknowledged a party's entitlement to conceal parts of a disclosed document on the grounds of irrelevance; however, where doing so would destroy the sense of the document or make it misleading that it was not permissible. He submitted that any redaction would destroy the sense of the accounting records or would render the unredacted figures unverifiable per the advice of the plaintiff's expert, Mr L.

The lower court declined to permit the further disclosure sought, as this would amount to permission for a wholesale investigation into ADHL's affairs, akin to a fishing expedition, leading to further demands for yet more disclosure, Kwan, J (Fok, J agreeing) stated:

“The generalised complaint that any redaction would destroy the sense of the accounting records and documents or would render the non-redacted figures unverifiable is not substantiated with particulars or demonstrated with any example why that is so. A bare statement of advice from Mr L would not suffice. It is not

the court's role in the consolidated proceedings to perform a roving evaluation of ADHL's affairs and accounts. There is no justification for the wholesale removal of redactions sought by the plaintiff”.

In respect of the expert evidence summons Kwan, J (Fok, J agreeing) concurred with the judge (in the lower court) who ruled that the content of the two affirmations did not constitute expert evidence, applying the following reasoning:

“As the Judge has ruled, these affirmations are factual; they are just a guide and a page-turner through the numerous pages of financial documents and records that are referred to. What the deponent did was to distil the facts as they appeared from those documents and records and then described them in a way which may be useful and helpful to the court. This is not evidence which “partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it”, nor is this evidence of fact given by an expert, the observation, comprehension and description of which require expertise”.

WHAT IT MEANS FOR EXPERTS

This judgment demonstrates the nuances of the distinction between expert evidence and evidence of fact. Clearly the financial controller had no direct knowledge of the accounting records of ADHL in respect of the issues in dispute as she was employed after the event. The court took the view that the financial controller's evidence should be viewed as a “guide and page turner” to the relevant accounting records and was admissible as such.

Specifically, as a person who has personal knowledge of ADHL's books and records as a whole, the financial controller is entitled to give evidence of his or her personal observation regarding the content of those books and records generally.

A Textbook Case

**GOOD FAITH PROPERTIES LTD AND OTHERS V. CIBEAN DEVELOPMENT CO LTD [2012] HKLT 87;
LDCS42000/2011 (16 NOVEMBER 2012)**

Expert witnesses who rely on published textbooks or studies in reaching their opinions must know when to submit that work with their opinions.

THE ISSUE

This is a case in the Lands Tribunal of Hong Kong. The case relates to a compulsory land sale application made under the Land (Compulsory Sale for Redevelopment) Ordinance.

The applicants sought leave to adduce further expert evidence. The respondent objected on the basis that the format of the additional expert report was not as agreed between the parties, that it might disrupt the trial, that some parts of the expert report were already included in earlier reports and that the report sought to introduce new evidence.

The issue between the parties was the redevelopment value of the commercial premises at No. 20 Caine Road. Both the applicants and the respondent had engaged experts, and both experts had prepared expert reports on the redevelopment value. The experts had also prepared a joint statement setting out areas of agreement and disagreement.

At the time the joint statement was prepared, the experts were aware that a new comparable transaction had taken place (i.e., a property transaction that provided a potential benchmark for the value of the subject property) at 38 Caine Road. The experts agreed that each would

analyse this additional comparable and deal with it separately by way of a letter. The applicant's expert, Mr Chan, submitted a letter with a detailed 76-page report addressing 13 topics (Item (a) to (m) in the letter). On the other hand the respondent's expert, Mr Lai, had prepared a three-page letter with three enclosures.

The respondents objected to the format of the evidence submitted by Mr Chan, saying it was inadmissible because it was not in the format agreed and presented new evidence. The tribunal considered that: "the admissibility of expert evidence should turn on whether they are [sic] relevant and should not be confined to its format".

On the date the joint statement was submitted, the government of the Hong Kong SAR also announced an adjustment to the stamp duty rates and introduced a Buyer's Stamp Duty on residential properties acquired by any person except a Hong Kong Permanent Resident. The applicant's expert addressed the changes in stamp duty in his revised report accompanying the letter. The respondent objected to the inclusion of this information on the basis that it was new evidence. The tribunal found that, since it had not yet determined a redevelopment value, it was "duty bound to consider all circumstances that are in existence and relevant before our determination. Both the Gramercy Shop

Comparable and the New Measures come into existence before the trial of this case commenced, the Tribunal will be failing its duty if these two recent events were not to be considered in the determination of the RDV [redevelopment value]".

A further objection related to textbook authorities submitted by the applicant's expert, Mr Chan, in support of his opinion about the problems associated with employing pre-sale comparables in a residual valuation. The tribunal's position was that Mr Chan was not putting forward new opinions as such, but only referencing the statements of authorities to justify his own stance. Expert witnesses are entitled to rely on published textbooks or studies in reaching their opinion. The disclosure of such assists the tribunal in its decision as to whether Mr Chan's opinion is accurate and whether to accept his evidence. The tribunal considered that the authorities should be admissible.

The tribunal dismissed the respondent's objection that the letter dealt with items previously covered, as well as introducing new material. It considered that the items previously covered required updated analysis to reflect the new comparable, and that the new material was either an extension of analysis previously performed, a response to issues raised by the respondent's expert, or otherwise helpful to the tribunal.

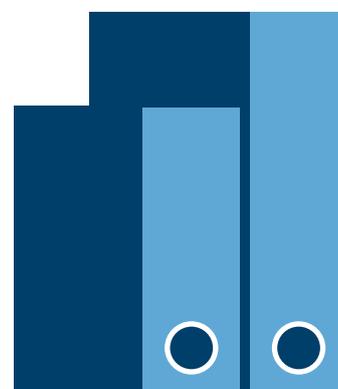
WHAT IT MEANS FOR EXPERTS

In this instance, the Lands Tribunal accepted extensive supplemental expert evidence at a late stage in the proceedings on the basis that it was pertinent and of assistance to the tribunal in making its decision.

The rules of evidence and court procedures require that an expert report submitted to a court or tribunal include a copy of

all documents referenced in the report and relied upon by the expert in arriving at his or her opinion. This disclosure helps the court determine whether the opinion is accurate and/or supported and gives the opposing expert an opportunity to review the same documents.

Documents that are reviewed but not relied on in the expert opinion need not be annexed to the report.



The cases:

Valuation and damages
approach

Valuation and damages approach

The goose that laid the golden eggs

KAM KWAN SING V. KAM KWAN LAI AND OTHERS [2012] HKCFI 1672; [2012] 6 HKC 246; HCCW154/2010 (31 OCTOBER 2012)

Where they are asked to make assumptions inconsistent with the facts, experts should consider whether it is appropriate for them to accept the appointment.

THE ISSUES

This highly publicised case made extensive use of expert witnesses — six from a variety of disciplines — and likewise offers a number of lessons for experts.

The case concerned the group of companies that own and operate the well-known Yung Kee goose restaurant in Hong Kong. Kam Kwan Sing, the eldest son of the founder of the restaurant (the founder having died some years ago), brought a petition against his brother, Kam Kwan Lai (the first respondent), and others, claiming that the parent company (Yung Kee Holdings Limited) had treated him unfairly. He wanted his brother to purchase his shares, or to be permitted to buy out his brother, or to close the company.

THE BACKGROUND

Yung Kee Holdings was incorporated in the British Virgin Islands (BVI). It owned (directly and indirectly) various other companies through which it operated the restaurant and other businesses, as well as property in Hong Kong. Harris, J dismissed the petition on jurisdictional grounds, on the basis that the subject was

a BVI company that had “not established a place of business in Hong Kong”.

Both parties adduced evidence on BVI law in relation to the degree of connection between the company and the BVI (which was relevant to the jurisdiction issue). Harris, J stated that he did not find this evidence “of much assistance”. In particular, he expressed concern at the petitioner’s expert making assumptions based on “discussions ... with instructing solicitors” where these assumptions appeared inconsistent with the facts. He concluded that he “found his [the petitioner’s expert’s] evidence generally to be no more than advocacy on behalf of the petitioner and on occasions disingenuous”.

After dismissing the petition, Harris, J considered several other issues that would have been relevant had the petition not been dismissed. This included the question of how the shares in Yung Kee Holdings would have been valued if one party had been ordered to buy the other’s shares. The assets of Yung Kee Holdings comprised various subsidiaries, some of which owned property and other assets, and some of which were operating companies (primarily the restaurant operating company, Yung

Kee Restaurant Group Limited). Both parties instructed separate experts in property valuation and business valuation.

Two significant issues arose between the experts with regard to property valuation. The first concerned existing and potential use of the properties. The first respondent asked his property expert to value the properties on the assumption that they would continue to be occupied by their existing tenants (at market rents) and that their use would be restricted to the current permitted use. He specifically excluded any redevelopment potential. These assumptions were based on his instructions, and he stated that he would not otherwise have made them.

The petitioner argued that the valuation should comply with the standards of the Hong Kong Institute of Surveyors and Hong Kong Financial Reporting Standards, and that under these standards a “market value” (the agreed measure of value between the experts) should not consider any special circumstances regarding the use of the property.

Harris, J accepted the first respondent’s view that the properties should be valued on the

assumption that their current use would be continued. He believed that the valuation standards allowed for assumptions about specific use to be made, and noted that the standards do not “specifically cater for the type of issues that arise under section 168A [of the Companies Ordinance] and they should not be treated as dictating what is a fair valuation of a company or any part of its assets”.

The second issue was whether the comparative method alone should be used to value the properties (as the petitioner argued) or whether the investment method (as applied by the first respondent’s expert) should also be used. The petitioner argued that the comparative method is generally accepted as the best method for valuing property. The first respondent’s view was that this method is reliable to the extent close comparables can be identified. If sufficiently close comparables cannot be identified, the valuer has to use the comparables available and make subjective adjustments, which makes this method less reliable.

Harris, J concluded that if there is “difficulty in finding suitable comparables, a check using an alternative method is advisable if such a method is available”, and that both methods should be used in the circumstances.

The key difference between the business valuation experts was in relation to how the restaurant company should be valued. The experts agreed that it should be valued on a going concern basis, but used different valuation approaches. The petitioner’s expert used the market approach (applying a price-to-earnings ratio from comparable listed companies) on the basis that “in his experience this is the most common way of valuing companies in Hong Kong”, while the first respondent’s expert used a discounted cash flow (DCF) analysis.

The petitioner’s expert identified only one comparable listed company on which

to base the valuation, and made certain adjustments to its price-to-earnings (P/E) ratio to account for differences between it and the restaurant company.

Harris, J considered that “it seems that [the comparable company] is so different in important respects to [the restaurant company] that it provides an unreliable guide to what a fair value of the latter is”.

He stated that he found the first respondent’s expert’s explanation for why this comparable was relevant “wholly unconvincing”, and that the first respondent’s expert had not “advanced any sensible reason for thinking that a prudent businessman considering buying [the restaurant company] would consider that [the comparable’s] P/E ratio provided much of a guide to what he might pay to acquire [the restaurant company]”.

Harris, J concluded that given that no suitable comparables appeared to be available, it was “perfectly sensible” to consider alternative methods of valuation, such as the DCF approach used by the first respondent’s expert.

WHAT IT MEANS FOR EXPERTS

Experts from three disciplines (the law, property valuation and business valuation) were retained in this matter, and certain issues emerged that are relevant to expert witnesses from different fields.

The first issue related to experts proceeding on the basis of instructions that are inconsistent with the facts, or being instructed to make assumptions they would not otherwise have made. There is a fine line between analysis that is helpful to the court and the perception of a lack of independence, as this case demonstrated. Harris, J was critical of the petitioner’s BVI law expert accepting instructions that contradicted facts that he should have

known, but did not take issue with the first respondent’s property expert following his instructions with regard to the assumed usage of the properties, which the expert stated that he would not otherwise have made.

For experts, stating clearly where they have relied on instructions and the implications of these for their conclusions is likely to minimise the risk of criticism on such grounds. Where relevant, experts should consider consistency between their instructions and facts within their knowledge. Where experts are instructed to make assumptions inconsistent with the facts, experts should consider whether it is appropriate for them to accept the appointment.

With regard to making assumptions that contradict common practice in their professions, experts need to be cognisant of the need that can arise in legal disputes to consider hypothetical situations that may not arise in practice. The property valuation assumption of the continued use of the Yung Kee premises to house the restaurant is an example of this.

A second issue in this case relates to the methods used by experts. Both the property and business valuation experts used comparables to determine property value. In both cases, Harris, J accepted the view that this approach is limited by the relevance of the comparables available, and that using a second valuation method (as a cross-check or as an alternative) would help the court. In general, using more than one method allows an expert to cross-check his conclusions, and is likely to assure the court that the conclusions are correct and reasonable. Harris, J’s conclusions also indicate that the methodology applied must be appropriate for the specific circumstances of the case, and the rationale that a given approach “is the most common way” of doing things may not always be accepted.

**LEHMAN & CO MANAGEMENT LTD V. EFFICIENT LTD AND ANOTHER [2012] HKCFI 1876; HCCW377/2010
(28 NOVEMBER 2012)**

A case that underlines the importance of both experts and lawyers being familiar and complying with the Rules of the High Court.

THE ISSUE

Each of two equal shareholders in a Hong Kong-incorporated company filed winding-up petitions, and one filed related claims for damages against the other. This was a private company that provided accounting services in mainland China. The two shareholders (and parties associated with them) were also involved in a separate Hong Kong High Court action for defamation (brought by the cross-petitioner against the petitioner), which had some implications for this case.

THE BACKGROUND

Harris, J had previously ordered the petitioner to sell its shareholding to the cross-petitioner, at a value by reference to the valuation of a court-appointed expert. The court-appointed expert was also asked to quantify the losses the cross-petitioner suffered as a result of the petitioner's conduct (which included the establishment of a competing accounting firm and trademark infringement). The cross-petitioner had lodged the separate claim against the petitioner seeking damages for losses resulting from alleged defamation.

Significant issues of both correct evidentiary procedure and damages in respect of the expert's valuation methodology emerged in this case.

Harris, J criticised the court-appointed expert for submitting a report that did

not comply with the Rules of the High Court. Although the expert signed the report, it stated that it was from his firm rather than from himself. Nevertheless, the court accepted the report.

The cross-petitioner accepted the valuation report in its entirety, but the petitioner disputed it. The petitioner sought leave to serve its own expert evidence, on the basis that the Rules of the High Court permit parties to serve expert evidence on issues where an expert has been appointed by the court, providing reasonable notice is given. The judge affirmed that such a right existed under the rules, but rejected the application to serve additional evidence on the basis that reasonable notice had not been given.

VALUATION AND DAMAGES ISSUES

1) Valuation evidence advanced in related proceedings was inconsistent

The court-appointed expert's valuation of the company was lower than that of the cross-petitioner's expert in a related High Court action for defamation. Counsel for the petitioner argued that it was "*unconscionable*" for the cross-petitioner to accept the court-appointed expert's valuation for determining how much it should pay for the shareholding it was to buy, while simultaneously advancing a damages claim based on a substantially higher valuation in the defamation proceedings. Counsel suggested that the court treat the valuation advanced by the cross-petitioner in the defamation proceedings

as the minimum value of the company for the purposes of these proceedings. Harris, J accepted that there was an inconsistency between the valuations in the two proceedings. However, he ruled that it did not follow that the court-appointed expert's valuation was incorrect. Harris, J concluded that he should evaluate the court-appointed expert's evidence on its merits. He noted that a consequence may be that the cross-petitioner is restricted by the position it has adopted in these proceedings from arguing for a higher valuation in the defamation proceedings, but stated that this was not a matter with which he needed to be concerned.

2) Income versus market-based valuation approaches

The court-appointed expert valued the company using the market method and used the asset method as a cross-check. Counsel for the petitioner argued that the market method was inappropriate since it relied on benchmarks from publicly listed companies, and that the benchmark companies selected by the court-appointed expert were larger businesses and trading in different geographies to the company being valued. Harris, J accepted that an income-based valuation may have been more reliable, but stated that he could determine whether this was the case if one had been submitted. Without such a valuation, he concluded that the court-appointed expert's valuation was not, on the basis of its methodology, "so unreliable that the Court should not accept it".

3) Application of the market-based approach

Counsel for the petitioner also criticised the court-appointed expert's application of the market method on the basis that it relied on one year's (2010) EBITDA⁵ (to which a price/earnings ratio had been applied), rather than the average EBITDA for a number of years. Since the company's financial performance in 2010 had been poor, it was alleged this produced an "artificially low" valuation.

Harris, J accepted that an adjustment to EBITDA may be appropriate in some cases since the market approach is based on maintainable earnings. However, he did not consider that counsel for the petitioner had demonstrated why that was appropriate in this case.

He noted that the company's earnings had been declining in recent years, and that it was "highly unlikely" any prospective buyer would accept a valuation based on the average EBITDA over a number of years, without some explanation of this decline. Harris, J noted that no explanation for this decline had been advanced except for the petitioner's conscious efforts to defame the petitioner, compete with the company and infringe its trademarks. He concluded that the petitioner's actions were likely causes of the decline in EBITDA, and that the court-appointed expert's valuation based on the 2010 EBITDA was appropriate.

4) Damages

The court-appointed expert also quantified the historical losses suffered by the cross-petitioner as a result of the petitioner competing with the company and infringing on its trademarks. He quantified losses using several approaches, which resulted in a broad range. Harris, J applied his own calculation to assess damages, and came up with a figure that fell within the expert's range.

A key issue was the extent to which profitability was affected by the actions complained of in these proceedings, and the extent to which it was affected by the defamation alleged in another set of proceedings. The court-appointed expert assumed that the two factors affected the company's profitability equally, and on this basis made a 50 percent deduction from the losses he calculated. Harris, J accepted this assumption.

WHAT IT MEANS FOR EXPERTS

This case underlines the importance of both experts and lawyers being familiar and complying with the Rules of the High Court, and demonstrates that failure to adhere to these rules may result in the court disallowing the admission of expert evidence.

It also suggests that the court may not be persuaded by arguments that an expert's methodology or analysis is inappropriate unless calculations are presented using alternative methodologies. In this instance, Harris, J recognised that there were potential shortcomings in the analysis of the court-appointed expert, but was unwilling to reject his valuation on the basis that no alternative evidence had been put before it, and that it therefore remained unconvinced that any shortcomings would have a material impact on the outcome.

For valuation experts, this case is a reminder that preparing all relevant valuation methodologies (where the required information is available) may lead to a more robust conclusion, and gives the court a range of options from which it may choose.

This findings on damages in this judgment also suggest that where specific evidence is not available on the contributions of different causes to the loss suffered, the court may accept an assumption that it does not consider unreasonable (such as the 50 percent deduction).

⁵ Earnings Before Interest, Tax, Depreciation and Amortisation

Asking blind men to imagine an elephant

LUCKY SKY ASIA PACIFIC LTD V. LUO SHU FAN [2012] HKCFI 1370; HCA842/2010 (4 SEPTEMBER 2012)

A case that underlines the importance of both experts and lawyers being familiar and complying with the Rules of the High Court.

THE ISSUE

The plaintiff in this case had entered into an agreement to purchase a property in a new luxury residential development in Hong Kong from the developer, and had entered into a back-to-back agreement to resell it to the defendant. Both transactions were due to complete following the issue of an occupation permit for the property (around the end of 2008). In the context of falling property prices in Hong Kong as a result of the international financial crisis, the defendant (having previously paid a substantial deposit) failed to complete the transaction as agreed. The plaintiff, who was required to complete on the “head agreement” with the developer, sold the property to an alternative buyer at a lower price. The plaintiff claimed the diminution in price, as well as costs incurred in connection with the resale (net of the deposit received from the defendant)

Master Lai stated that the normal measure of damages in such circumstances is “the difference between the contract price and the market price of the property at the contractual time fixed for completion”. The parties accepted this measure and both parties adduced expert evidence on the market value of the property at the relevant time.

Both parties’ experts valued the property using a comparable transactions approach. The plaintiff’s expert restricted his comparables to those transactions for properties of (materially) the same

size, in the same development, and with a similar aspect. The defendant’s experts (the defendant had served expert reports by two experts with similar conclusions) considered a broader range of comparables, including properties of a materially different size and aspect. Master Lai preferred the plaintiff’s expert’s approach on the basis that the use of direct comparables minimised the need for subjective adjustments and accepted his valuation. Master Lai quoted the judgment in ZHUANG PP HOLDINGS LIMITED & ORS. V LAM HOW MUN PETER & ORS. (HCA 1589/2003, UNREPORTED, 19 AUGUST 2009):

“To use the unit rate in transactions of properties which are not comparable in size to the Basement as comparables and then inflate it by size adjustment is just like asking blind men to feel parts of an elephant and then to imagine what an elephant is. Depending on where the blind men feel, they may come up with different ideas of what an elephant is”.

Master Lai also noted that the defendant and its experts did not appear at the hearing, and as such, no explanation was provided to the court on the adjustments made by them to the comparables selected. Master Lai placed no weight on the defendant’s experts’ reports.

The actual resale price achieved by the plaintiff was approximately 4 percent lower

than the market value of the property (as accepted by the court). Master Lai stated that the price at which the seller resold the property is not usually taken into account in preference to the market value. He noted, however, that the resale price “afforded good evidence on the market price”. He considered that in this case, the plaintiff was forced to sell the property in a short timeframe and it was relevant to take the impact of this on value into account. On the basis that the resale was at a price close to the market price, and that there was no indication that it was not at arm’s length, Master Lai accepted the resale price as the benchmark for calculating the loss suffered by the plaintiff.

WHAT IT MEANS FOR EXPERTS

This judgment shows the preference of the court, where comparables-based valuations are performed, is for comparables that are as close as possible to the subject. Such comparables minimise the need for subjective adjustments to value, and are most likely to be accepted by the court. This preference will, however, necessarily be subject to there being a sufficient number of close comparables (in this case there were eight. Where there are not close comparables, a broader set may need to be considered).

Another interesting aspect of this case was the court’s willingness to take into account the forced nature of the resale, and the impact this would have on value.

Whereas "market value" is usually described as the value at which an asset would be exchanged where buyers and sellers both acting without compulsion, in this case the judge considered it appropriate to calculate the plaintiff's loss based on a value that reflected the forced nature of the sale.

A further (and somewhat obvious) lesson is the value of experts appearing in court to be examined on their written testimony. This is an essential part of the process

through which the court can satisfy itself that the methods adopted and assumptions made by an expert are justified. It is important, both for experts and those instructing them, to ensure when an expert is instructed that both parties are committed to participating in the litigation process.

On accepting an engagement or providing written testimony, an expert should be prepared and available to give oral testimony.



**MGA ENTERTAINMENT INC V. TOYS & TRENDS (HONG KONG) LTD AND OTHERS [2012] HKCA 348;
[2012] 5 HKC 372; CACV104/2011 (8 AUGUST 2012)**

The plaintiff's expert evidence was "seriously flawed and lacking in objectivity"

THE ISSUE

This was an appeal concerning an assessment of damages following the discharge of an interlocutory injunction.

THE BACKGROUND

The plaintiff (in the original application for the injunction) owned the copyright to a popular fashion doll product called "Bratz". The defendants were toy manufacturers and distributors who in early 2002 marketed a range of dolls known as "Funky Tweenz", and began to receive orders for these.

The plaintiff claimed that the Funky Tweenz dolls infringed its copyright. It applied for (and successfully obtained) an interim injunction restraining the defendants from producing or marketing the Funky Tweenz product. Prior to commencing proceedings seeking an injunction, the plaintiff caused 'cease and desist' letters to be written to actual and potential customers of the defendants.

In a hearing some six years later, the plaintiff applied to discontinue the action and the injunction was discharged. As a consequence, the defendants were given liberty to apply for an enquiry as to damages (arising from the injunction), which they did. In May 2011, judgment was handed down awarding the defendants damages of US\$7,250,000 plus interest and costs.

This judgment of 8 August 2012 related to an appeal by the plaintiff seeking to set aside the award of May 2011. The appeal was dismissed by a majority (two judges to one) of the three-judge panel in the Court of Appeal.

In the damages hearing, both parties had adduced evidence from quantum experts. The plaintiff instructed Mr T of Grant Thornton, whereas the defendants instructed Mr P of Alvarez & Marsal. Seagroatt, DJ, hearing the enquiry as to damages, was critical of Mr T, who had calculated damages of less than US\$172,000, stating that he found his evidence "seriously flawed and lacking in objectivity" and "as a whole, and on material particulars, as lacking both logic in its approach and fairness in its evaluation".

By way of example of the flaws in Mr T's approach, he stated "Mr [T] in the text of his report at paragraph 4.5 opined that since the injunction related to the dolls specified in the order, 'any claims for losses on the sales of accessories or other related products... would appear to be irrelevant.' This statement is quite illogical. If the dolls are out of the market the accessories and related products have nothing to be accessories to or to be related to".

In contrast, [Deputy Judge Seagroatt] stated that he found the evidence of Mr P "both rational and objective in its approach", and he based his award on Mr P's quantification of losses, which he considered conservative.

The key issues that arose in the appeal included the assumptions made by Mr P in relation to the level of sales of Funky Tweenz "but for" the injunction, and the duration for which these sales would have continued (i.e. the product life cycle).

Mr P had based his estimate of annual sales volumes on the orders received prior to the injunction (some of which were subsequently cancelled), and on expressions of interest received by the defendant. Mr P had assumed a life cycle of 10 years (whereas Mr T had assumed a life cycle of 15 months).

The dissenting judge, Cheung, JA, noted that this was not a case where a supplier's ongoing production was disrupted by an injunction, but rather of a product introduced to the market only shortly before the injunction. With regard to Mr P's sales assumptions, he considered that "to rely on expressions of interest as a projection for future sales cannot be right. After all if the buyers were really interested in buying the goods, they would have placed orders, even if initially for a small amount". He further noted that the defendants were unable to substantiate the majority of the figures for which they claimed expressions of interest had been received.

He also considered that Mr P's assumption of a 10-year period of sales (based on comparison with successful similar products such as the "Barbie" and Bratz dolls) was unrealistic, and that Mr P had applied an unsuitable comparison.

Cheung, JA stated *“Mr [P]’s report which was based on the figures provided by the defendants appeared more like a business plan with a rosy projection of future growth than an analytical examination of the damages sustained by the defendants”*.

Two other issues raised by Cheung, JA were that the loss was, in fact, the loss of a chance, and did not appear to have been appraised as such. He also stated that it was likely that part of any loss flowed not from the injunction, but from the writing of the cease and desist letters (which were not the act for which damages were being awarded).

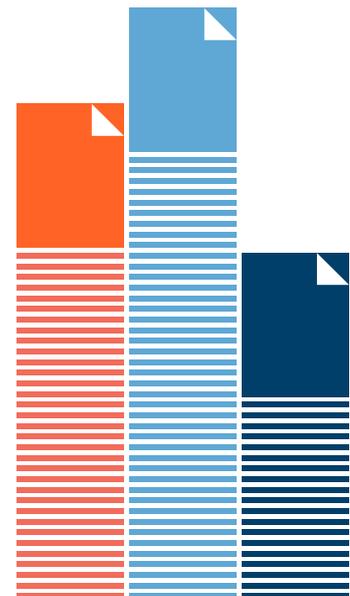
Cheung, JA went on to note that although Mr P’s calculation had been described as conservative, it “is not sufficient to say that [Mr. P’s] analysis is already based on a conservative estimate when the very foundation of this estimate was based on some grossly inflated figures”.

WHAT IT MEANS FOR EXPERTS

The case demonstrates the importance of quantum experts considering whether information provided to them by clients is reliable, and forms a reasonable basis for the calculation of damages. It also illustrates the importance of a damages calculation being underpinned by reasonable and (where appropriate) conservative assumptions. This is particularly important where there is an element of future loss and assumptions are required in order to quantify the future loss.

Another issue for damages experts is the implication of the uncertainty of future losses in the quantification of damages. In this instance, the dissenting judge raised the question of whether the damages should be considered on the basis of the ‘loss of a chance’.

A further issue raised by the dissenting judge was in respect of causation. Experts should be familiar with the legal concept of causation and how this may impact the calculations of damages.



The cases:

Expert's qualifications and
suitability

Expert's qualifications and suitability

HUI LING LING V SKY FIELD DEVELOPMENT LIMITED [2012] HKCFI 653; HCA35/2007 (8 MAY 2012)

“... I have serious reservations about the reliability of his [the plaintiff's expert's] evidence”

THE ISSUE

This is a dispute concerning water leakage in a multi-storey building. The plaintiff's flat is directly below the defendant's flat. The plaintiff complained that over a period of more than 10 years a water leak caused serious damage to her flat. The plaintiff claimed the source of the water leak was from the defendant's flat.

Expert evidence was adduced to deal with both the issue of liability and quantum. The opinion proffered by the plaintiff's expert was that the origin of the water leak was from the defendant's flat. This was contrary to the opinion of the defendant's expert.

The plaintiff's expert was Mr Wong of Proficient Surveyors & Co. Mr Wong provided two reports, dealing with both the questions of liability and quantum. His view was the water leakage was from the defendant's flat and was likely from multiple causes.

The defendant called two expert witnesses. Mr Chan of KC Surveyors Ltd dealt with the question of liability. Mr Chan prepared two reports, and concluded the defendant's flat was not the source of the problem.

The defendant's second expert was a chartered surveyor of Jones Lang LaSalle Sallmanns. He prepared a report dealing with the issue of quantum; however during the trial the valuation issue was eventually agreed by the parties. The key issue therefore was on liability.

Mr Rimsky, SC remarked as to Mr Wong's credentials, said to be relevant to the issues in the action, including his professional memberships and his qualifications. He further noted Mr Wong's status as an expert in the context of water leakage was questioned in an earlier case before the district court.

Ng, DJ made the following observations in respect to Wong's professional qualifications and experience:⁶

“The various institutions of which he is a member have no statutory recognition in Hong Kong and their membership requirements are unknown ... More significantly, Wong [the plaintiff's expert] is not a registered engineer although he is said to be a member of Chief Engineers Association. The identity of the registration body in respect of his qualification as registered

professional investigator in the United Kingdom is unknown. It appears from the evidence that Wong's experience was gained mainly in relation to claims settlement, property damage appraisal and loss adjustment. I have reservations as to his ability to speak reliably on expert investigation into the causes of water leakage. Such concern is reflected in some contradictory and speculative aspects of his evidence seen below”,

Rimsky SC had similar observations as to the reliability of the plaintiff's expert as follows:

“As reviewed by the answers he gave when cross-examined on his qualifications by counsel for the defendant, it is apparent that Wong's qualifications had not been materially improved since 2004. Most importantly, it remained the fact that Wong was at all material times not a registered or chartered engineer, nor was he a registered or chartered surveyor (especially in the context of building survey)”.

⁶ In HUI LING CHUN V. SHIU MAK YING AND CHOI CHUN HOI, unrep, DCCJ 10294/2001 (3 March 2004)

The matter was resolved in favour of the defendant as the plaintiff had failed to discharge her burden of proof, i.e. the evidence adduced before the court was not sufficient to show, on the balance of probabilities, that the water came from the defendant's flat.

WHAT IT MEANS FOR EXPERTS

This case is a timely warning of the difficulties for those who instruct experts. Not only was the expert not suitably qualified and lack the expertise necessary to support his opinion, but his qualifications were questioned in prior proceedings.

An expert whose qualifications have already been questioned by the courts and found wanting, adversely affects the credibility and competence of that expert and the issue(s) to which he provides

his opinion: "exaggerations aside, many of the observations made by Wong were no more than bare assertions without detailed or solid reasons or analysis".

An expert's opinion should be supported by fact, or assumptions based on fact, and should clearly set out the reasoning of how the expert came to that conclusion. Wherever possible the expert should support the opinion with reliable information and analysis. A mere assertion of a position without such information and analysis is not an opinion at all.

Practical experience may qualify a person to serve as an expert, but some on-the-job experience may not be sufficient. Your qualifications are a testimony to your experience and expertise, not an employment application.

The cases:

Other

Other

Strange, but true

HKSAR V. MUHAMMAD AKRAM [2012] HKDC 1251; DCCC423/2012 (10 SEPTEMBER 2012)

The case of the nonexistent fingerprints

BACKGROUND

This is a criminal prosecution in the case of a robbery that occurred at a male public toilet located on the first floor of a building at Hung Hom. The defendant climbed over a partition and used a glass bottle to threaten and rob the victim of cash and a mobile phone.

The defendant was intercepted by two police officers when he was leaving the toilet. The victim, who was still inside the public toilet at the time, alerted the police and the defendant was searched. The victim's mobile phone and some cash were found on the defendant. A glass bottle was retrieved from a rubbish bin inside the toilet.

A police fingerprint expert located the defendant's fingerprints on the toilet partition at the scene. Surprisingly, no fingerprints were found on the glass bottle.

At the trial, five prosecution witnesses, including the fingerprint expert, were called to testify in court. The victim testified that

“the defendant waved the glass bottle and hit the victim's left middle finger”. Our reading of the transcript of the judgment is unclear, but there appears to have been some speculation at the trial as to why the victim's fingerprint was not found on the bottle found in the rubbish bin and purported to be the weapon used in the robbery.

The results of the fingerprint expert were called to question by counsel for the defence:

“His findings will not be repeated here as the prosecution subsequently decides not to adduce evidence to prove the chain of evidence, hence the bottle might have been tampered after PW1's examination at the scene. PW2's findings on his examination in court are therefore irrelevant. When asked whether it is possible that no fingerprint can be found on the glass bottle which has been touched by human beings, the expert answers in the affirmative and gives examples to explain the possibilities.”

WHAT IT MEANS FOR EXPERTS

An expert's credibility is always subjected to challenge in cross-examination. In this case, however it appears that it was the chain of custody that was the source of the experts' discomfort in providing testimony, rather than his opinion.

Top three things to consider when engaging an expert

1. Ensure your expert really is an expert. Check your expert's curriculum vitae ("CV"), and that he/she has no conflicts. The expert should have no issue with you scrutinising his/her CV and his/her relevant experience. After all opposing counsel will do the same if that matter gets to trial. Many people purport to be experts in their field or "enhance" their CV to add credibility, or overstate qualifications. Take the time to check some of those qualifications. Do get to know your expert witness and ask them how they see their role in the case. A discussion of the key issues can help you evaluate the expert's ability to use good judgment in analysing facts, to form opinions in a logical and structured manner and to express themselves clearly when describing complex matters. You wouldn't hire a paralegal without checking their references, so why would you not seek to verify your expert's credentials? (See *WANG DIN SHIN v. NINA KUNG* (2002) HKCFI 1338; HCAP8/1999).

2. Ensure your proposed expert understands the procedural rules of the court. Consider whether your expert has knowledge of court procedure and is therefore likely to be able to comply with the Rules of the High Court, or whether your expert has the specialist expertise required, but no previous experience in expert witness work. Experts from the latter category are less likely to have direct knowledge of the procedural rules and more likely to be unfamiliar with legal proceedings, consequently requiring more guidance and instruction. Consider, for example, the industry expert, or someone of a unique occupation who rarely has cause to be involved in legal issues. Take the time to educate and guide them on legal procedures so as to stay within the rules of expert evidence.

3. Do share all the information in the matter with your expert and not just what you consider relevant to the expert. Your expert, as an independent witness, may be in a better position strategically to help you see the strengths and weaknesses of the issues in dispute. Experts ordinarily review a variety of documents relevant to the matter, only some of which are relied on to help them arrive at their opinion. One approach often used by lawyers so as to limit costs incurred in using experts is to limit the expert's access to documents, especially in large litigation matters, to a selection of "relevant" documents. It is important to consider whether such an approach puts a case at a disadvantage in terms of what the expert may conclude based on the documents. By culling documents from the pool to be reviewed you may just be removing documents and information that may actually be highly relevant and influence the expert's view. One of the tactics used by the defence in criminal matters is to actually review the unused materials for potentially relevant material not relied on by the prosecution.

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