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Shopping around for favourable expert evidence

Allen Tod Architecture Ltd v. Capita Property and Infrastructure Ltd
[2016] EWHC 2171 (TCC)

Article by David Bowden

HHJ David Grant sitting in the Technology and Construction Court of the High Court in Birmingham has had to decide what order to make when one side in litigation accused the other of shopping around to find a more favourable expert to bolster up their case. This was a dispute about renovating Barnsley Civic Hall. The claimant alleged professional negligence against the defendant. The claimant had instructed a structural engineering expert. He had been slow to respond. The claimant wanted to replace its expert. The defendant wanted disclosure of the first expert's draft and final reports as well as any instructions passing to that expert from the claimant's solicitors as a condition of consenting to a change of expert. The court granted the defendant's application.

Allen Tod Architecture Ltd v. Capita Property and Infrastructure Ltd
[2016] EWHC 2171 (TCC) 26 August 2016
High Court of Justice, Queen's Bench Division, Technology & Construction Court (HHJ David Grant)

What are the facts?
The Claimant is a construction management business which obtained a contract in 2005 to renovate Barnsley Civic Hall. The project hit serious problems in 2007 when weaknesses in the walls and foundations were found. The Defendant was engaged as a structural engineer on the project. The civil hall is owned by the local council. In arbitration the local council settled for £2million its claim against the claimant in 2015. In this case, the claimant alleges professional negligence against the defendant. The defendant denies either liability or causation and challenges the reasonableness of the settlement sum the claimant agreed with the local council in arbitration.

What directions had been given about expert evidence?
At a CMC on 3 September 2015 an order was made which gave the parties permission to adduce expert opinion evidence by reference to discipline, rather than by reference to named experts. It also provided that a party seeking to call expert evidence orally at trial had to apply for permission to do so before pre-trial checklists were filed. This was not a case where the claimant needed permission to change its expert.

What does the CPR say about expert evidence?
CPR part 35.4 provides as follows:

> '*(1) No party may call an expert or put in evidence an expert's report without the court's permission.*
> *(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –*
> *(a) the field in which expert evidence is required and the issues which the expert evidence will address; and*
> *(b) where practicable, the name of the proposed expert.*
> *(3) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address*.'

What experts had been lined up?
The Claimant had initially instructed a structural engineering expert referred to only as 'A'. It is not clear who the Defendant had instructed. The Claimant wished to replace its initial expert with Professor John Roberts who was latterly the Dean of the Faculty of Technology and Director of the Sustainable Technology Research Centre at Kingston University.

Why was a change of expert sought?
Expert A seemed to be unable to produce the report or respond to requests within the timescales required. The claimant lost confidence in him. The claimant's witness evidence said:

> '*The position with expert A had reached the end of the line. … he was clearly unable to properly manage the documents in the case and express his views with the clarity that would assist the court. He was also unresponsive when we contacted him to review matters.*'

Are there any other relevant facts?
The case is listed for a 9 day trial due to start on 4 October 2016. The original expert let the claimant down by not even attending its mediation meeting with the local council.

What was the application before the Judge?
This was the defendant's application in which it sought specific disclosure of these 3 things from the claimant:

- its letter(s) of instruction to its expert A,
- its letter of instruction to Professor John Roberts, and
- any report, document and/or correspondence in which the substance of the expert opinion of the first expert was set out, whether such was in draft or final form.

On what basis did the defendant seek to make this application?
The defendant stated that its consent to the appointment of Professor Roberts as the claimant's new expert was conditional upon it disclosing these 3 groups of documents.

On what basis did the claimant seek to resist the application?
The claimant disclosed both letters of instructions to both its experts as well as the report of expert A dated 12 February 2016. It objected to producing the correspondence on the basis it was covered by legal professional privilege.

What did the Court of Appeal decide in *Edwards-Tubb*?
It handed down its judgment in *Edwards-Tubb v JD Wetherspoon plc* **[2011] EWCA Civ 136** on 25 February 2011. This was a personal injury case where one side wanted to instruct a different expert to give evidence on orthopaedic surgery. Lord Justice Hughes ruled that

> '30. *…. I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A in whom he has for whatever reason lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him. An expert who has prepared a report for court is different from another witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A …. there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported. ….it is appropriate for the court to exercise the control afforded by rule 35.4 in order to maximise the information available to the court and to discourage expert shopping ...*'

Are there any other prior authorities of relevance?
These authorities are relevant in this case:

> *Vasiliou v. Hajigeogiou* **[2005] EWCA Civ 236** (Brooke, Dyson & Gage LJJ)
> The court made an order giving both parties permission to '*instruct one expert each in the specialism of restaurant valuation and profitability*'. The defendant instructed an expert who visited the premises and prepared a draft interim report. Subsequently, deciding that he did not wish to rely on that report, the defendant instructed the 2nd and sought the court's permission to rely on his evidence. The judge found that although the order had not named the 1st expert, properly construed it permitted the defendant to instruct the 1st expert and no other. Therefore the defendant required permission to rely on the 2nd expert. The judge granted permission on condition that the defendant discloses the first expert's draft report.
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> *BMG (Mansfield) Ltd v. Galliford Try Construction Ltd* **[2013] EWHC 3183 (TCC)**
> There is no evidence before the court from the expert. The court does not know whether his wish to retire was driven by either his age or the fact that he had had a bruising time at the experts' meeting or the mediation. The court can see nothing unreasonable about an expert who, approaching his 70th birthday, wants to be relieved of his duties as an expert in litigation that he could reasonably have expected to have been concluded some years earlier. What is more problematic is disclosure of documents such as solicitor's attendance notes of telephone calls with the expert which record the substance of his opinions.
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> *Beck v Ministry of Defence* **[2003] EWCA 1043** Court of Appeal (Phillips MR, Dyson & Ward LJJ)
> There clearly ought to be a condition attached to the order permitting the defendants to instruct a fresh psychiatrist - that they should forthwith disclose the previous expert's report upon which they no longer seek to rely. Expert shopping is to be discouraged, and a check against possible abuses is to require disclosure of the abandoned report as a condition to try again. Such a course should both prevent the practice of expert shopping, and provide the claimants with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done.

What principles did the judge apply in coming to his ruling?
The judge said there were 5 principles from the case law on a change of expert:

- The court has a wide and general power to exercise its discretion whether to impose terms when granting permission to a party to adduce expert opinion evidence,

- The court may give permission for a replacement expert but such power is usually exercised on condition that the 1st expert's report is disclosed,
- Once an expert has produced a report, the expert owes a duty to the court irrespective of his instruction by one of the parties,
- The court discourages expert shopping, and the court's power to impose terms on a change of expert has to be exercised reasonably on a case-by-case basis, and
- The court will require strong evidence of expert shopping before imposing a term that a party discloses anything other than the report of the replaced expert.

What ruling did the Judge make on the application?
The judge had to rule on 3 submissions. Firstly he rejected a submission that legal professional privilege meant that drafts reports of the 1st expert or instructions to him did not have to be disclosed. The judge ruled that: '*I do not find the fact that any of the documents presently sought to be disclosed are or may be cloaked with the cover of privilege is a reason for them now not to be disclosed as part of the price which the claimant will have to pay in order to call expert B as its expert witness at trial.'*

As to whether sufficient material had already been disclosed by the claimant's solicitors he said that *'the court has power to order disclosure not only of expert A's final report (in the sense of it being a signed and/or Part 35 compliant report), but also of any earlier or draft report, as a condition of giving permission to the applying party to rely on new expert B'.*

Finally as to whether there had been expert shopping here, he decided that *'it is not necessary for the defendant to establish that the claimant has been expert shopping in order to found the jurisdiction of the court to impose a condition of disclosure on any permission to the claimant to call expert B at trial'* . Fortunately for the claimant he concluded that *'I have come to the conclusion that this is either not a case of expert shopping or, if it is, then it is only so to a faint degree'.*

What was the order the judge made?
The judge ordered the claimant to disclose any document in which expert A provided his opinion on the issues in the case prior to the mediation on 12 April 2016. As a safeguard he directed that if '*any other material is contained within any such document, it is to be redacted from such document before the document is disclosed*.'

What lessons can be learned from this case?
This case is a useful reminder of the different way that expert evidence is treated by the court. Whilst an expert may be instructed by one party in a dispute, the expert's over-riding duty is to the court. Where a party wishes to change experts, if there is a good reason for doing so (for example the expert is retiring) then the price of being able to change experts is having to disclose the instructions to and the draft, interim or final reports of the original expert.

Where it does not appear that there is a good reason to change expert, then a party is vulnerable to a challenge of having to disclose far more. Those drafting instructions to experts should bear this in mind. It would also be helpful to understand an expert's availability and to be clear that he can deliver the report or come to meetings or conferences before the instruction decision is finalized.

Finally, there is a clear advantage at a CMC of simply seeking a direction for expert evidence in the field of x rather than being hamstrung and the order appointing y as an expert. Where the order is in the former terms, it still remains easier to change experts.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.