

# **Surveyors acting as expert witnesses**

## **RICS practice statement and guidance note**

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# RICS second addendum to Surveyors acting as expert witnesses

## GN 22 Immunity of the expert witness

This addendum has been produced to reflect the implications of the case of *Jones v Kaney* (2011).

It replaces GN 22 *Immunity of the expert witness* in the third edition of the practice statement and guidance note and should be read in conjunction with the 1st addendum issued in 2009.



# GN 22 Immunity of the expert witness

## England and Wales

- 22.1 The general immunity from civil suit was removed by the UK Supreme Court on 30 March 2011 in *Jones v Kaney* [2011] UKSC 13. The effect of this decision is:
- (A) An expert witness owes a duty of care to give honest, independent and unbiased, advice and opinion to his client and to the court on the matters in which he is instructed. If the expert witness gives such advice that is within the range of reasonable expert opinion on the matter then it is very likely that he will have discharged his duty both to the court and his client.
  - (B) The duty may arise by way of contractual relationship (through an express term or implied term under section 13 of the *Supply of Goods and Services Act 1982*), or in negligence (under the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 principles), depending upon the nature of the appointment.
  - (C) It is now clear that the duty applies equally to pre-expert report advice, expert reports, joint meetings and joint reports as well as evidence given in court.
  - (D) The duty applies equally to expert evidence in relation to civil, criminal and family proceedings as well as all tribunals defined in the preamble to the practice statement.
- 22.2 The absolute privilege enjoyed by all judges, advocates and witnesses in respect of claims for defamation in relation to anything said in court remains.
- 22.3 Lord Dyson provided some very helpful guidance at paragraph 99:
- ‘There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.’
- 22.4 Further useful advice was given by Lord Collins at paragraph 85:
- ‘...a conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more (or less) credible that an expert will be deterred from giving evidence unfavourable to the client’s interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future

cases. The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report. It is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case.’

**22.5** Lord Phillips provided advice where an expert witness changes his mind:

‘...the question then arises of the expert’s attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client’s case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client’s case. They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will be because of a fear of being sued – at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty.’

**22.6** Expert witnesses are reminded that when considering what amounts to professional negligence in the discharge of their duties, regard will be given to the practice statement and the guidance note. In particular, reference should be made to the note in relation to practice statements on page 2 of the practice statement.

**22.7** Expert witnesses are advised to obtain adequate professional indemnity insurance to reflect the nature of their practice rather than simply providing the minimum cover required by RICS.

**22.8** Expert witnesses are reminded that regardless of whether they are pursued in a civil action for breach of their duties, there may be disciplinary consequences should they fail to comply with the practice statement.

**22.9** An expert witness remains liable for criminal prosecution for perjury, perverting the course of justice or for contempt of court.

**22.10** An expert witness remains liable for:

- (A) Misfeasance in public office or conspiracy to injure for having fabricated evidence (*Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435).
- (B) Libelling the opposing party in a report prepared for court proceedings (*Schneider v Leigh* [1955] 2 QB 195).
- (C) The tort of malicious prosecution, where the expert witness by giving malicious evidence procured the prosecution (*Martin v Watson* [1996] AC 74).

- (D) Breach of confidence (*De Taranto v Cornelius* (2002) 68 BMLR 62).
- (E) Wasted Cost orders if the expert witness acts in flagrant disregard of their duty (*Philips & Others v Symes & Others* [2004] EWHC 2330 Ch.).
- (F) Procuring a breach of contract if a party acts on advice that is found to be invalid.
- (G) Possible other torts that need to be considered by an expert witness.

### **Scotland**

- 22.11 Although *Jones v Kaney* was a decision of the UK Supreme Court, it might not currently apply when expert witnesses are giving evidence in the Scottish courts. Lord Hope (giving a dissenting opinion), expressed the view that expert witness immunity is a matter devolved to Scotland, however, it is not clear if that is the case for civil law matters, given that the UK Supreme Court is binding in Scotland on civil law matters. The situation regarding the immunity of expert witnesses in Scotland is therefore uncertain, but is likely to evolve in due course.
- 22.12 Surveyors acting as expert witnesses in Scotland (wherever they are based), are advised to be conversant with the potential implications of *Jones v Kaney* and discuss the matter with their professional indemnity Insurers.

### **Northern Ireland**

- 22.13 The position set out in the preceding England and Wales section of guidance note 22 is equally applicable to the situation in Northern Ireland. Whilst tribunals in Northern Ireland are not bound to follow the decisions of other tribunals in the UK, the decisions cited are persuasive to Northern Irish tribunals and broadly reflect the procedure adopted in those tribunals.

