

Economists in Court

Procedural rules and guidance for economists

Economists are increasingly appearing in court as expert witnesses in competition litigation. This requires an approach and skills very different from that typically used for regulatory and administrative proceedings where there are no rules of evidence. Whatever one's views on whether the adversarial system is the best way of dealing with economic evidence, one thing is clear - the economist who agrees to be an expert witness had better know the procedural rules. The recent High Court judgment in *Leeds City Council v Watkins and Whiteley* [2003] UKCLR 407 shows that this cannot be assumed. This Casenote sets out the rules and offers some guidance for those economists likely to appear in common law courts. It draws on the author's recent experience of English trials, and some comparison with Australian practice.

The Rules

The rules governing expert evidence in England & Wales are as set out in the *Civil Procedural Rules 1998* as revised in the *White Book* (or the Australian equivalent). These state that the expert's overriding duty is to the court and not the client. Unless the court otherwise directs, the expert's evidence is to be in a written report addressed to the court. This report must:

- ❑ give details of the expert's qualifications;
- ❑ begin with a summary of the instructions/questions that have been asked, the material that has been reviewed and seen, the assumptions made, what has been done, and the conclusions;
- ❑ the body of the report should ideally be given paragraph numbers, divided into sections, and cross-referenced to the material relied on, and assumptions made;
- ❑ where any test or experiment has been used, the expert's qualification and whether or not it was carried out under the expert's supervision should be stated;
- ❑ where there is a range of opinions on the matters dealt with in the report these should be summarised and reasons given for the expert's own opinion; and
- ❑ conclude with a statement that the expert understands his duty to the court and has complied with that duty, and be verified by the statement of truth: "*I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct*".

An expert has the right to ask the court in writing for directions at any stage, without giving notice to any party

to the proceedings, to assist him in carrying out his functions as an expert.

Prior to the trial, and assuming that the other side has retained an expert economist, both may be asked to draft a joint report stating the areas of agreement, the areas of disagreement, and the reasons for their disagreement. This is designed to guide the judge and should be short and cover the main points only.

Lawyers' Input

Much of the material will be supplied by the lawyers. This will consist of the Particulars of Claim and the Defence which together state the case; and various lay witness statements. These should be read carefully and any relevant points/facts considered and addressed. However, relying exclusively on the material supplied by lawyers is not advisable, and can in some jurisdictions (US) be fatal. It is important where possible to undertake independent inquiries and research to determine the relevant facts. The other side will not take a sanguine view of your failure to do so (but see below).

Lawyers are not permitted to coach witnesses. In England this leads to little guidance and advice being given to the economist. It generally amounts to: Here are the issues! Here are the documents! What else do you need? and Can we have a draft report by the 12th! Your selection as an expert witness will, however, be based on your preliminary view that you find merit in their client's case. In Australia the relationship between expert and lawyers is more interactive with the lawyers offering suggestions, revising instructions, and providing additional information. The report must be your expert opinion so that any "guidance" which does not accurately reflect or properly express your expert opinion must be rejected.

Admissibility

It is the lawyers' responsibility to ensure that your report is drafted on a correct understanding of the law. The economists' role is to offer expert opinion on economics. This will usually cover areas such as market definition, market power, the interpretation of statutory language which has a technical economic meaning (competition, market; efficiency etc.), and the economic aspects of practices or actions which are alleged to have competition effects. Here there are notable differences. In English law the judge will often admit evidence on the relationship between economics and competition law and which

sometimes border on legal interpretation. The position taken is that an experienced competition economist has something to contribute to the non-expert judge. In Australia a more rigid approach is taken, and opinions expressed by an economist on the law or the facts are likely to be inadmissible.

The economist is not in a position to know the truth of or verify the facts. The economist's report will therefore be based on **assumed facts** which have been supplied by the lawyers or made by the economist. The lawyers will then seek to persuade the judge to accept their version of the facts which have been assumed in the economist's report, and to persuade the judge that their economist's conclusions support their client's case. It is important to state the assumptions on which the analysis is based, since the other side's lawyers may offer different assumptions in cross examination which undermine the analysis. In England it is not usual to receive lists of assumed facts from the lawyers. In Australia it is not uncommon for the economist to be given page on page of instructions stating that "You are to assume that", and to confine your reading to specific documents. In one Australian case the economists were supplied with 38 pages of assumptions upon which they were instructed to base their economic analysis. If the lawyers have asked you to assume certain facts, you may feel an idiot if under cross examination you admit that you have made no attempt to discover their truth, or it is suggested that the facts differ; your "defence" is that you were not instructed to do so. If this damages the client's case, it is the lawyers' fault.

When in court

In court you will **not** have an opportunity to present the report to the judge. The report will stand as "evidence in chief" and will be taken as written. You are only subject to cross-examination by opposing Counsel who is highly unlikely to emphasize the strong points in your expert report. The cross examination may take several hours, days or longer. This may begin with a challenge on your competence as an expert, and knowledge of the XYZ industry, and/or the admissibility of some parts of your evidence. This should not discomfit you, as clearly you do not hold yourself out as an industry expert or witness of fact.

There other areas to be aware of. Your written report must be carefully drafted to say what you intend it to say; and be qualified on the basis of the assumed facts relied on and your other assumptions. Loose language or statements which are conditional or based on implicit assumptions not articulated in the report will be seized on by the opposing barrister.

Second, if you have published articles on the subject, expect these to be read and quoted against you if they appear to contradict your evidence to the court. If this happens it could affect your credibility and the admissibility of your evidence.

Under cross examination give direct and brief answers, do not be argumentative, partisan, defensive, and/or seek to avoid an uncomfortable question. Address your answers to the judge. Generally take your time, ask for the question to be repeated if it is unclear, and if the question is incomprehensible say so. If you have made a mistake or do not know the answer, say so. If you change your mind get the lawyers to inform the judge of the retractions or proposed amendments before trial and certainly before cross examination when you will be asked if the document is your expert report and properly represents your expert opinion.

There is no requirement to react passively to the cross examination. Most English judges will allow you to expand or clarify a point, or counter an unfair or irrelevant line of questioning. Most judges do not like conflict in their court room so that this should be done politely. In other jurisdictions the scope for the expert to do this is more limited, and the judge may direct you to answer the question as put even if you cannot see the sense of it or its relevance. Some judges will intervene when they cannot see the relevance of a question or think it unfair; others will not. You may be asked to read a document you have never seen before, and invited to agree that the paragraphs you have been directed to read contradict your written evidence. In these circumstances you should if directed by the judge to answer the question, read the paragraphs carefully in your own time and clarify any aspect you find unclear. Then answer with the appropriate qualifications and in your own words. Other questions will be so general that it is impossible to disagree but which invite the inference that this undermines your written analysis. You should not be afraid to ask for the question to be repeated and then made more specific, and to answer with appropriate qualifications.

Finally, be prepared to be a librarian when under cross examination. The courtroom will contain rows of folders and you will frequently be asked to pick up a folder and read specific paragraphs. It is important that you are thoroughly familiar with the documents you have reviewed and able to negotiate the texts so as to support your expert analysis. It is advisable to take your own marked up copies into court.

© Case Associates 2003

CASE ASSOCIATES

are an economics practice providing advisory, strategic, and economic assistance in competition and regulatory proceedings, and litigation. A description of Case's services and earlier Casenotes can be found on www.casecon.com. For further information or to discuss a specific assignment contact:

Dr. Cento Veljanovski on + (44) (0) 20 7376 4418 or cento@casecon.com