The Ticking Timebomb of Expert Certification

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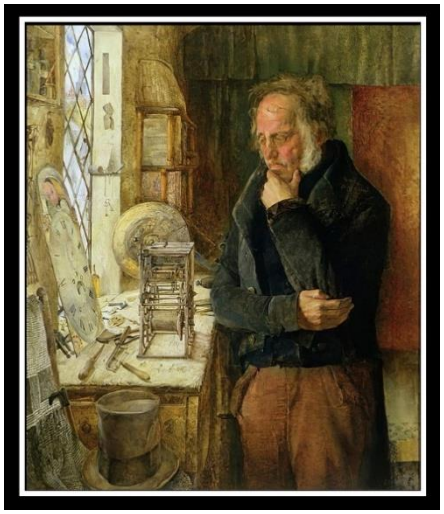

I am prompted to write this article by more general concern for the issue of certification of expert witnesses upon it arising recently in my own practice, and as affected by the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. In short, the 2019 Rules impose a default requirement for advance judicial certification. This arose in a piece of litigation in which I was instructed earlier this year, yet which had been raised back in 2020. Fairly swiftly after my appointment, it settled in favour of those for whom I was acting in terms of sum sued for and judicial expenses in principle. Yet, at that stage it became apparent that certification had never been sought nor granted for various experts, and where their fees would come to several tens of thousands of pounds.

Since my involvement in that case, my research into the issue at large tends to suggest a potential extent of lack of familiarity with the 2019 rules as they relate to experts. Thus, my concern, and my reason for this article.

The 2019 Rules

The 2019 Rules are a general set of rules such as which are laid into law from time to time in order to regulate various issues relating to judicial expenses at large. The 2019 iteration came into force on 29 April 2019 (r.1.1(2)). Before their entry into force, the previous procedure for certifying an expert, or '*skilled person*', usually consisted of making an application ***after*** the expert had given evidence. The basic rationale for this was that only once the judge or sheriff had heard the expert could s/he adjudicate on whether that individual was indeed an expert. However, the 2019 Rules now require that certification be sought in advance of instructing the expert.

So far, there appears to have been very little published caselaw on the operation of the 2019 Rules in respect of certification of experts, e.g. **Finlay v Borders HB [2019] 10 WLUK 698** (albeit that was actually more concerned with certification for counsel). Yet, given the 2019 Rules' importance in this regard, I predict more caselaw in the future, particularly since this issue is, in effect, a 'ticking timebomb', where even as I write / you read this article, experts might be getting instructed absent certification, and absent knowledge of the need for certification, only for this to arise as an issue when the case in which they are instructed eventually concludes — which could be several years from now.

Advance certification of experts is not necessary for personal injury actions (rules 4.5(4)(a)(i) and (ii)), nor for simple procedure actions (rule 4.5.(4)(a)(iii))

Advance & Retrospective Certification

Thus, the 2019 Act of Sederunt sets up a ***default procedure*** for certification of an expert, whereby r.4.5(1) in effect requires that a party wishing this should usually seek ***advance certification*** before employing the expert (additional emphasis):

> ***Skilled persons***
>
> 4.5.—(1) *No charge incurred to a person who has been engaged for the purposes of the application of that person's skill is to be allowed as an outlay unless—*
>
> (a) *the person has been certified as a skilled person in accordance with rule 5.3 (certification of skilled persons); and*
>
> (b) *except where paragraph (4) applies,* ***the charge relates to work done, or expenses incurred, after the date of certification****…*

Thus, as said, the entry into force of the 2019 rules marked a departure from the previous procedure, whereby the court would typically certify experts ***after*** hearing their evidence, i.e. once having had an opportunity to assess whether such witnesses were indeed suitably qualified to give expert opinion evidence (for example, in terms of **Kennedy v Cordia (Services) LLP [2016] UKSC 6**).

However, under the 2019 rules where a party does not apply for certification in advance, s/he may still seek ***retrospective certification*****,** which is the effect of r.4.5(4)(b) in conjunction with r.5.3(5):

> ***Skilled persons***
>
> 4.5.—(4) *This paragraph applies where—*
>
> (b) *the sheriff has determined in accordance with rule 5.3(5) that the certification has effect for the purposes of* ***work done, or expenses incurred, before the date of certification****.*

Certification of skilled persons

5.3.—(5) *Where this paragraph applies, the court may only determine that the certification has effect for the purposes of **work already done** by the person where the court is satisfied that the party applying has **shown cause for not having applied for certification before** the work was done.*

This is also borne out by Macphail, 4th edition, at para.19.71:

*…A motion for certification **can be made at any time prior to taxation**…*

Where footnote no.307 observes:

*Taxation of Expenses Rules 2019 r.5.3(1). The rule contains **no express time limit** but when read along with r.4.5(1) and (2), it is thought that it is implicit that the motion must be granted prior to taxation.*

Thus, there emerges between rules 4.5 and 5.3 a difference in approach as between ***advance certification***, on one hand, and, on the other, ***retrospective certification***. In instances of advance certification, it appears that, once the court has granted certification for a named expert, then that holds good for all work that s/he shall do (at least in principle, subject to the auditor's assessment of the appropriateness of each and every item of work). By contrast, in instances of applying for retrospective certification, the party making such an application must satisfy the court as follows:

- ***Question no.1*** — broadly speaking, the expert was indeed an expert, or a '*skilled person*'
- ***Question no.2*** — each and every item of work was appropriate
- ***Question no.3*** — there is '*cause*' for not having applied in advance, and this in respect of each
  and every such item of work

Why Certification Matters & Other Types of Approval for Experts

In short, and as can be seen from the foregoing, judicial certification, whether advance or retrospective, is essential in order that the auditor of court may subsequently approve experts' actual fees for payment by the unsuccessful party as entries in the successful party's account of judicial expenses overall. And, here it is apt to clarify that, usually, the judge / sheriff only grants certification in principle, and does not adjudicate on the sums that experts are charging for their work, which is more proper for the auditor in due course (albeit aggrieved parties may challenge the auditor's assessment by referring it back to the judge / sheriff, which is quite rare).

And, experts' fees can be extremely significant, depending on their area of expertise, its rarity, and other factors, including extent of involvement in the case, whether the expert has had to travel and stay overnight, whether s/he has had to consult with counsel and testify, and if so for how long.

It also bears mention that other forms of approval for experts may be necessary for other purposes, e.g. advance sanction by the Scottish Legal Aid Board, or advance approval by legal expenses insurers.

Complexities

In the case of mine that I mentioned at the outset of this article, the motion that I advocated for retrospective certification was successful, whereby the sheriff determined that, notwithstanding failure to apply in advance, nonetheless the experts' fees were recoverable, at least in principle (subject to the auditor assessing the actual fees). Points emerging out his lordship's ***ex tempore*** judgment include:

- The dispensing power, e.g. OCR r.2.1, does not necessarily apply, although it and its caselaw may be useful by analogy
- The test of '*cause*' as made out in r.5.3(5) of the 2019 Rules sets a low bar
- Yet, usually, ignorance of the rules would not be sufficient to constitute '*cause*'
- Each case depends on its own particular facts and circumstances
- The judge / sheriff has very broad discretion
- In cases where the expert's work is essential to the progress of the litigation, it appears this may be a factor (for example, by analogy, as said advance certification is not necessary for PI cases at all anyway, where obviously medical expert opinion is always essential)

And, it occurs to this author that the following points may also be germane for consideration:

- Where an expert is instructed pre-litigation, obviously there is no action in dependency at that time such as to provide a procedure for applying for advance certification
- It was suggested by the opponent in my case that, in this type of situation, the correct means by which to proceed would be to apply for retrospective certification immediately the action is raised (although the sheriff did not appear to regard that as crucial in our case, and in any event it does not appear to be what the rules actually say)
- This is further complicated where an expert was instructed before 29 April 2019, i.e. before the 2019 Rules came into force, and where those rules themselves do not appear to have retrospective effect
- Given that retrospective certification requires certifying each item of work undertaken by the expert, this may entail a relatively detailed forensic analysis, e.g. by comparing the times of instructing discrete items of work, on one hand, with, on the other, the overall litigation timetable at large, e.g. did it suddenly become necessary to instruct a particular item of work because of what the opponent had adjusted into pleadings at the last moment of amendment procedure?
- The nature of conducting procedural business, ***a fortiori*** in very busy sheriff courts, may not necessarily lend itself particularly well to such a detailed forensic approach
- Was the older way of doing this better?