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Legal Update
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Changing experts: the potential consequences

In the recent case of *Allen Tod Architecture Ltd (in liquidation) v Capita Property & Infrastructure Ltd* [2016] EWHC 2171 (TCC) the Court held that permission to call a second, replacement expert at trial, was conditional on disclosure of documents containing the first expert's opinion.

Background

The substantive proceedings concerned a claim in professional negligence against a structural engineer. The main order for directions in the proceedings gave the parties permission to adduce expert evidence (in accordance with CPR 35.4) by reference to discipline, rather than by reference to named expert. In addition, a party seeking to call expert evidence orally at trial had to apply for permission prior to filing pre-trial checklists.

The Claimant had provided the first expert (Expert A) with two separate letters of instruction (at different stages in the proceedings) and Expert A had produced written responses to questions put to him by Counsel, a "preliminary report" (which was a summary of his views) and a draft report. Shortly after Expert A provided his draft report, the Claimant decided to change experts, having lost confidence in Expert A's ability to manage the documents in the case and express his views with clarity. Expert A was also said to be unresponsive on occasions.

The Claimant subsequently instructed a new expert (Expert B).

It was common ground between the parties that the Claimant did not require the Court's permission to change expert but that as an incident of granting permission to call an expert witness to give evidence orally, the Court did have the power to impose conditions upon such permission.

The application

The Defendant applied for specific disclosure of the following documents as a condition of the Court granting the Claimant permission to call Expert B to give oral evidence at trial:

(a) Letter of instruction to Expert A (which was disclosed by the Claimant in response to the application);

(b) Letter of instruction to Expert B (which was disclosed by the Claimant in response to the application); and

(c) Any report, document and/or correspondence in which Expert A set out the substance of his opinion – either in draft or final form.

In relation to (c), whilst the claimant disclosed the draft report of Expert A, it resisted disclosure of: Expert A's responses to questions raised by Counsel; the document described as a "preliminary report"; and other documents in which Expert A's views were expressed in writing (in particular, the input he gave in respect of a mediation).

The Claimant resisted such disclosure on three grounds:

(1) that each of the documents was privileged;

(2) that the disclosure given to date was sufficient to provide a proper basis for the Court to permit Expert B to give evidence; and

(3) that it was not a case where the Claimant had been 'expert shopping' because it considered Expert A's evidence to be unfavourable.

Relevant legal principles

In the High Court Judgment, HHJ David Grant considered three cases, which provide a series of established principles concerning the appointment of a second expert.

Vasiliou v Hajigeorgiou [2005] 1 WLR 2195; [2005] CA Civ 236; while the Judge wrongly decided at first instance that permission was required to appoint a second expert, the Court of Appeal nevertheless considered what would have been the position if the Court's permission had been required. It approved an earlier case, *Beck v Ministry of Defence* [2005] 1 WLR 2206, in which it was held that permission to instruct a new expert should be on terms that the previous expert report be disclosed. Dyson LJ held in *Vasiliou* that 'expert shopping' is undesirable and wherever possible the Court will use its powers to prevent it. In imposing conditions, the Court is not "*abrogating or emasculating*" legal professional privilege, but simply seeking a waiver of privilege in return for permission to substitute experts.

Edwards-Tubb v JD Wetherspoon Plc [2011] 1 WLR 1373; [2011] EWCA Civ 136, in which the Court of Appeal held that a report obtained prior to the issue of proceedings but in the context of relevant pre-action protocol procedure, ought to be disclosed. Whilst the report was a privileged document, the prime duty of the expert was "*unequivocally*" to the court. Imposing disclosure of the first report as a condition of permission for a substitute expert was not overriding privilege. Rather, Hughes LJ held that "*it is presenting the claimant with a price which must be paid for the leave of the court...*". It is appropriate for the Court to exercise such control so as to "*maximise the information available to the court.*"

In *BMG (Mansfield) Ltd v Galliford Try Construction Ltd and another* [2015] EWHC 3183 (TCC) the Court held that where there is a change of expert after the pre-action protocol has been commenced, the court's power to impose a condition of disclosure ought to extend beyond an expert's final report but also to other reports containing the substance of the expert's opinion. Indeed, Edwards-Stuart J held that this should be "*usual practice*". If there is a "*strong case*" of 'expert shopping', disclosure of solicitors' attendance notes may be justifiable. Otherwise, Edwards-Stuart J was concerned to avoid what he described as a "*significant and unjustifiable*" invasion of privilege if there was only a "*faint*" appearance of 'expert shopping', as there was in the instant case.

The decision

The Defendant's application was successful and HHJ Grant granted the Claimant permission to call Expert B at trial on the condition that the Claimant disclose all categories of the documents sought by the Defendant. HHJ Grant summarised the established principles as follows:

1. The Court has a wide and general power under the CPR to exercise its discretion as to whether to impose conditions when granting permission to adduce expert opinion evidence;
2. In exercising such discretion, the Court may give permission for the party to rely on a second replacement statement, but it is usually exercised on condition that the first report is disclosed;
3. Once the parties have engaged in the relevant pre-action protocol process and an expert report is prepared within that context, the expert's duty is to the Court;
4. While the practice of requiring the party to disclose the abandoned expert report discourages the practice of 'expert shopping', the Court's power to exercise such discretion ought to be exercised reasonably. The decisive factor in imposing a condition of disclosure was whether the expert was engaged in the context of the pre-action protocol process and not whether it was an instance of 'expert shopping'; and
5. Disclosure of other documents such as attendance notes and memoranda containing the substance of an expert's opinion will only be ordered where there is strong evidence of 'expert shopping'.

In respect of each of the Claimant's grounds of resistance, HHJ Grant found as follows:

1. Privilege attached to the documents was not a reason for them not to be disclosed as part of the price to be paid by the Claimant in order to call Expert B;
2. Expert A's notes and "preliminary report" expressed his opinion; and
3. This was not a case of 'expert shopping' or if it was, it was only to a "*faint degree*". Whilst the expression had the connotation that a party is dissatisfied with the substance of an expert's opinion, "*there is a wide range of circumstances in which a party may wish to change its expert*". Even where there was only a faint degree of 'expert shopping', the Court could still direct disclosure of material in which an expert expresses an opinion.

Comment

HHJ Grant has been careful to take an approach consistent with previous authorities. His decision reiterates that the price for changing expert is likely to be a waiver of privilege over previous reports. The price goes up where there is strong evidence of 'expert shopping', and may entail disclosure of a much broader scope of documents and a more significant invasion of privilege. This is regarded as consistent with an expert's duty to assist the Court and the Court's ability to exercise its power to maximise the information available to it.

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