Case name: *Gardiner & Theobald LLP v David Jackson (VO)* [2018] UKUT 253 (LC) (3 August 2018)

Topic: Expert witnesses

Full case: click here

Summary: An expert witness acting on a conditional fee arrangement must disclose that to the Upper Tribunal as soon as possible in the proceedings, to avoid the risk that this will cause the evidence to be ruled inadmissible or given lesser (or, indeed, no) weight. This applies even where a fixed fee has been agreed for the hearing, if the overall fee payable to the surveyor or his/her firm (including in respect of work before or after the hearing) is contingent on the outcome of the case.

Commentary: This case relates to the conduct of experts, including surveyors, who provide expert reports and evidence before the Upper Tribunal (Lands Chamber). The question addressed is whether the obligation to declare a success-related fee arrangement applies to remuneration not only for services as an expert witness, but also for services provided by that expert (or the practice for which he or she works) other than as an expert witness, whether before or during the proceedings before the Tribunal. Further, to what extent may success-related fees be compatible with an expert's obligation to the Tribunal to act independently?

The underlying proceedings (in respect of the rateable value of certain premises in the 2010 rating list) had been settled by negotiation, but the Tribunal called for the rating surveyor in question to attend a hearing to examine his independence in the context of the underlying success-related fee arrangement that linked his firm's fee to any reduction in rateable value achieved by whatever means, including a tribunal decision. This was despite a separate fixed fee having been agreed in respect of the provision of the expert report and evidence before the Upper Tribunal. Such success-related fees applicable throughout the life of a rating list have become the norm in work carried out by rating surveyors for occupiers, which both improves access to justice and from a commercial perspective enables surveyors to recover the cost of unremunerative work where no savings can be achieved and, therefore, no fee is paid.

The decision referred to earlier cases where this issue had been addressed before the High Court and the Court of Appeal and to the relevant provisions of the Civil Procedure Rules. In *R v (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2003] QB 381 the Court of Appeal stated that "it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management."

In *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] 1 WLR 2945 the Supreme Court paved the way for the Upper Tribunal to consider the application of Factortame to that forum. The President stated that "the tribunals have different rules from the courts and

sometimes require a slightly different approach to a particular procedural issue". It is, therefore, unsurprising that the Upper Tribunal has taken the opportunity to rule on this issue, although the extent to which Factortame should apply was not argued before the Tribunal and as a result there are still unanswered questions, e.g. as to whether a conditional fee arrangement may be permitted in simplified procedure cases where access to justice would otherwise be adversely affected.

Until the Upper Tribunal rules further on the point, the safe approach is to ensure that all expert evidence is provided under a ring-fenced fixed-fee arrangement. This may, for example, entail commuting the overall fee payable to the expert or his/her firm to a fixed amount at the point when expert evidence is about to be given, for example in the Statement of Case. However, the agreement of a fixed fee while the litigation risk remains at large will present challenges for both the surveyor and ratepayer at a time when trust in the expert is of fundamental importance in achieving a satisfactory outcome for the client.

An alternative to the application of Factortame in all Upper Tribunal cases (denying the expert the ability to provide evidence) would be to give weight to the expert evidence according to perceived compliance (and to what extent) with the duty of impartiality, as opposed to rejecting outright such evidence (as inadmissible) where there has been a failure to comply. This would, however, lead to uncertainty as it may not be apparent until the end of proceedings whether the expert's submissions are to be given any weight at all. By way of example, in *Keen v Worcestershire County Council* (LCA/44/2001), the claimants had sought compensation for depreciation in the value of their home arising from the use of a new by-pass. Evidence was given by a surveyor who was also acting on more than 50 similar claims. The surveyor acted on a no-win no-fee basis but did not disclose this to the (then) Lands Tribunal – it emerged during the course of the hearing. The Tribunal decided that no weight should be given to the surveyor's opinion, as he had a financial interest in the outcome of the reference. If the Tribunal had been given the opportunity to consider at an early stage whether the expert should be permitted to act on a conditional fee basis that outcome may have been very different.

To reduce the risk of expert evidence being ruled inadmissible, it is essential that any conditional fee arrangement is drawn to the Upper Tribunal's attention at the earliest possible stage, enabling the Tribunal to form a view as to whether the success-related fee is acceptable in that particular case (e.g. where the matter is being dealt with under the simplified procedure).

Turning to professional requirements incumbent on surveyors, the 4th edition of the RICS "Practice Statement and Guidance Note: Surveyors acting as expert witnesses" (PSGN), which came into effect on 2 July 2014, states in paragraph PS10.4 (in the context of a surveyor acting in the dual roles of advocate and expert witness in a lower tribunal) that "conditional fees when the surveyor has appeared in a lower tribunal will, at the point of transferring to the superior or higher tribunal, need to be commuted and replaced by an hourly rate or fixed-fee arrangement".

The PSGN prescribes at PS5.4(p) that all expert reports must contain a declaration in a set form, including an unequivocal statement that the expert is not instructed under any

conditional or other success-based fee arrangement. All members of the RICS are under a professional duty to comply with the Practice Statement, breach of which may lead to disciplinary action being taken by the Institution.

It is currently unclear whether the Valuation Tribunal for England ("VTE") will adopt the same approach to expert witnesses acting on a success-related basis, but the President of that tribunal recently indicated that it was not his intention to do so. It is understood from recent commentary that the Upper Tribunal is considering the possibility of extending the ban on success-based fees to the whole tribunal system, but this will raise jurisdictional issues which will need to be addressed.

The decision in Gardiner & Theobald has caused rating surveyors to review custom and practice in the charging of fees for their services. Recent commentary on the impact of the case has suggested that that a conditional fee arrangement is acceptable up to the point when expert evidence starts to be given, which in the Upper Tribunal will be when an appeal is lodged and expert opinion forms part of a Statement of Case, an Expert Report or is given at the hearing. In the VTE, the position is less clear (as proposals may morph into appeals with no further input from the surveyor) but the better view is that the duties will apply to any evidence forming part of a VTE submission and evidence given at the hearing.