

## Legal Briefing

### Ted Lowery considers the consequences of disregarding CPR Part 35

*Mayr & Ors v CMS Cameron McKenna Nabarro Olswang LLP*  
[2018] EWHC 3669 (Comm)

Before Mr Justice Males

In the Commercial Court

Judgement delivered 14 December 2018

#### The facts

In June 2017 the claimants commenced proceedings against their former solicitors alleging professional misconduct and claiming £65m damages.

In accordance with CPR Part 35 the court's directions included permission for the parties to adduce expert quantum evidence in two areas described as "the LMM issue" and "the Turkish issue". In the usual way the directions provided for an initial exchange of experts' reports to be followed by a meeting between the experts, the production of a joint statement recording points of agreement and disagreement and thereafter the exchange of supplemental reports.

In relation to the LMM issue the experts exchanged reports and then met during summer 2018. However, the meeting did not produce agreement on any points and against each of the issues listed for discussion in the joint statement the claimants' expert noted that he had "not finalised his thinking on this point" but expected to have formed a view by the time he served his supplemental report.

In relation to the Turkish issue, experts' reports were exchanged on 30 November 2018 and the experts met on 5 December 2018. However, as recorded in a joint statement produced on 11 December, once again there was no agreement on any points and against each issue the claimants' expert – the same individual retained for the LMM issue – repeated that he was considering his response and anticipated forming a settled view in his supplemental report, to be served on 21 December. The claimants subsequently indicated that their expert's supplemental report on the Turkish issue would not be ready until 7 January, some two weeks before the start of the trial.

At the pre-trial review on 18 December 2018 the defendant complained, characterising the claimants' approach to expert evidence as a "stunt".

#### The issue

What, if any sanction should be applied to the claimants' expert evidence?

#### The decision

The judge said that the experts' joint statement on the Turkish issue did not come close to compliance with the court's order. As a result, the procedure for further expert evidence had been thrown into disarray with the defendant's expert being unable to complete his supplemental report until the claimants' expert's further report arrived on 7 January 2019.

The judge decided that the claimants had failed to comply with the conditions under which they had been permitted to adduce expert evidence and had failed to seek relief from sanctions for not doing so. It was therefore appropriate to make a ruling that the claimants no longer had permission to adduce expert evidence on the Turkish issue unless they could offer a reasonable solution.

The judge rejected the three grounds advanced by the claimants in opposition to his decision: firstly, although there had been no application for the Turkish issue expert evidence to be disbarred the defendant had loudly complained and the court was equally interested in ensuring that expert evidence was properly prepared. Secondly, the judge said that whilst the fault apparently lay with the claimants' expert, given that the same problems had arisen on the LMM issue, the claimants and those advising them had remained responsible for making it clear to their expert what was required. Thirdly, the judge said that contrary to the claimants' submission, he was not striking out the expert's evidence, rather he was putting the ball firmly in the claimants' court to come back with proposals to correct the problem without prejudicing the trial date.

The judge therefore directed that the claimants' permission to adduce evidence on the Turkish issue was conditional upon their expert producing a supplemental report by 21 December. The claimants were also required to submit proposals for an experts' meeting and the production of a proper joint statement that would enable the defendant's expert to complete his supplemental report in sufficient time to ensure that the fairness of the trial was not prejudiced.

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### Commentary

Following the experts' meeting, the joint statement should help narrow the dispute by highlighting areas of agreement and identifying contested issues which can be addressed in the supplemental reports and which ultimately, the court is likely to be required to determine. It will only be in very rare cases that the experts will genuinely be unable to find any common ground and the objective of CPR Part 35 will be thwarted if experts refuse to engage or simply prevaricate.

This judgment delivers a clear warning to experts who adopt an indifferent approach to the court's directions and to the requirements of CPR Part 35, likewise to lawyers who indulge any such casual behaviour.

Ted Lowery  
February 2019