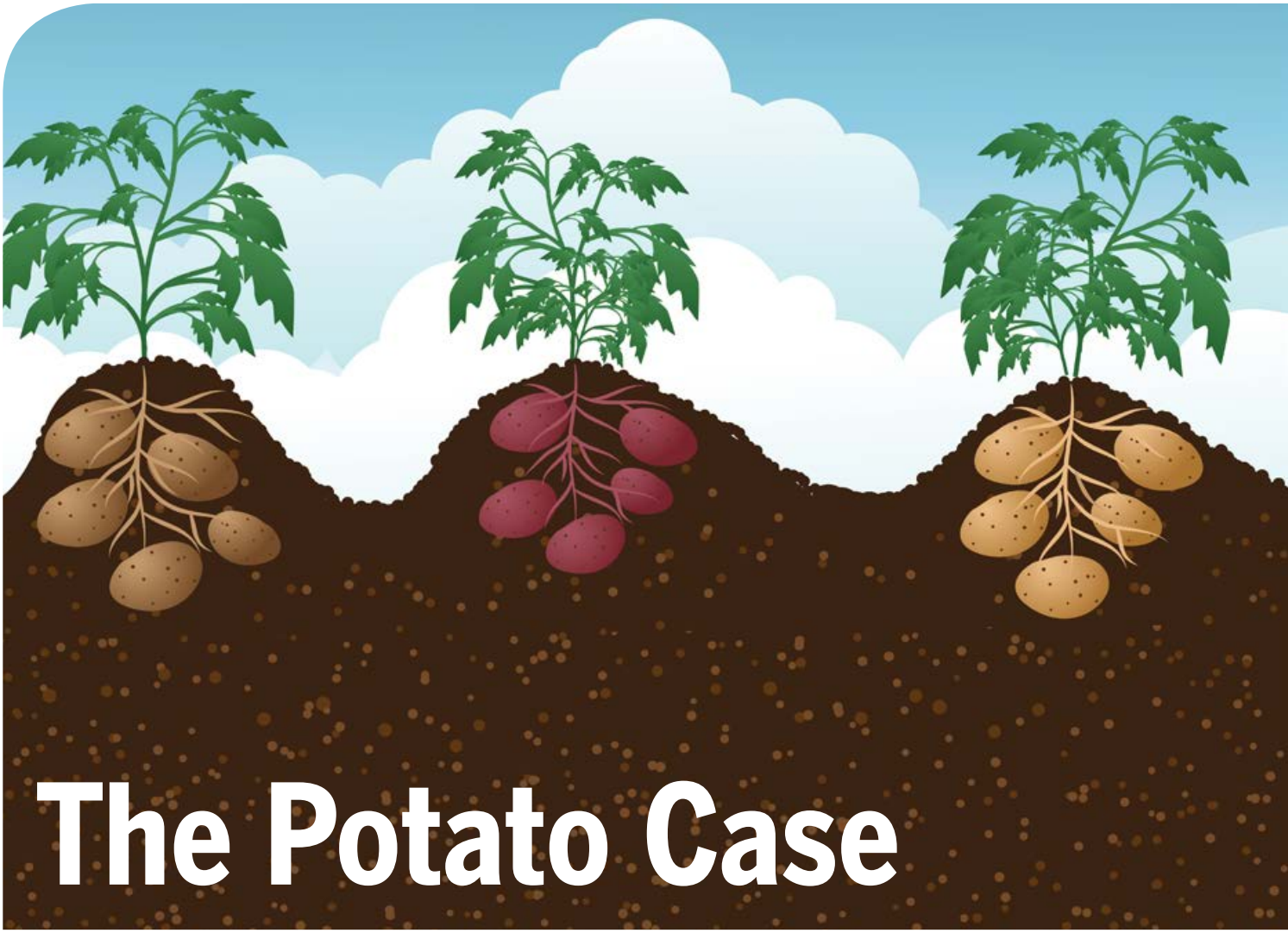

The Potato Case

JOHN MULLEN – PRINCIPAL, DIALES DISCUSSES THE RISK TO AN EXPERT'S REPUTATION AND SOME EXAMPLES OF EXPERTS WHO WERE TRULY NOTHING OF THE SORT!

In issue 5 of the Driver Trett Digest - January 2014, I talked about the importance of experts properly understanding their role and duties and correctly fulfilling them. I gave some examples of judgments from the England and Wales courts, where judges had made very pointed and public criticisms of certain experts. Some of those judgments are not for the squeamish; there is concern among some practitioners that the criticisms made have been unreasonable and unnecessarily direct and say little, if anything, of the role of those instructing the experts who got it so wrong.

In contrast it can be of some frustration, to those of us whose main market is international arbitration, that arbitral awards are private and that some experts do not receive the censure that they deserve. It appears that, in any event, many international arbitrators are reluctant to comment on the expert evidence provided to them, with awards just focussing on which evidence they prefer and adopt. Perhaps it is considered that, in the privacy of an arbitration, there is no wider purpose to recording such criticisms. Alternatively, perhaps the tribunals are concerned that criticisms of a party's expert may be construed, in some jurisdictions, as evidencing bias against that party.

The frustration this causes is exacerbated by the poor quality and 'hired gun' nature of much of the expert evidence presented in international arbitrations. Contrary to the impression one might gain from reading certain Technology and Construction Court (TCC) judgments, the UK can be proud of the quality of much of the expert evidence that its practitioners provide around the world. When reading some of the TCC judge's more damning comments on the experts appearing before them, it is often tempting to recall examples of similar, or worse, testimony in international arbitrations that passed without published critical comment.

Under English law, the role and duties of experts were set out 20 years ago by Justice Cresswell in the Court of Appeal in the Ikarian Reefer[1]. In the courts of England and Wales, and in Scotland, their Civil Procedure Rules (CPR) set out the procedural requirements of expert evidence. Those CPRs followed Lord Woolf's reports of the mid-1990s[2], which criticised the unnecessary costs and lack of neutrality of much expert evidence. Thus, in the domestic markets the requirements of experts are well developed and the courts' criticisms are made against that background.

Internationally, few jurisdictions have developed, through their legislature or precedents, such a detailed framework for experts to work in. However, this is not to say that experts will not be suitably chastised where appropriate. As with the England and Wales judgments, some overseas judgments can be similarly informative as to the potential pitfalls for experts and those instructing them. They also might offer some light relief for those suffering published criticism in the UK, or frustrated at the lack of it in international arbitration.

The world took an understandable

> *"Slapdash, disappointing and had a negative effect on her credibility as a witness"*

interest in the South African proceedings in the Oscar Pistorius trial. Whilst there is disappointment in some quarters at his original sentence, he appears to have achieved that outcome notwithstanding the quality of the expert evidence adduced by his team.

Pistorius' chief witness was a former police officer, Mr Roger Dixon[3], who gave expert evidence on ballistics, gunshot wounds, pathology, and blood splatter. He was also involved in both audio and visual tests. However, he admitted to not being an expert in any of these fields, but was actually a forensic geologist. On the detail of his investigations, he admitted to the following failings:

- He had not done his testing with any light meters or equipment other than his own vision.
- He testified on a recording of gun shots and a cricket bat striking a door although he was not there when the tests were conducted and knew nothing about the sound equipment used.
- He "overlooked and omitted" Pistorius height when conducting the test, which meant that his assistant, while kneeling, was a good 20cm shorter than Pistorius on his stumps.
- Regarding fibres he claimed to have found in a door that matched Pistorius' socks, he admitted that he had only seen photographs of the socks but had never examined them or looked at the fibres concerned under a microscope. Furthermore, he never drafted a formal report on his evidence, but made notes on his computer, which he had given to the defence.

A second expert relied upon by Pistorius, Mr Tom Wolmarans, gave evidence on the noises made by gunshots and cricket bats, but admitted that:

- He was not an expert in any of these fields.
- In particular, he was not a 'sound expert'.
- He had a hearing defect.
- His gun jammed on first test.
- He was unable to record rapid gun fire.
- The quality of his recordings were affected by frog sounds in the background.
- He could not repeat the recordings, as the door he had used had been broken.

A third expert appeared for Pistorius in relation to sentencing. Miss Annette Vergeer was a social worker and registered probation officer at the Department of Correctional Services. She gave testimony on the suitability of South African jails, warning that Pistorius would be at risk from: slippery floors; toilets and showers with no hand rails; and having his prosthetic leg taken away. However, she admitted that her evidence was based on statistics published nine years previously. Her evidence was contrasted with the evidence provided in the Shrien Dewani[4] case. There the UK courts were so convinced that South African prisons adhered to international standards that they extradited Dewani to South Africa for trial. The Pistorius judge described Miss Vergeer's evidence as: "Slapdash, disappointing and had a negative effect on her credibility as a witness".

Whilst the high profile nature of the Pistorius case drew international media attention to the poor nature of some of its expert testimony, a judgment of rather more significance locally is that of the Supreme Court of Appeal of South Africa in the recent Potato case[5]. This involved a claim against PricewaterhouseCoopers (PwC) for alleged negligent audit services, in which the first respondent relied for its 'entire case' on the expert testimony of a Mr David Collett.

Before assessing the expert's evidence, the court set out the standards to be expected of expert testimony. The judge started by quoting from Justice Cresswell in the Ikarian Reefer and noting how the principles therein echoed those set out in a South African case Stock v Stock[6].The Canadian judgment of Justice Marie St-Pierre in Widdrington[7], was then quoted from as "helpful" to the judge. The South African court found that Mr Collett's evidence did not measure up to those standards.

Mr Collett's only practical audit experience was when he was training, 22 years earlier. The detailed criticisms of his performance are lengthy, but include describing some of his opinions as "risible" and his approach as, "pedantic, rigid and dogmatic". The criticisms cover most of the potential errors that an expert witness might make, but included:

- Contradicting himself.
- Seeking to avoid answering hypothetical questions.
- Only reluctantly making concessions.
- Mostly basing opinions on hearsay evidence.
- Acting as an advocate advancing his client's case.
- Not giving evidence objectively, but to justify the conclusions he had formed.
- Disregarding or discounting facts inconsistent with his own theories or conclusions.

> *"...evidence, "did not satisfy the tests for admissibility as expert evidence" and was, "of little or no value in this case"*

- Lacking independence from his client in that he:
  - → Undertook the original investigation leading to the claim.
  - → Was involved in the gathering of evidence and pleaded formulation of the claim.
- Giving evidence in areas where he lacked expertise.

The judge concluded that, when tested against the standards enunciated by Justice Cresswell and Justice St-Pierre, Mr Collett's evidence, "did not satisfy the tests for admissibility as expert evidence" and was, "of little or no value in this case".

In conclusion, while experts practicing in the UK courts may feel aggrieved at their vulnerability to public reproach for their efforts, particularly where they also observe what happens in other jurisdictions, they might take some comfort from those criticisms that are published in other jurisdictions. Those judgments provide a useful resource for those acting as experts to understand the pitfalls of the role. Similarly, those instructing experts might consider how it came to be that Messrs Dixon and Collett were instructed in the first place to roles for which they were wholly unsuited. In the end, the real victim of expert evidence that is held to be 'of little or no value' is the party whose case suffers as a result. ■

[1] National Justice Compania Naviera SA v Prudential Assurance Company [Ikarian Reefer] [1995] 1 Lloyds Rep.455

[2] Access to Justice, Interim Report, June 1995; Access to Justice, Final Report, July 1996

[3] Who unfortunately did not gain his early training in London's Dock Green area

[4] The British businessman acquitted last year of murdering his wife on their honeymoon in South Africa

[5] PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another (451/12) [2015] ZASCA 2 (4 March 2015)

[6] Stock v Stock 1981 (3) SA 1280 (A)

[7] Wightman v Widdrington (Succession de) 2013 QCCA 1187 (CanLII)