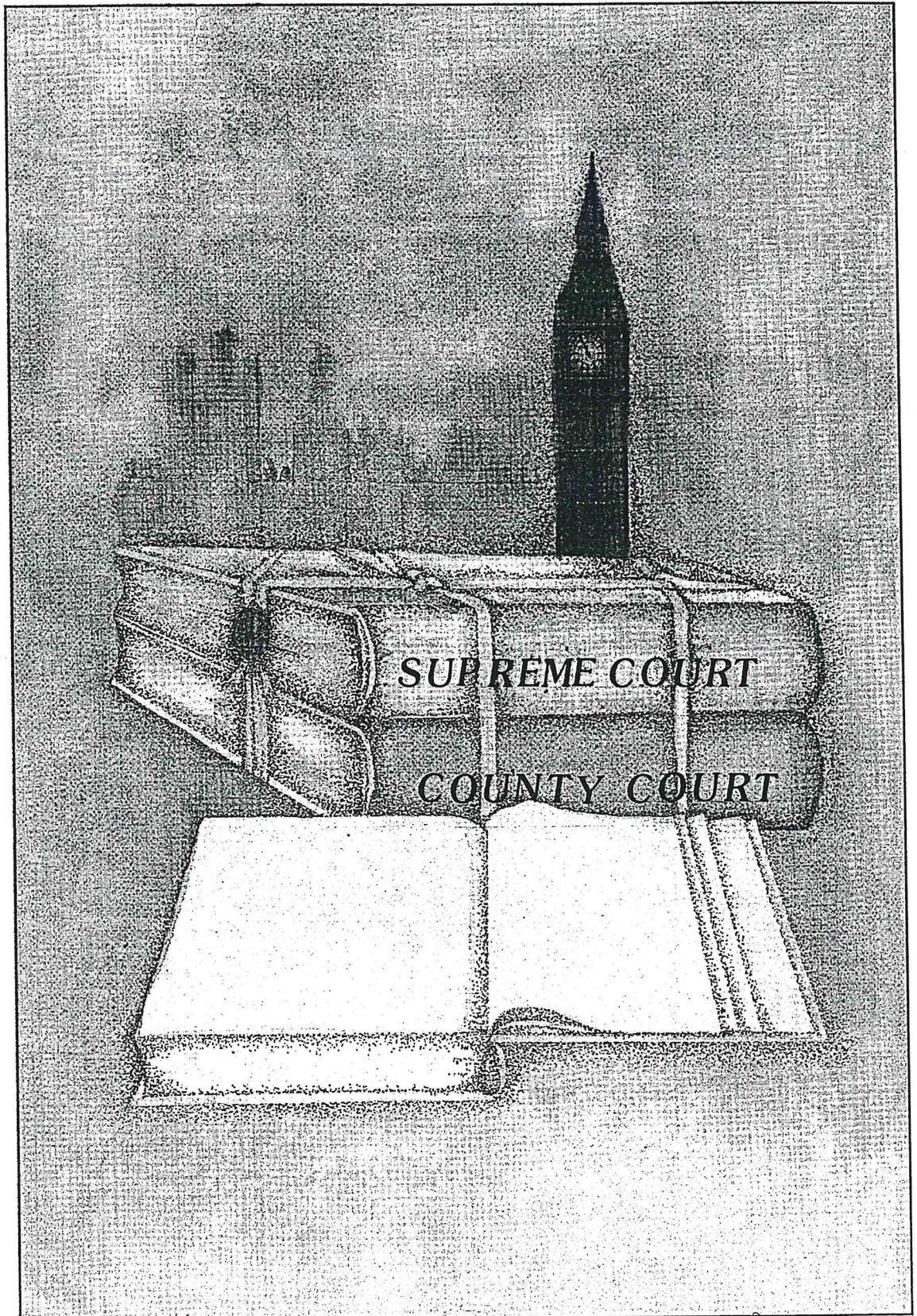


LIVING WITH THE CPR - VIEWS ALL ROUND

NEWSletter



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The View of the Expert

Following the introduction of the Civil Procedure Rules there have been many examples where barristers and solicitors have found difficulty in preparing their cases. This is largely due to inconsistencies in the way the rules are being applied both by the courts and solicitors who refuse to abandon old style adversarial litigation.

Lord Woolf has without question turned civil litigation on its head, parallels of which have not been witnessed since the introduction of legal aid in 1949.

While examples of good practice and swift outcomes obviously exist, there is a feeling of increasing frustration and difficulty particularly with regard to the appointment of experts.

Keith Carter of Keith Carter & Associates, Employment Consultants, outlines some examples where the new procedures are not working and considers possible reasons.

Example one: We recently received a letter from a solicitor acting for the defendants objecting to our appointment on the grounds that we were claimant orientated. On that very same day, we received a letter from a claimant's solicitors suggesting that we did too many defendant cases and questioned our independence.

In replying to both solicitors, we pointed out that under the Civil Procedure Rules an expert's duty is to the court. What surprised me is that neither solicitor asked for an indication of our experience in analysing a particular occupational area. This would have been a much better way to ascertain the contribution we could offer as employment experts. Both solicitors appeared to be rooted in pre-Woolf adversarial litigation.

Example two: In this case, both sets of experienced personal injury lawyers appointed us as the joint expert. Both parties found value in the preliminary overview we provided but wanted attendance at trial to deal with additional questions. The District Judge ruled that an expert was not needed and refused leave for us to be called. He suggested as an alternative that the solicitors should undertake the work themselves. While it was explained that the work had already been commissioned and that the material in the expert's report was complicated, the District Judge maintained his ruling.

While the above negative experiences seem to be on the increase, examples can be given where a more flexible approach was adopted resulting in:

- (i) a reduction in costs
- (ii) an acceleration of the litigation process

- (iii) information to enable solicitors to negotiate a settlement

Examples of where a different more flexible approach has been adopted are:

- (a) A District Judge refused to give leave to call an expert instructed on the basis that information should be provided to both parties. Whilst refusing an expert's full report, he maximised the use of an expert allowing the solicitors to benefit from their easy access to information.
- (b) Leave was granted for both sides to instruct an 'advisor' but not an 'expert'. The District Judge indicated in this case that the trial judge would benefit from expert information and allowed both sides to investigate matters further.

The latter two examples reflect a more considered approach and favour the European inquisitorial system. Despite this the overriding impression is that there is a great deal of confusion regarding the application of the CPR and the habits of old-style adversarial litigation remain.

At present, rulings are typically yes, no - or after a lot of negotiation - a joint expert. An approach which has not been developed (certainly in the area of employment) is obtaining assistance through the heading of 'advisor'.

Common sense suggests that as employment experts have been used in litigation cases for over 16 years, their expertise and information should be of assistance. To direct each firm of solicitors to independently develop their own library and database would almost certainly slow down litigation or push costs up - NOT what Lord Woolf wanted.

An alternative to the three common rulings of 'yes', 'no' and 'joint' might be:

- Information only from an expert
- Expert to act as advisor only
- Joint or single expert in multi-track or difficult cases.

I believe the above approach, which would tap into the existing resources, makes economic sense.

While changes in attitude are more difficult to achieve, the new climate looks destined to remain with us and perhaps - unlike legal aid - will last for more than 51 years.

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