WHEN MAY COMMUNICATIONS WITH EXPERTS AND DRAFT REPORTS BE DISCLOSABLE?

THE PERILS OF “EXPERT SHOPPING”

General rule on expert evidence: CPR rule 35.4

"(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."

[My emphasis here and on later slides]

Power to impose conditions: CPR rule 3.1(3)

"(3) When the court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequence of failure to comply with the order or a condition."

The exception to privilege: CPR 35.10(4)

(1) An expert's report must comply with the requirements set out in Practice Direction 35.

(2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.

(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.

Case Study 1:
Vasiliou v. Hajigeorgiou [2005] 1 WLR 2195

- Case concerned breach of covenant under a lease.
- Directions order gave permission for “one expert each in the specialism of restaurant valuation and profitability”.
- Expert 1 inspected Claimant’s premises and prepared a draft report, which was never served.
- Expert 2 was subsequently instructed without explanation or disclosure of draft report 1 to the Claimant.
- Court of Appeal held that Defendant did not require permission to serve a report from Expert 2, because the order did not name Expert 1. There was nothing new for which permission was needed.

Broader Principles canvassed in *Vasiliou:* What if the order had named Expert 1, so that permission for Expert 2 was required?

- Considered *Beck v. Ministry of Defence*, a psychiatric injury case in which the defendants applied for permission to change expert after expert 1 had examined the claimant. The C.A. held that permission should be conditional upon disclosure of the 1st expert's report.
- Held in *Vassiliou*:
  - Para 27: "The question of principle that was decided in *Beck's* case was that the court has the power to give permission to a party to rely on a second (replacement) expert which it should usually exercise only on condition that the report of the first expert is disclosed. This decision is binding on us. We cannot accept that the decision is wrong or that it is conceivable that the court was unaware of the fact that reports prepared for the purposes of litigation are, until they are disclosed, protected by privilege."

- Para 29: “The principle established in *Beck* … is important. It is an example of the way in which the court will control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it. It needs to be emphasised that, if a party needs the permission of the court to rely on expert witness B in place of expert witness A, the court has the power to give permission on condition that A's report is disclosed to the other party or parties, and that such a condition will usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so.”

Case Study 2: Allen Tod Architecture Ltd v. Capita Property Infrastructure Ltd [2016] EWHC 2171

- Claim for professional negligence against a structural engineer.
- Claimant instructed Expert A after service of the Defence.
- Expert A expressed summary views to Claimant before a CMC in July 2015.
- Directions order:
  - Gave permission for expert evidence by discipline, not named expert.
  - Directed that parties were to apply for permission to call experts to give oral evidence prior to filing pre-trial checklists
- Conference with Expert A, supplemental instructions to him and a draft report in February 2016.
- Further communications in April 2016, prior to a mediation.
- Claimant then formed the view that Expert A was unsuitable and wished to change expert.

The disclosure application in *Allen Tod*

- The Defendant applied for specific disclosure of all letters of instruction to Expert A, the letter of instruction to Expert B, and all reports, documents and correspondence that set out the substance of Expert A's views.
- Claimant disclosed the February 2016 draft report and both letters of instruction to Expert A.
- The Defendant maintained an application in relation to the early communications with Expert A, the "summary" of views and any other communications setting out the substance of Expert A's opinions.

The ruling in *Allen Tod*

- Application granted in relation to all 3 categories (the 3rd to the extent it existed in documentary form).
- Principles derived from *Beck*, *Edwards-Tubb* and *BMG (Mansfield Ltd)* applied – see Appendix.
- Privilege was no answer to the Court's ability to impose conditions. It did not raise different issues in relation to ancillary documents as opposed to draft reports.
- Disclosing experts' February 2016 report and instructions letters was not enough. His earlier notes and preliminary report were also documents in which he expressed his opinion on the issues of the case.
- There had been no "expert shopping" in a pejorative sense but it was still appropriate to order this disclosure.

Other cases referred to in *Allen Tod*

- ***Edwards-Tubb v. JD Wetherspoon*** [2011] 1 WLR 1373: personal injury claim. Claimant served a report with the Particulars of Claim from an expert not nominated in pre-action correspondence. Held: Claimant could rely on Expert 2 but conditionally upon producing the examination report of Expert 1.

- ***BMG v. Galliford Try*** [2013] EWHC 3183: construction negligence case. Claimant had instructed Expert 1 pre-action. A lot of time passed. It wished to swap to Expert 2. Held:
  - The Claimant's application pre-empted the requirement to apply for permission in relation to expert evidence at the CMC. Conditions could be imposed.
  - Conditions could extend to documents setting out the substance of the experts' opinion, not just reports.
  - Disclosure of documents such as solicitors' attendance notes is problematic and should be confined to a very strong case of expert shopping.

Qn: “If you want to change experts, will the solicitors’ attendance notes be disclosable?”

- This is an area of discretion, so no hard and fast rules apply.
- If you require permission to do something (call an expert, make an inspection, conduct an examination), the court has a discretion to impose such conditions as it sees fit
- The conditions may extend to solicitors’ notes but there are strong arguments against this absent clear evidence of “expert shopping”: *BMG v. Galliford,* a C.A. authority which “trumps” *Allen Tod*.
- This raises the question “what is expert shopping”? The paradigm case is an unexplained change of expert from someone who appears to have the right qualifications to another (e.g. in *Edwards-Tubb*).

What do you do with a “duff expert”? (1) Try to avoid having one

- Clear and complete instructions are always essential.
- It is wise to involve an expert at an early stage – plead a case without expert input at your peril.
- Try to sound out your expert before formal instruction and leave formal instruction to as late a stage as possible.
- If in any doubt by the CMC stage, do not identify your potential expert by name.
- Bear in mind that working with an expert who has not been involved with litigation before can be more difficult (though also very successful): start earlier and be clear about expectations.

(2) Change expert if necessary, but be prepared to disclose at least the draft report of a "duff expert" as the price of change

- Expert evidence is often crucial. It is sometimes necessary to change expert, even if this comes with a price.
- Bear in mind that *Allen Tod* only applies where some form of permission is needed.
- *Allen Tod* is exceptional in requiring disclosure of more than "the report" of the first expert. There are likely to be strong arguments against any further disclosure.
- Consider the pros and cons of changing. A good replacement expert should be able to deal with and dismiss any problems arising from a first report if it really is "duff".

Where next for the rules / law?

- *Allen Tod* did not go to the Court of Appeal. There is scope for arguing that the orders made in that case went much too far.
  - Why should anything other than a final report be relevant?
  - Parties need to be able to have frank discussions with their experts.
- More generally, this line of cases distinguishes the position where a party changes expert after obtaining general permission at a CMC (*Vasiliou*, 1st point: no permission required, no scope for conditions) and cases where a party changes expert before the CMC, and needs permission for expert evidence for the first time *(Beck*, *Edwards-Tubb*). Why? There is scope for a general rule about expert reports other than that relied on.

Conclusions

- This is a developing body of case law. *Allen Tod* goes further than past cases and supports difficult distinctions. Look out for further developments and possible rule changes.
- In the meantime, there are traps for the unwary. Be aware of the potential risks of changing expert. The Court may require disclosure of all documents that contain the substance of an expert's views as the price of permission to change expert.

Appendix
Judge David Grant's Principles: *Allen Tod* paragraph 32

"From those authorities I derive the following principles:

(1) 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: that is consistent with both the general way in which CPR rule 35.4 (1) is expressed, and the wide and general nature of the court's case management powers, in particular those set out in CPR rules 3.1 (2) (m) and 3.1 (3) (a).

(2) In exercising that power or discretion, the court may give permission for a party to rely on a second replacement expert, but such power or discretion is usually exercised on condition that the report of the first expert is disclosed: see Dyson LJ at paragraphs 27 and 29 of his judgment in *Vasiliou*.

(3) Once the parties have engaged in a relevant pre-action protocol process, and an expert has prepared a report in the context of such process, that expert then owes a duty to the Court irrespective of his instruction by one of the parties, and accordingly there is no justification for not disclosing such a report: see Hughes LJ at paragraph 30 of his judgment in *Edwards-Tubb*.

(4) While the court discourages the practice of ‘expert shopping’, the court's power to exercise its discretion whether to impose terms when giving permission to a party to adduce expert opinion evidence arises irrespective of the occurrence of any ‘expert shopping’. It is a power to be exercised reasonably on a case-by-case basis, in each case having regard to all the circumstances of that particular case. See the approach of Hughes LJ in *Edwards-Tubb*, in particular at paragraph 30 of his judgment when referring to the range of circumstances which might lead to a change of expert, and Edwards-Stuart J in *BMG*; both those judges found that the fact that an expert had produced a report in the course or context of a relevant pre-action protocol process was a critical or decisive factor, rather than there having been any instance of ‘expert shopping’.

(5) The court will require strong evidence of ‘expert shopping’ before imposing a term that a party discloses other forms of document than the report of expert A (such as attendance notes and memoranda made by a party's solicitor of his or her discussions with expert A) as a condition of giving permission to rely on expert B: see paragraphs 29-32 of the judgment of Edwards-Stuart J in BMG.”