Part 35 and the Experts' Joint Statement

Christopher Sharp QC, St John's Chambers, Bristol

Published March 2019

1. A group of recent cases have revealed some worrying aspects of how experts, and their instructing lawyers, approach the exercise of preparing a joint statement pursuant to the Part 35 regime. Although in at least one case (*Mayr & Others v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3669 (Comm)) there was a suspicion that the failure to conduct the exercise appropriately may have been deliberate, there is also (as in *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC)) an indication that experts may simply not fully appreciate their professional duties. In a third case (*Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 the judge was critical of a 60 page joint statement that did nothing to "agree and narrow" the issues. The experts/parties seemed to have lost sight of the purpose of the joint statement.

2. <u>The Joint Statement</u>

   CPR 35.12 provides for discussions (not in fact a meeting, and most discussions are by phone or emails rather than face to face) between experts. These are not obligatory unless directed by the court but such a direction may be given at any stage of the proceedings. The object is to identify the issues between them and if possible resolve those differences, but it is not for the experts to seek to settle the case in such discussions. However, the object is to reduce the issues which remain in contention and to that end it is impermissible for an expert to be instructed (or for the expert to accept instructions) not to agree (or to defer agreeing) any matters which fall within the experts' competence, and indeed the

joint statement should contain a declaration that they have not been so instructed.

3. The subject(s) for such discussions may be set by the court, or the parties may agree the agenda, but care must be taken that such agenda setting does not become itself a proxy war. If necessary directions can be sought from the court.

4. The conduct of the discussion

The content of these discussions remains privileged (unless the parties agree otherwise) but the statement of agreement or disagreement (with reasons) will be disclosed. Such a statement does not bind the parties (unless this is expressly agreed). The statement is governed by the same duties as the substantive reports (so e.g. the discussion should not stray beyond the experts' area of expertise). A similar declaration of recognition of these duties is required.

5. There are different views as to whether lawyers should attend such discussions. There may be merit in a lawyer chairing the discussion to ensure that there is focus on the legal issues, but such a chair will need to be independent. In family cases such meetings are often chaired by the children's guardian's solicitor, and the discussion itself is sometimes recorded and transcribed. This can be particularly helpful where the meeting or discussion involves experts from several different disciplines, and in a civil claim where there are co-morbidities a similar procedure might be valuable. It has been suggested that in clinical negligence cases, to ensure that the claimant does not feel that there has been a 'stitch up' by members of the profession, the parties themselves should be present or represented. However, if others are present they should not become involved in the discussion.

6. If an expert significantly changes their opinion after the discussion, this may give rise to problems. If the experts does this then the joint statement must set out a note explaining this (and the reasons). However, it is essential that very real care is taken by the experts in approaching such discussions and there have been several cases where a lack of such care has resulted in real criticism of the expert, for instance when concessions have been made and then the expert sought to renege on them. Such behaviour may lead to a claim by the instructing party

against the expert witness in negligence: see eg *Jones v Kaney* [2011] UKSC 13 in which the Supreme Court abolished witness immunity in such a case. Dr Kaney, a psychologist, had been instructed by the claimant, Mr Jones. Dr Kaney had diagnosed PTSD in her report. She agreed to a joint statement which was very damaging to Mr Jones' claim in that it recorded an agreement that his psychological reaction to the accident was no more than an adjustment reaction that did not reach the level of a depressive disorder of PTSD. It further stated that the respondent had found the appellant to be deceptive and deceitful in his reporting, and that the experts agreed that his behaviour was suggestive of "conscious mechanisms" that raised doubts as to whether his subjective reporting was genuine. Dr Kaney signed this joint statement despite not having seen the other side's expert's reports, and despite the fact that the joint statement did not in fact reflect either what she had said during the discussion or her true opinion. She said she felt under pressure to agree the joint statement. She did not amend her own report or explain her apparent change of view as recorded in the joint statement. The Supreme Court decision was on the principle of immunity on assumed facts and not on the issue of Dr Kaney's liability. Of course an expert has the overriding duty to the court and it would not be negligent to change her opinion for good reason but it was accepted by her representatives that on these facts she would be liable if there was no immunity.

7. <u>Some cases where things have gone wrong</u>

There have been some other recent cases where joint statements have not served the purpose for which they were intended. In *Igloo Regeneration (General Partner) Ltd v Powell Williams Partnership* [2013] EWHC 1718 (TCC), a professional negligence case, the experts included some who were inexperienced in forensic work, and who were verging on the partisan. The judge was critical not only of this but of the lawyers for allowing the exchange of multiple addendum reports. He noted:

> *'It was a disappointing feature of the case that there was what some might call a "disconnect" between the experts on each side and in each discipline. They were permitted to exchange a number (up to 5)*

addendum reports in report or letter form, which is not a practice to be encouraged as it adds to the cost and to the complication of any given case; supplementary reports may be necessary but not generally because the whole idea of the experts producing joint statements listing what is agreed and disagreed is to enable the experts to deal in their main reports only with what is not agreed. Examination of the voluminous second joint statement of the engineer experts reveals what is essentially a running debate on numerous points which is almost like a long and partly repetitive pleading; it was not helpful. It also revealed as was confirmed by Mr Brown in oral evidence that by this stage the two experts had fallen out with each other, which again was not satisfactory. The quantum expert statements were not particularly helpful because they seem to have largely incorporated almost verbatim what was in their reports; it was surprising (and unusual) that there was such little agreement on the figures.'

8. In *Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 the judge was critical of a 60 page joint statement that did nothing to "agree and narrow" the issues. It seems there had been two separate agendas with repetitive questions, rather than one agreed agenda. The solicitors had failed to co-operate and had descended into a proxy war over the issues. What is required is a succinct and clear summary of issues, and of the reasons for the remaining disagreement.

9. In another recent decision *Mayr & Others v CMS Cameron McKenna Nabarro Olswang LLP* [2018] EWHC 3669 (Comm) one party's expert failed to engage properly in the process of the experts' discussion. On two successive occasions a joint statement was prepared which wholly failed to address the issues. There was a suspicion that the expert may have had instructions not to agree or to delay expressing an opinion (contrary to the required practice: see para 39 above). Males J commented:

> ***'Nobody involved in litigation in this court, whether as client, lawyer or expert, can be in any doubt that the court expects and requires the experts at the joint meeting to take a constructive approach, discussing the contents of their report and the issues on which they are required to express their opinions, reaching agreement where they can and setting out concisely where they cannot reach agreement and why they canno****t.***

That agreement is then to be recorded in a joint statement or memorandum. He went on:

> *It is the experts' responsibility to agree the content of the joint memorandum. This is part of their duty to the court as independent experts and is the basis on which the court gives permission for expert evidence. While the lawyers may properly assist the experts by ensuring that they focus on the issues which the court will need to determine, neither clients nor lawyers have any role in dictating to the experts what they can or cannot agree.*
>
> *It is only once that joint memorandum is produced that there is scope for supplemental reports which are usually described, and were described in the order made on this occasion, as short supplemental reports. The object of those reports is not simply to repeat what has been said the first time around but to engage with the points, hopefully although not always, the narrowed points on which the experts remain in disagreement after their joint meeting. Sometimes the order will spell this out but, even when it does not, this is implicit.*

10. In this case no agreement was reached on any issue but the claimant's expert claimed (twice) that he had "not finalized his thinking" and in the event never produced any constructive contribution to the process. The result was that the claimant was (even though there had been no 'unless' order) debarred from producing their evidence on the issues which had the practical effect of their claim being struck out. While the case (which needs to be read) is an exiguous example of what can go wrong it is nevertheless an important lesson, as well as

a useful illustration of the court's power to control the evidence and especially the expert evidence in the case before it.

11. In *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC) one expert, Dr Tonks despite considerable experience in acting as an expert witness had sent the first draft of the joint statement to his instructing solicitors for their comments and, having received feedback, made some changes to that draft as a result. The judge held it was quite inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement or, for that matter, for the solicitors either to ask an expert to do so or to provide input if asked, save in the limited circumstances referred to in paragraph 13.6.3 of the TCC Guide, which states that:

> "Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement.
>
> Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement.
>
> Any such concerns should be raised with all experts involved in the joint statement."

This is consistent with the Practice Direction to Part 35, which at paragraph 9 makes clear that:

> (1) The role of the legal representatives in expert discussions is limited to agreeing an agenda where necessary and, whilst they may attend the discussions if ordered or agreed, they must not intervene and may only answer questions or advise on the law.
>
> (2) Experts do not require the authority of the parties to sign a statement, which should be done at the conclusion of the discussion or as soon thereafter as practicable and in any event within 7 days.

12. The judge took the view that, while the expert appeared unaware that his conduct in this respect was inappropriate, it was nevertheless a serious transgression. It was important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. While an expert may if necessary provide a copy of the draft joint statement to the solicitors (otherwise it would not be possible for them to intervene in the exceptional circumstances identified in the TCC guide) nevertheless, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means.

13. While that case was proceeding in the TCC the principles are equally applicable across the range of civil litigation

14. <u>Conclusion</u>

It is apparent that despite the requirement in Part 35 (at Pt 35.10(2) and 35PD 3.2(9)) for experts to include in their report a statement that they understand their duty to the court and have complied with it and that they are aware of the requirements of Part 35, the practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014, it may not always be the case that this is more than a formality. Attention therefore needs to be given by those

instructing experts to ensure that they are aware of their obligations and have indeed had copies of the rules, the practice direction and the Guidance and understand them.

Christopher Sharp QC
St John's Chambers

March 2019