



Changing experts – a risky business

7 September 2016

The recent case of *Allen Tod Architecture Ltd (In Liquidation) v Capita Property and Infrastructure Ltd (previously known as Capita Symons)*¹ provides a timely reminder of the risks of changing experts. In this case, the Defendant made an application for specific disclosure of documents prepared by the Claimant's first expert. The High Court held that privilege in such documents should be waived and the documents should be disclosed where a party seeks to rely upon the evidence of an alternative expert.

Background

The Claimant, Allen Tod, was retained by Barnsley MBC in connection with the renovation and expansion of Barnsley Civic Hall as a "one-stop construction management service", acting as architect, design consultant and services consultant. The Defendant, Capita, was appointed by Allen Tod to provide structural engineering advice for the project.

Serious structural defects to walls and foundations were identified, resulting in delays to the works. Barnsley MBC intimated a claim against Allen Tod in January 2009, and subsequently commenced arbitration proceedings in July 2015, which settled in the sum of c.£2m in October 2015.

Allen Tod had previously issued proceedings against Capita in December 2013, seeking to pursue a claim to recover any settlement monies that might be paid to Barnsley MBC.

Allen Tod instructed Expert A in September 2014, after service of proceedings, who provided his substantive opinion in December 2014, preparing a note

responding to questions raised by Allen Tod's Counsel. However, Expert A failed to issue his substantive preliminary report until July 2015. Upon receipt of Expert A's revised report, in February 2016 (following amendments to Statements of Case), Allen Tod elected to instruct an alternative expert, Professor Roberts. Allen Tod was concerned that Expert A was unresponsive, unable to manage the documents and unable to express his views in a manner acceptable to the Court. Expert A did, nevertheless, advise Allen Tod in relation to a mediation in April 2016.

The application

In light of Allen Tod's request to appoint Professor Roberts, Capita made an application for specific disclosure of:

- Allen Tod's letters of instruction to Expert A
- Allen Tod's letter of instruction to Professor Roberts
- any report, document and/or correspondence in which the substance of Expert A's opinion was set out (whether in draft or final form).

Any comments or queries?

Alan Stone Partner

+44 20 3060 6380
alan.stone@rpc.co.uk

Alexandra Anderson Partner

+44 20 3060 6499
alexandra.anderson@rpc.co.uk

Claire McNicholl Senior Associate

+44 20 3060 6349
claire.mcnicholl@rpc.co.uk

1. [2016] EWHC 2171 (TCC).

Allen Tod agreed to disclose the letters of instruction and Expert A's report dated February 2016 but refused to disclose:

- notes attached to an earlier email in December 2014, in which Expert A responded to questions raised by Counsel for Allen Tod
- a preliminary report prepared by Expert A in July 2015 and/or
- any documents prepared by Expert A in preparation for the mediation in April 2016.

Allen Tod refused disclosure on the grounds that the documents were privileged and that sufficient material had been provided to Capita, such that it would be unnecessary and/or disproportionate to disclose any further material. Allen Tod denied that it had been "expert shopping".

The High Court's decision

The Court has a wide and general discretion in determining whether to impose conditional terms when giving permission to adduce expert evidence.

The High Court agreed with Capita, upholding the decision of Dyson LJ in *Vasiliou v Hajigeorgiou*², that permission for Allen Tod to rely upon the evidence of Professor Roberts was conditional upon waiver of privilege in respect of any previous expert reports, prepared during the pre-action protocol process or during litigation.

Whilst expert shopping is discouraged, it is sometimes unavoidable. In such circumstances, the High Court held that the waiver of privilege and duty of disclosure is likely to extend to draft or provisional reports, including any other documents which set out the substance of an expert's opinion on the issues.

In this case, instructing Professor Roberts where Expert A was unable to prepare a Part 35 compliant report in sufficient depth, at the time requested, did not amount to expert shopping or, at the very least, was minor expert shopping.

In light of the above, Allen Tod was obliged to disclose all documents requested by Capita, if Professor Roberts was to be instructed.

However, the Court noted that it would exercise this discretionary power reasonably, on a case-by-case basis, having regard to all of the circumstances of each case.

Other key decisions

In reaching this decision, the Court considered the following decisions which are worthy of note:

Vasiliou v Hajigeorgiou²: this was a claim for breach of covenant in a landlord and tenant dispute. At a case management conference, the Court granted the parties permission to rely upon the evidence of an expert in the field of restaurant valuation and profitability. The defendant appointed an expert, who inspected the property. The defendant subsequently decided to instruct a second expert. At first instance, the Court held that, although the order did not name the first expert, the defendant was only permitted to instruct the first expert under the terms of this order. The defendant was therefore only entitled to rely upon the evidence of a second expert if it disclosed the first expert's report. The Court of Appeal disagreed, concluding that since the original order identified the expert by expertise only, permission was not required to rely upon the evidence of a second expert.

Edwards-Tubb v JD Wetherspoon plc³: this was a claim for damages after the claimant, employed by the defendant, fell at work and sustained personal injuries. The claimant disclosed the identity of an orthopaedic expert in pre-action correspondence but sought to rely upon the evidence of a different expert after issuing proceedings. The defendant applied for disclosure of the first expert's report. The Court of Appeal held that, although the first expert's report was not prepared with the intention of being served during the proceedings, it was obtained during the course of the relevant pre-action protocol period, and the same discretionary power to impose a condition of disclosure of any report

2. [2005] 1 WLR 2195.

3. [2011] 1 WLR 1373.

from the first expert was available when the claimant sought to change experts. It was appropriate for the Court to make such an order, so as to maximise information available and to discourage expert shopping.

BMG (Mansfield) Ltd v Galliford Try Construction Ltd⁴: this was a claim for damages against a design and build contractor and architect following a fire at a shopping centre, arising from inadequate fire protection. The claimant appointed an expert during the pre-action protocol period. This expert subsequently withdrew from the claim and retired, after service of proceedings. The defendants alleged that the claimant was expert shopping and should disclose all relevant documents as a condition of relying upon an alternative expert. The Court held that, if there is a change of expert, imposing a condition of disclosure of previous reports should be usual practice once the pre-action protocol period was initiated. The duty of disclosure should extend to all reports, including those prepared before the issue of proceedings, but there had to be a very strong case of expert shopping before the Court would order disclosure of additional documents such as attendance notes.

Coyne v Morgan and Harrison⁵: this claim related to defective building works at a property. The defendant builders applied for permission to rely upon evidence from a second expert, replacing the draft report of the original expert, following the original expert's withdrawal from the case. The

defendant's original expert had prepared a draft report, for use in proceedings, and had met with the claimant's expert to discuss the issues. The Court held that, once a report has been prepared, the expert owes a duty to the Court, irrespective of a party's instruction. The appointment of a substitute expert should therefore be conditional upon disclosure of the original expert's draft report (redacting any without prejudice discussions) but not attendance notes or other documents setting out the substance of the original expert's opinion, as this was not a strong case of expert shopping.

Comment

The Court takes a relatively consistent approach to expert substitution. It clearly accepts that there are numerous reasons why a party may substitute an expert and will exercise discretion. A change of expert will not always be interpreted as expert shopping but, given the frequency of expert instructions in construction disputes, caution should be exercised when appointing experts. The message from the Court in *Allen Tod* and in the previous decisions is clear: the Court's agreement to an alternative expert is likely to be conditional upon waiver of privilege and disclosure of previous reports, whether obtained during the pre-action period or during litigation. Where there is evidence of expert shopping, this duty may extend to any document in which the former expert sets out the substance of their opinion, whether otherwise disclosable or not.

4. [2013] EWHC 3183 (TCC).

5. [2016] EWHC B10.

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