

## Ensuring the reliability of expert witnesses in criminal cases

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**Corporate Crime analysis: Narita Bahra QC, barrister at 2 Hare Court, and Nick James, barrister at Furnival Chambers, comment on the credibility of expert witnesses in criminal trials following the recent collapse of the carbon credit and diamond sales hearing.**

### **What was the background to the carbon credit and diamond sales hearing and why was it abandoned?**

In *R v Pabon* [\[2018\] EWCA Crim 420](#), [\[2018\] All ER \(D\) 114 \(Mar\)](#), Gross LJ issued the following reminder after it had been discovered that an expert witness relied on by the Serious Fraud Office had 'failed to comply with his basic duties as an expert':

'Nonetheless, there is no room for complacency and this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre.'

The recent collapse of Operation Balaban, a carbon credit fraud trial at Southwark Crown Court, is clear evidence that the warning has not been heeded. The expert in carbon credit trading relied on in that case, Andrew Ager, was exposed by the defence to such an extent that the Crown conceded he could no longer be relied on. Having heard Mr Ager's evidence over two days, the trial judge found that he was not an expert of suitable calibre and that 'he had little or no understanding' of what an expert's duties were or why they were important.

Mr Ager's credentials as an expert fortuitously unravelled following a joint conference with the instructed defence expert, Dr Frunza. During the conference Mr Ager had made assertions about the evidence that were not true and, as the trial judge found, sought to dissuade Dr Frunza from giving evidence in the proceedings.

This led to an application to exclude Mr Ager's evidence and for further disclosure of his documentation and methodology. On 23 and 24 May 2019, he was cross-examined by the defence on a voir dire. Mr Ager's failings as an expert witness were numerous, but the most significant were that:

- he had failed to disclose the fact that he had made concessions while giving evidence on the same issues more than a year earlier (in evidence he explained that he did not provide a supplementary statement and/or volunteer the fact because his practice was to wait for defence counsel to ask the relevant questions)
- his witness statement purported to answer questions posed by the investigating officer about carbon credit trading, but was in fact 'cut and pasted' from another case and the said officer had never asked him those questions
- he had not completed a certificate of declaration, certificate of instructions or an unused material schedule
- he retained no notes setting out the material he had viewed and the basis on which he reached his opinions, meaning his reports could neither be peer reviewed nor analysed by a defence expert

As a result, the prosecution abandoned reliance on Mr Ager and in doing so informed the court that the Crown Prosecution Service (CPS) would not be relying on him as an expert in future cases.

## **What guidance is there for practitioners in relation to expert witnesses? What else should practitioners be aware of? How can prosecutors and defence lawyers ensure the credibility of an expert witness?**

Between Part 19 of the Criminal Procedure Rules 2015, [SI 2015/1490](#) and the [Guidance Booklet for Expert's Disclosure](#) issued by the CPS and Association of Chief Police Officers, there are ample safeguards to ensure an expert witness is reliable, unbiased and has complied with their duties. However, it falls to the lawyers relying on the witness to review the material supplied by the expert and ensure the rules have been complied with.

In Mr Ager's case, although the prosecution lawyers cannot have anticipated his behaviour in the joint conference, those managing prosecution disclosure and the reviewing lawyer should have satisfied themselves that Mr Ager had completed and provided copies of his signed certificates, declarations and unused material schedule before any of his statements were relied on. Mr Ager's evidence was that it was not his practice to keep any such documents. Therefore, had the documents been requested his lack of compliance would have been flagged at an early stage.

In terms of positive steps, the prosecution should have ensured that any instructions given to Mr Ager were in writing, a record of those instructions was kept, along with a list of all documentation he had been provided with and in turn, these matters should have been recorded on the investigation unused material schedule. Mr Ager gave evidence in Operation Balaban that his first dealings with the CPS in that case were one week before the trial commenced, almost six years after his first witness statement in the investigation. Until that point, Mr Ager had been working directly and exclusively with the investigating officers.

In the circumstances, it would have been prudent for the investigators to have clarified whether Mr Ager had given evidence since his witness statements/reports were prepared and if so whether any qualification by way of supplementary statement was necessary. These questions should be routinely asked of experts by reviewing lawyers, but it is especially important in cases where there has been a significant passage of time between the preparation of the expert evidence and the trial.

## **Recent amendments to the Criminal Procedure Rules 2015, SI 2015/1490 and Criminal Practice Directions have placed more responsibility on the expert and on those instructing them to consider the issue of credibility of the expert. How effective are these rules and what else could be done?**

Safeguards do exist, if followed rigorously any inadequate or unreliable expert ought to be exposed. The danger is that if all in the prosecution team assume disclosure has been properly complied then an expert can continue presenting themselves as unbiased, honest and reliable when in fact they are not. Absent any disclosure undermining the expert opinion, defence counsels are highly unlikely to take on an expert in cross-examination before a jury and so unreliable experts will not be exposed. Sadly, this is how Mr Ager has been able to continue giving evidence in numerous trials without being exposed.

This case should also serve as a reminder to defence teams of the importance of properly checking the unused material schedule in relation to an expert witness and of making focused disclosure requests. Where the evidence of an expert is relied on, the defence must hold both the expert and the prosecution to account. In most cases, the efforts will result in confirmation that the expert has complied with their duties and is of a suitable calibre, but in this case Mr Ager was exposed.

## **When a case is abandoned because of expert evidence failings, what impact does that have for those who were convicted in other trials involving those experts? Can those convictions be appealed? How successful are appeals based on discredited expert evidence?**

It is unclear at this stage how many trials Mr Ager has given evidence in or how many people his evidence has helped to convict. In the immediate aftermath of the collapse of Operation Balaban, the CPS announced that all such convictions would be reviewed.

The Court of Appeal made clear in *R v Pabon* that the fact that an expert is exposed will not be sufficient grounds to overturn convictions of itself. The crucial question is how important was the expert's evidence in the case against any individual? There will be cases where the expert's failings were so fundamental to the overall fairness of the trial that the convictions are unsafe. However, an appellant will usually need to show a causal link between his conviction and the experts failings.

How far the Court of Appeal decide Mr Ager's failings go remains to be seen.

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