Out of your depth?

When will they ever learn? Mark Solon shares some expert advice for experts in the dock

Extracts from the cross-examination at trial (R v Pabon)

Q: Are you really saying that when you signed off the declaration which I suspect is in standard form, you hadn't in fact read either the CPR or the booklet?
Rowe: I don't think I could have read them fully....
Q: Did you read them at all?
Rowe: I'm pretty sure that I glanced at something.
There were further beam me up Scottie cross-examination moments dealing with Rowe's expertise including
Q: What you did in 2016 was to start pinging out emails and texts to people, passing on the material you had been provided with by the SFO and saying to people: can you help me to understand it because I don't understand it? That's what you did isn't it?
Rowe: So what else am I supposed to do as an expert?
Q: Say it is not my field; I cannot give you an expert opinion; you the SFO should go and speak to someone else.
Rowe: I think I have had conversations with the SFO to check that they know that I am not a STIR [short-term interest rate] expert.

Yet again experts need to learn that their duty is to the court and that they must stay within the area of their expertise, Gross LJ said this in the judgment in *R v Pabon* [2018] EWCA Crim 420, [2018] All ER (D) 114 (Mar) Court of Appeal, Criminal Division last month. He went on to say the sole test for the Court of Appeal when deciding whether to allow or dismiss an appeal against conviction is whether that conviction is unsafe. Pabon's appeal was dismissed but there are lessons for experts and lawyers.

The appellant, Alex Pabon, together with a number of co-defendants, faced a count of conspiracy to defraud, alleging that they dishonestly rigged LIBOR. Few had heard of LIBOR before the case thinking it perhaps a mispronounced opposition political party but it is vital in the pricing of money. Gross LJ helpfully explained the term LIBOR for the uninitiated: 'LIBOR is the shorthand for the "London Inter-Bank Offered Rate". It is a global benchmark interest rate for many types of financial transactions. LIBOR is set in London and is based on the rate of interest banks charge one another for loans of funds or, put another way, the interest rate at which banks could borrow money from each other on a particular day.'

Conduct matters

The appellant was sentenced to two years and nine months' imprisonment. The sole focus of the appeal concerned the conduct of an expert witness, called by the Serious Fraud Office (SFO), Mr Saul Haydon Rowe. Gross LJ said: 'At the retrial and following cross-examination on new material, not available at the Appellant's trial, Rowe fared disastrously.'

The SFO case was that the defendants dishonestly agreed to procure or make false or misleading LIBOR submissions. The traders requested that the LIBOR submitters submit false rates and the submitters in turn provided rates. The manipulation of the rates was undertaken in order to increase the traders' profits or decrease their losses. Acceding to the traders' requests gave the LIBOR submitters status and standing within the bank. The traders were able to make larger profits for their desk, ultimately increasing their bonuses, their prospects of career advancement, and their own status within the bank. The smallest movement in the published LIBOR rate was capable of directly affecting the profit or loss of the bank.

The SFO identified some 120 dodgy requests from traders to get the rate they wanted for example '1,350 contracts. We need high one month, we need to get kicked out, 1,350 eurodollar contracts'; 'Tell PJ to keep LIBOR low'; and 'We see three-month LIBOR at 5.2225. Anything above that would be great.'

The central issue for the jury was dishonesty. Rowe was called by the SFO to assist the court on the complexities of LIBOR and the banking system.

For the appellant, Mr Allen QC submitted that Rowe's conduct fell far below the standards expected of an expert witness in many different ways. Rowe had given expert evidence in two previous LIBOR trials and the prosecution had spent some £400,000 in payments to him. At the original trial, in the absence of the fresh material available at the retrial, the appellant's counsel had been inhibited in his ability to cross-examine Rowe as to his credibility or expertise. That picture had been radically altered by the fresh material at retrial. It was clear that Rowe's failings as an expert were extensive; thus: '[H]e had signed documents stating that he had complied with his duties when he knew he hadn't; he had failed to report with any detail or accuracy as to how he reached his opinions; he secretly consulted with a number of undisclosed advisors; he blatantly disregarded the directions of a trial judge during the course of a criminal trial; and he knowingly gave evidence about matters

outside his area of competence. These are deeply troubling failings that bring the system of justice into disrepute... .'

Not the sort of expert any lawyer would be too pleased with, especially having paid hundreds of thousands of pounds for the evidence. The fresh material would have permitted devastating cross-examination at the trail. It did do just that at the retrial. The duty resting on an expert witness is so fundamental that where it is abused, the entire process is affected: 'It leads to the peculiarity of a trial in which the prosecution seeks to prove the dishonesty of a defendant and in order to do so calls a dishonest expert as an essential building block of their case. ... There may be circumstances in which that state of affairs does not impinge upon the safety of the conviction. But this was not one of them.'

Gross LJ went on to say: 'For the SFO, Mr Hines QC, after (if we may say so) a somewhat grudging concession as to Rowe's failings in his skeleton argument, accepted that Rowe had not complied with his duties as an expert. The SFO had itself had no inkling of Rowe's want of expertise (other than his lack of trading experience, known to all at the trial); this was his third "outing" in LIBOR trials. That said, Rowe's evidence went to largely agreed background matters... The single issue at trial concerned the Appellant's dishonesty.'

In February 2014, Rowe was instructed by the SFO to provide an expert report 'explaining the workings of an investment bank, inter-dealing brokerage and related financial instruments and trading terms used by individuals within these institutions'. As background, Rowe was informed that the SFO was investigating allegations that 'between 2005 and 2010, LIBOR was dishonestly manipulated across a number of different currencies and tenors'.

In March 2016, the defendants in the trial sought a pre-trial hearing to exclude or restrict Rowe's evidence, on the ground of lack of expertise. Although it was accepted that Rowe had some general banking experience, it was contended that he had no direct experience of interest rate derivatives trading, cash trading or making LIBOR submissions. His evidence ought to be restricted to the 'core' of his report, covering the structure of banks, financial concepts and an overview of the relevant financial instruments in the case. Rowe, it was submitted, should be prevented from giving 'inadmissible evidence as to the permissible approach to the LIBOR-setting process, the permissible extent of communications between traders and LIBOR submitters, or whether conduct of any kind is or could be regarded as being dishonest'.

> *"Inevitably, Rowe was subjected to damaging & unfortunately amusing cross-examination at the retrial on this rich seam of material, including his duties as an expert & the declaration in his report, required by the Criminal Procedure Rules"*

Gross LJ said: 'Rowe was not competent to provide opinion evidence on such matters. He had never worked as an interest rate derivatives trader, a cash desk trader or a LIBOR submitter and appeared to have no direct knowledge of the LIBOR submission process. He had not worked as a trader of any kind since 2000 and, from 2005 onwards, had acted as a professional expert witness on general banking disputes.Particular exception was taken to various Powerpoint slides.'

At the trial, Rowe gave evidence in April 2016. He ran a company providing expert consulting and testimony in banking cases. He had worked in the finance industry between 1989 and 2000. He gave evidence concerning various banking terms and concepts. He was asked to comment upon e-mails sent between the defendants and the terms used in those e-mails. He utilised slides to demonstrate concepts such as the interrelationships and functions of various desks in banks and the categories of trader and the financial instruments within which they were concerned.

Before leaving court on the 13 April, the trial judge gave Rowe the usual admonition, 'You know not to talk about this case to anyone whilst your evidence is in progress'. Rowe would, of course, have known that he would face cross-examination the next day.

The retrial saw dramatic developments concerning Rowe's evidence. Rowe provided e-mail correspondence revealing that Mr Dominic O'Kane, a partner at Rowe's firm and a part-time Professor of Pricing and Risk Financial Derivatives, had been responsible for drafting sections of Rowe's report. This was not previously known. Prior to April 2016 Rowe had sent excerpts of the case papers to others without telling them about the trial nor explaining to them the caution which they should exercise in expressing an opinion.

In the month prior to his giving evidence in the 2016 trial, much like a phone addicted teenager, Rowe had exchanged around 90 text messages with other experts, as well as numerous emails. A remarkable feature of the newly disclosed material was the revelation that at the conclusion of the first day of his evidence at the trial and having been expressly warned by the judge not to discuss his evidence until it was concluded, Rowe went on to do just that.

Inevitably, Rowe was subjected to damaging and unfortunately amusing cross-examination at the retrial on this rich seam of material, including his duties as an expert and the declaration in his report, required by the Criminal Procedure Rules (see box out on first page).

Telling evidence

The judge's summing-up at the retrial was telling as to Rowe's evidence, in an extended passage early in his summing-up: 'Despite that catalogue of experience, you may have formed a judgment that he knew very little about the duties of being an expert... he seems to have been perfectly content to sign a standard declaration in which he declared that he had read the Criminal Procedure Rules which govern his conduct as an expert, both before trial and in giving evidence, and the booklet on his duties of disclosure without doing anything really to familiarise himself with either of those documents. It will be for you to judge whether he has in fact given expert opinion which falls outside his true expertise. Any expert is entitled to research a topic on which he is to give evidence and obtain the views of others, including work colleagues, about it to enhance his opinion, so long as he records where he went for that advice and so long as it is to enhance an expertise he already has, rather than to become an expert on a subject where he has no knowledge whatsoever.'

So lawyers need to be very careful in selecting experts who are appropriate to the issues in dispute and have training in the basics of law and procedure as relevant to experts and their duties. **NLJ**

Mark Solon,chairman, Wilmington Legal & founder, Bond Solon (*mark.solon@wilmingtonplc.com; www.wilmingtonplc.com*).