Buyer beware: the hazards of expert shopping

Chris Pamplin considers the court's power to allow a party to change its expert witness & how far back this power can reach

IN BRIEF

▶ In July 2021, the court gave a potentially very significant judgment in *Rogerson (trading as Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd* [2021] EWHC 1807 (TCC). The case concerned the power of the court to allow a party to change its expert witness upon terms that can include disclosure of any reports prepared by a prior expert. It raised an interesting question: how far back in time can this power reach?

Deterring 'expert shopping'

The courts have, for many years, acted to discourage the practice of expert shopping, ie changing one expert for another who is more supportive of the party's case.

There are many good reasons why a party might seek permission for a change of expert, however, whenever there is such an application, there must always be the suspicion that this is being done because the substitute expert's evidence will be more favourable to the party. For this reason, when allowing an application for a change of experts, the court will usually waive privilege in any earlier expert report and order its disclosure as a condition of allowing a substitution.

The leading case has been *Beck v Ministry of Defence* [2003] EWCA Civ 1043; [2005] 1 WLR 2206, in which the parties had each obtained permission to adduce expert psychiatric evidence. The experts were not named in the order. The defendant obtained an expert psychiatrist's report, but then lost all confidence in the expert and sought permission to change experts. The Court of Appeal considered whether and, if so, on what terms a replacement expert could be instructed.

It was held that, once it had been decided in principle to allow a new expert, there was no reason for continuing to withhold disclosure of the original expert's report and every reason why disclosure should be made. No room would then be left for the claimant to wonder whether the application to change experts was in reality made because the report was favourable to the defendant. The court found it difficult to imagine circumstances in which it would be permissible to instruct a new expert without being required to disclose the earlier expert's report, although it did not rule out the possibility.

Accordingly, it was held that the defendant could instruct a new psychiatrist on condition that the earlier report was disclosed. The fact that the experts had not been named in the order, so that, strictly, no permission to change experts was needed, was not argued.

Position of experts pre-action

Since the case of *Beck*, there have been many cases that have gradually extended and modified the rule on disclosure. These have tended to centre on the questions of whether experts unnamed in a directions order, or instructed to advise pre-action, are experts within the ambit of the provisions. The distinction being drawn here is between 'expert witness' (ie an expert appointed under, for example, Civil Procedure Rule (CPR) 35) and 'expert advisor' (ie an expert appointed outside CPR solely to advise the instructing side).

For example, in *Carlson v Townsend* [2001] EWCA Civ 511, the CPR Pre-Action Protocol for Personal Injury Claims applied. When one party changed expert, the other party demanded sight of the first report. The court said that the aim of the protocol was not intended 'to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim, which he would be at liberty to discard undisclosed if he did not agree with it.' So the court could not override the claimant's privilege in the first expert's report.

In another personal injury pre-action protocol claim, *Edwards-Tubb v J D Wetherspoon plc* [2011] EWCA Civ 136, the claimant initially instructed one of the experts approved by the defendant and a report was produced. When the claimant commenced proceedings, however, a different expert's report was attached, and that report revealed the claimant had previously seen yet another expert, an orthopaedic surgeon. The defendant sought disclosure of the earlier expert's report.

Although these cases appear similar, the Court of Appeal distinguished between them because, in *Carlson*, the parties had not reached the stage where permission to adduce expert evidence was needed. Hughes LJ said in his judgment that 'the power to impose a condition of disclosure of an earlier expert report is available where the change of expert occurs pre-issue as it is when it occurs post-issue. It is of course a matter of discretion, but I would hold that it is a power which should usually be exercised where the change comes after the parties have embarked upon the protocol and thus engaged with each other in the process of the claim.'

With regard to expert advice obtained before even the pre-action protocols apply, Hughes LJ took the view that 'where a party has elected to take advice pre-protocol, at his own expense, I do not think the same justification exists for hedging his privilege, at least in the absence of some unusual factor'. In support of this view, he quoted the words of Brooke LJ in *Carlson*, who said that pre-protocol, a party is free to take such advice on the viability of his claim as he wishes. An expert consulted at that time and not instructed to write a report for the court is outside CPR 35.2.

The intention of the courts here seems clear. There is obviously an advantage in allowing parties to explore the merits of their potential claims by seeking independent advice at a pre-action stage. Indeed, at that point, proceedings may not even be seriously contemplated. They should expect that such communications would be privileged in the usual way. However, once the parties have engaged in proceedings the position becomes somewhat different. The court must then exercise its discretion as to what should be made disclosable, and whether the documents sought to be disclosed are pre-action or post-action. How this discretion should be exercised then becomes a matter for the court in the circumstances of the individual case.

Hotel fire sheds light on court's power

In July 2021, the court gave its ruling in *Rogerson*. This builds significantly on the previous decisions by the court and establishes some new authority on the exercise of the court's discretion in cases where witness shopping is suspected.

The case involved a fire at a hotel. The claimant alleged that the fire had been caused by the defendant building contractor's employees, who were working at the hotel.

At an early stage, each party instructed forensic fire investigators who attended the site in the immediate aftermath of the fire. Over the following months, the investigators had communicated with each other by e-mail. Some 18 months after the fire, the claimant issued a letter of claim pursuant to the Pre-Action Protocol for Construction and Engineering Disputes and enclosed reports from its experts. The defendant issued a letter of response. Contrary to Protocol requirements, though, the defendant did not identify its expert witness. At a case management conference, the defendant applied under CPR 35.4 to rely on the evidence of a different expert witness.

The claimant raised no objection to the change but contended that this was a case that raised a clear inference of expert shopping. Notwithstanding that the first expert had not written a report, the claimant requested that the court should order the disclosure of communications between the defendant and the expert, including an attendance note of a telephone call between the expert and the defendant's solicitor.

The defendant objected to disclosure and argued that the first expert had been instructed pre-action to act merely as a preliminary advisor; no report had been written, and it was never intended that he should become the part 35 expert. The defendant further argued that, unlike the first expert, the second expert had specialist expertise in cigarette-induced fires and that it should not be irredeemably held to its first choice of expert.

The court, following the decision in *Edwards-Tubb*, were content that the court's jurisdiction to order disclosure could attach to privileged pre-issue reports, post-issue reports and other expressions of opinion. It accepted, however, that experts consulted at an early stage, eg to advise privately on the viability of a claim and who were not instructed to write a report for the court, were in a different position.

However, the status of the first expert in this case was ambiguous. Indeed, the court took the view that the defendant had not been clear and candid about the nature of the expert's involvement. The court had to distinguish between an expert instructed for an initial inspection and report on the one hand, and an expert instructed for the purposes of prospective litigation on the other, and must do this on a case-by-case basis. If the defendant was contending that the expert had been instructed on the former basis and not the latter, then it behoved it to disclose the retainer to show that this had been so.

Advisory experts should stay schtum

The court accepted that the expert had been instructed at a very early stage (immediately after the fire) and that it would not be appropriate to assume that an expert, at that stage, had been instructed as a part 35 expert. However, there had been a process of co-operation and engagement by the parties in the process of the claim. Even at the time of instruction, there was already the clear understanding that litigation was in prospect. Moreover, in cases such as this, where the likely issues were known, it was common for a party to rely at trial upon the expert who had inspected at an early stage. The court must decide for itself the point at which a process of engagement for the purposes of litigation had occurred.

Turning to the lack of a written report, the court considered that this was not fatal to an application for disclosure. The court accepted that an expert's views could be confined to oral conversations or privileged notes of attendances. In those circumstances, notes and preliminary conversations also become relevant.

Allowing the claimant's application, Alexander Nissen QC said that there was a sliding scale with flagrant expert shopping at one end and an unexpected need to replace the expert for objectively justifiable reasons at the other. The closer the circumstances are to the former, the more likely the imposition of conditions commanding a high price, eg the waiver of privilege and the scale of material to be disclosed.

He said that the court will require strong evidence of expert shopping before imposing a term that a party discloses documents other than an expert's report (eg attendance notes and memoranda made by a party's solicitor). Had there been only a faint appearance of expert shopping, this would not have justified disclosure of the solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they would not properly record the expert's actual words. In this case, the inference of expert shopping was sufficiently strong to order disclosure of the note.

Conclusion

The case highlights just how early in potential proceedings the parties can be considered to be sufficiently engaged to bring any expert instructed within the ambit of the jurisdiction of CPR 35 once proceedings are commenced. It further provides a stark warning about the vulnerability to disclosure orders of communications between solicitors and experts if there is any later application to change experts. NLJ

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