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Insights

TRY BEFORE YOU BUY: THE PRICE OF EXPERT SHOPPING

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When it comes to replenishing my wardrobe, I have little patience for the careful selection of clothes for style and fit (this should come as no surprise). Instead, I am one of those who buys a job-lot of clothes once or twice a year to see me through the next couple of seasons. When I may not have been sufficiently realistic about size, I rely on the ability to change my mind and send things back or exchange for something more appropriate.

However, do the same with experts at your peril!

The case of *Matthew Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd* provides a very useful reminder of the court's approach to expert shopping. As well as a recap on that approach, it invites reflection on how we go about *selecting*, *instructing* and *managing* experts when proceedings are anticipated.

What is expert shopping?

The term is used to describe a situation where a party to proceedings chooses to *replace an expert witness* with somebody else to provide an opinion on the same matters and areas of expertise: the presumption being that the opinion of the first expert did not support the instructing party's case.

The courts discourage the practice. That is because experts (owing independent duties to the court or tribunal) are expected to provide the same professional, objective and unbiased opinion irrespective of which party instructs them. So, if that opinion does not support the case of the party instructing it, that ought to inform that party's expectations and approach to the litigation, rather than causing it to try and find somebody else who may (or may not) give a more sympathetic view.

The courts discourage the practice not by banning expert shopping outright, but by exercising a discretion to impose conditions should the party proceed to swap expert: namely by ordering *disclosure of the report(s) of the first expert* that is being replaced. In more extreme cases (and where, as in this case, there is no report), this can extend to an order to *waive privilege* in communications between the expert and their instructing solicitors.

The rule normally applies only when experts are instructed in the context of live or prospective litigation (for example, in the *pre-action protocol stage*), and not where a party privately engages an

expert to provide an early assessment of the merits of its position to guide its strategy. However (as was the case here), that is not necessarily always the case.

Rogerson case – what happened?

This case concerns a fire that occurred at the Cottesmore Hotel, Golf and Country Club in June 2018 when the defendant (Eco Top) was carrying out window installation works. The seat of the fire was in a ground floor tunnel used for the storage of laundry bags, which sat below where Eco Top was working.

The claimant (Rogerson) claimed that the fire was most probably caused by one of Eco Top's workers discarding a cigarette into the ground floor tunnel. Eco Top denied this and, shortly after the fire took place, retained "Dr N" as its expert to investigate the cause of the fire.

Dr N participated in joint site investigations and joint interviews with witnesses with experts retained by Rogerson and continued to engage directly with those experts in respect of queries arising in the investigation. Dr N did not produce a report of his findings but he conveyed his opinion on causation of the fire to his instructing solicitors in October 2018 and an attendance note was taken of that conversation.

However, when (16 months later) the matter moved on to the exchange of positions under the pre-action protocol for construction and engineering disputes, and then to proceedings in the TCC in August 2020, Eco Top no longer relied on or named Dr N as its expert. Instead, prior to the *costs and case management conference*, Eco Top communicated its intention to appoint another expert in Dr N's place. Rogerson applied to the court to require Eco Top to give disclosure of certain documents concerning Dr N's expert work as the price for his replacement.

The court granted Rogerson's application and ordered disclosure of the attendance note recording Dr N's opinion on causation of the fire as a condition to the replacement of experts.

In working through the relevant cases on expert shopping, the court considered the timing, nature and extent of Dr N's instruction and involvement in the matter and the likely motivation for Eco Top to replace him as its expert in the proceedings.

Although Dr N's engagement preceded significantly the commencement of the pre-action protocol process, the court found that the nature of his engagement and degree of his collaboration with Rogerson's experts (including the interviewing of witnesses) went well beyond that of an expert employed to provide a private assessment of the case. Instead, this pointed to the engagement of an expert expected to be retained to give evidence (and owing duties) to the court in proceedings that were already contemplated at the time. Therefore, the court found that it had jurisdiction to impose conditions on Dr N's replacement consistent with the policy to discourage expert shopping.

In the absence of a clear account from Eco Top's solicitors as to Dr N's instructions or of a witness statement from Dr N to the contrary, the court drew a clear inference that Eco Top replaced Dr N because he reached an opinion on the cause of the fire that was adverse to Eco Top's case. This led the court to conclude that this clearly was a case of expert shopping, which justified the imposition of conditions regarding the disclosure of Dr N's opinions – to the extent that Eco Top would have to waive privilege in the attendance note of Dr N's meeting with Eco Top's solicitors in which those opinions were conveyed.

A guide to shopping

It is safe to say I can give no reliable advice on replenishing your wardrobe. As for experts…

This case reminds us first and foremost that the court encourages parties to take heed of the independent expert opinion of those they engage in litigation and to adapt their approach to the litigation based on that opinion, rather than try to side-step it by seeking a second opinion. To do so will, ultimately, most probably increase that party's exposure to a costs award against it.

However, it should also cause us to reflect on how we can, in the first place, put our clients in a position where:

- The opinion reached by the expert is not a surprise that requires a fundamental change in tack.
- The client has a sufficient degree of confidence in the expert and their opinion so as to re-evaluate the merits of its position in the litigation, if so required.

It is not always the case that parties seek to change their expert because they reach an unwelcome conclusion in response to their instructions. It is sometimes the case that experts are unable to continue to act because they become incapacitated through illness or, worse, they pass away before giving evidence. The courts understandably adopt a much more lenient approach to the replacement of experts in those cases.

However, it is also (too) often the case that the relationship between the expert and those instructing them simply doesn't work irrespective of the opinion that they might ultimately reach:

- It may be that the client or instructing solicitors cannot provide to the expert sufficient factual evidence to allow the expert to do their job properly.
- Sometimes, there is ambiguity or error over the questions that the expert is required (or qualified) to respond to.
- It is also possible that, while genuinely an expert in their field, the expert is unable to present their analysis and that opinion in a sufficiently coherent manner to the court.
- The expert lacks the capacity or resources to meet the timetable for the proceedings.

These are all things that we can guard against in selecting and retaining experts and this case has reminded me of some key points that should be borne in mind when setting out to the shops (for the first time):

- What are the issues in the case in respect of which expert evidence is truly required? What expert discipline responds properly to those issues and what are the questions that we need to put to the expert to give an opinion on?
- Consider how best to canvass an appropriate expert. There are obvious sources of candidates in the common expert disciplines in construction disputes such as delay and quantum. For those more niche technical disciplines, care must be taken to identify the right field of expertise and candidates within it. Very often, our own clients, or relevant consultants on the project, will have an informed view as to what is required. In addition, there is no replacement for good old-fashioned research and tapping into our networks to identify who fits the bill.
- When candidates have been identified, it is often useful to go through an interview and selection process that gives the client confidence in and some control over the selection of the expert. In doing so, we routinely check:
  - that the candidate has the right professional qualifications and experience to give expert evidence in the relevant field;
  - that the candidate (and the organisation of which they may form part) does not have any conflict of interest to act independently in the matter;
  - that the candidate possesses the availability, capacity and resources to conduct the analysis and produce and present the evidence in accordance with the anticipated timetable for the proceedings. This can sometimes call for very frank questions over who will in fact be carrying out that work; and
  - in more technical disputes, it is often necessary to weigh up the benefit of the candidates' genuine professional expertise in the relevant field with their experience and familiarity of giving evidence in legal proceedings. Where the expert is not experienced in giving evidence, greater support may be required from the instructing solicitors to guide the expert through the process.

Once the expert is selected, there is then the need to ensure that they are provided with all relevant documents and other evidence to respond fully and properly to their instructions. Project management is vital in the flow of information, liaison with the client and witnesses and production of draft analysis to allow the expert to reach an early and robust opinion in response to their instructions.

All of this will pay dividends in allowing the client and its legal team to evaluate the merits of the client's position such that it should not be necessary or desirable to go back to the shop for an exchange.

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