Case No: HT-2020-000294

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 1807 (TCC)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 2 July 2021

Before :

MR ALEXANDER NISSEN QC
sitting as a Judge of the High Court

- -

Between :

MATTHEW ROGERSON (t/a COTTESMORE HOTEL, GOLF AND COUNTRY CLUB)	**Claimant**
- and -	
ECO TOP HEAT & POWER LIMITED	**Defendant**

- -
- -

MR NEIL MOODY QC (instructed by **KENNEDYS**) for the **Claimant**
MR GRAHAM EKLUND QC (instructed by **KEOGHS**) for the **Defendant**

Hearing dates: 15 June 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 1st July 2021 at 10:30am"**

MR ALEXANDER NISSEN QC

.....

MR ALEXANDER NISSEN QC:

Introduction

1. The application before the Court concerns the jurisdiction which permits the Court to allow a party to change its expert witness upon terms which can include disclosure of materials, including any reports prepared by a prior expert, as the price for such change. It raises the interesting question of how far back in time this jurisdiction can reach. At the end of the oral hearing I gave my decision on the application, to enable the Costs and Case Management Conference to proceed in light of it, but reserved the reasons for my decision. These are my reasons.

2. The action arises from a disastrous fire at Cottesmore Hotel, Golf and Country Club on 11 June 2018. The Claimant is the owner of the hotel. At the time of the fire, the Defendant, a small firm of building contractors, was undertaking window installation works at the hotel premises. On the day of the fire, the Defendant's employees were working in a first-floor room known as the barn store. The seat of the fire was in a ground floor tunnel below where the Defendant's employees were working. The tunnel is where laundry bags left for collection had been stored. The Claimant's case is that the fire was most probably caused by a cigarette discarded by one of the Defendant's employees. Alternatively, the Claimant says that the fire was caused by a spark emitted from an angle grinder used by the Defendant's employees. The claim is advanced in negligence and breach of contract. Damages are claimed in a substantial sum, namely £7,642,450, comprising material damage and business interruption losses.

3. The Defendant denies negligence and breach of contract. The Defendant does not advance a positive case as to the mechanism which caused the fire but denies that it was caused by a cigarette discarded by one of its employees or by its use of an angle grinder. Its case is that none of the employees on site at the relevant time were smokers and it does not admit that a cigarette which fell through a gap in the floor would have ignited laundry left in the tunnel below. If the fire was caused by a cigarette, it suggests that it may have been one discarded by the Claimant's own staff. It denies using the angle grinder on the day of the fire.

4. As I shall explain in greater detail below, a Claim Form was issued on 11 August 2020. Pleadings have now closed. In the lead up to the CCMC, the solicitors for the parties exchanged correspondence about proposed directions. On 12 March 2021, the Defendant's solicitors, Keoghs, sent draft directions to the Claimant's solicitors, Kennedys, which included one that it should have permission to call Ms Emma Wilson of Prometheus Forensics Ltd concerning the cause of the fire. On 19 March 2021, the Claimant's solicitors, Kennedys, contended that the decision to call Ms Emma Wilson involved a substitution for a prior expert, namely Dr Anil Nagalingam of Burgoynes.

5. On 17 May 2021, the Claimant's solicitors issued the application presently before the Court. The application was originally listed as a self-standing one but it was subsequently re-fixed to be heard at the same time as the CCMC. The Claimant does not oppose the direction sought by the Defendant to rely on the evidence of Ms Wilson but applies for a condition to be imposed upon that direction which involves the disclosure of certain documents and categories of documents as the price for doing so. In essence, the Claimant's case is that this is a clear case of expert-shopping.

6. The application was heard in person on 15 June 2021. Mr Neil Moody QC appeared for the Claimant and Mr Graham Eklund QC for the Defendant.

Factual Chronology

7. As I have said, the fire occurred on 11 June 2018.

8. On 13 June 2018, Keoghs wrote to Mr Porter, the General Manager of the Claimant stating as follows:

> *"Will you please note our interest in this matter as the Solicitors now instructed on behalf of Eco Top Heat & Power UK Ltd. Our instructions are received via liability insurers potentially interested in this matter…*
>
> *We are instructed and we are writing to you because there have been early reports of your Mr Johnny Porter having made suggestions that the cause of this fire may have been the careless discarding of a cigarette end by an employee of Eco Top Heat & Power UK Ltd.*
>
> *That suggestion is firmly denied and further it is equally firmly denied that anything on the part of Eco Top Heat & Power UK Ltd was in anyway related to the start or spread of this fire.*
>
> *Nonetheless in the circumstances where your Mr Johnny Porter is understood to have made some assertion against our client we are instructed now to take all steps necessary to fully protect the position of Eco Top Heat & Power UK Ltd and robustly to defend any assertion of liability on its part. We shall be seeking our costs of doing so in due course from Cottesmore Golf & Country Club.*
>
> *We are immediately taking steps to arrange for the involvement of an expert forensic fire investigator on behalf of Eco Top Heat & Power UK Ltd and we shall imminently request from you facilities for that duly appointed expert to make a full forensic examination and inspection of the fire scene.*
>
> *…*
>
> *We anticipate that legal representatives may by now have been appointed to act on behalf of the Cottesmore Golf & Country Club and we would be pleased to further this correspondence with those representatives as soon as they are identified to us."*

9. On 21 June 2018, Gateley solicitors, acting for the Claimant, sent an email to Keoghs which said:

> *"You indicated in your letter of 13 June that you were instructing an expert forensic fire investigator on behalf of your client. Please "reply to all" giving the contact details of your client's fire investigator…"*

10. Later that day, Mr Houseago of Keoghs replied:

> *"Dear All,*
> *My instructed expert for the fire investigation is:*
> *Dr A C Nagalingam*
> *Associate*
> *Dr JH Burgoyne & Partners LLP…*
>
> *Please ensure that Dr Nagalingam is made party to any examination of the physical evidence remaining at the site."*

11. The terms upon which Dr Nagalingam was retained have not been shared by the Defendant. According to Mr Houseago of Keoghs, Dr Nagalingam was originally instructed by UK Power Network ("UKPN"). I assume UKPN would have had an interest in investigating the fire in case it was suggested that an electrical fault was the cause.

12. Dr Nagalingam first attended site on 4 July 2018 and attended again on 16 July 2018. On both occasions he took site investigation notes which the Defendant has now voluntarily disclosed. The notes of 4 July include a sketch plan and records of various discussions with a number of witnesses including Mr Porter, the Claimant's General Manager and Matt Smith, the Health Club Manager. Dr Nagalingam also took photographs. His further notes from 16 July include more sketches and notes of conversations. The meeting on 4 July took place jointly with two experts appointed, respectively, by the Claimant and its insurer, namely Mr Christie and Dr Vallance. The witnesses were interviewed together by the three of them. Mr Evans of Kennedys says in his witness statement that, after the interviews had been concluded, Mr Porter asked the three experts their opinion on causation. Mr Christie and Dr Vallance both said "cigarette" and Dr Nagalingam added: "It's hard to see it's anything else". Mr Houseago of Keoghs supposes that, if he did say that, it was probably because at the second joint meeting Dr Nagalingam, Mr Christie and Dr Vallance had been informed of evidence relating to contractors in hi-vis jackets near the tunnel who were smoking. CCTV apparently does not show the Defendant's workforce in hi-vis jackets.

13. No loss adjuster was ever appointed by the Defendant. Insurers did not attend the site.

14. On 2 October 2018, Dr Nagalingam had a meeting with the Defendant's solicitors. It is common ground that the attendance note of the meeting prepared by Keoghs is privileged. It is also common ground that, during the meeting, Dr Nagalingam set out or referred to his views on causation. (See paragraph 7 of Mr Houseago's witness statement.)

15. Dr Nagalingam was still instructed on 11 October 2018, when he wrote to both of the Claimant's experts by email to say that he had finally received witness statements from Eco Top Contractors. He said:

> *"At this stage I have been instructed not to disclose the statements as they are still a work in progress but from the sounds of it my principal has no objection to them being shared once they have finalised".*

16. He identified some matters raised by the Defendant's witnesses and asked the experts for permission to approach Mr Porter again to address these points with him. In his witness statement, Mr Houseago says he does not know who Dr Nagalingam was referring to as "his principal" and says that he is not aware what witness statements were being referred to. I am unpersuaded by this evidence. In my judgment, it is obvious that Dr Nagalingam was referring to Keoghs as his principal. Keoghs agree that they prepared statements of the Defendant's witnesses.

17. On 18 October 2018, Dr Nagalingam had another email query for Dr Vallance, asking him to confirm whether the Defendant's workforce were wearing hi-vis vests.

18. On 4 February 2020 Kennedys issued its Letter of Claim pursuant to the Pre-Action Protocol for Construction and Engineering Disputes. The letter enclosed expert reports from various experts including ones from Mr Christie and Dr Vallance. Keoghs issued a Letter of Response on behalf of the Defendant on 13 March 2020. Although paragraph 8.5.3 of the Protocol provides that the Letter of Response should identify "the names of any experts already instructed on whose evidence it is intended to rely", no expert was identified. An issue arose between the parties as to the need for a pre-action protocol meeting but it is unnecessary for me to express any view about that. Proceedings were issued on 11 August 2020. Pleadings were exchanged until February 2021.

19. In advance of the CCMC, proposed directions were exchanged. As I have noted, it was these exchanges which revealed the Defendant's intention to call Ms Emma Wilson rather than Dr Nagalingam.

20. Probing questions were asked by Kennedys seeking an explanation for the decision to rely upon Ms Wilson, rather than Dr Nagalingam. The answers given did not satisfy Kennedys, whereupon the application was issued. Amongst the points made, Keoghs said that:

    - *Dr Nagalingam of Burgoynes was first instructed to investigate the cause of the fire not by our client or their insurer but by UK Power Networks.*
    - *Our client and their insurer later agreed to share fees in respect of Dr Nagalingam's (sic) in order to arrive at some basic understanding of this matter.*
    - *It is certainly not correct to assume Dr Nagalingam ever produced for the Defendant a report, letter or otherwise, which sought to address the cause of the fire….*
    - *To be clear, our client is not 'changing' expert. A decision to instruct Ms Wilson as expert is not because our client prefers one expert's views to that of another. Dr Nagalingam has never given an expert opinion on causation, favourable or unfavourable.*

21. The last point was plainly not correct. As I have earlier noted, it is now agreed that he did express views on causation in a meeting at his offices attended by Keoghs on 2 October 2018. The only record of this is contained in a privileged solicitor's attendance note.

The Law

22. There have been a number of cases in which this jurisdiction has developed. I will obviously focus particularly on those passages relevant to the issues in this application.

23. The first case is Beck v Ministry of Defence [2005] 1 WLR 2206, CA. Suffice it to say that the Court of Appeal emphasised that expert shopping was to be discouraged because it was undesirable. To prevent the practice occurring, it concluded that any permission to instruct a new expert should be on terms that the report of the previous expert be disclosed.

24. The second case is Vasiliou v Hajigeorgiou [2005] 1 WLR 2195, CA. Once again, it was said by the Court of Appeal that expert shopping was undesirable. Dyson LJ said at [29] and [30]:

> "[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 A in place of expert witness B, 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.
>
> [30] A question that was not considered in Beck is whether the condition of disclosure should relate only to the first expert's final report, or whether it should also relate to his or her earlier draft reports. In our view, it should not only apply to the first expert's "final" report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion."

25. The third case is Edwards Tubb v JD Wetherspoon plc [2011] 1 WLR 1373, CA. Hughes LJ said this at [11]:

> "[11] The question of principle which this case raises is whether the power to impose a condition on the grant of permission to rely on expert B can properly be employed to require the disclosure of the privileged report of expert A, and if so when. If this is proper, what is being done is not directly to override the privilege, because the claimant can elect to stand upon his right to it. Rather, it is presenting the claimant with a price which must be paid for the leave of the court to rely on expert B; that price is waiver of privilege in relation to expert A. It is necessary to recognise that whilst a claimant in a personal injuries action could in theory proceed without medical evidence, and may do so in a simple case of transient injury easily provable, in a case such as the present some medical evidence is a practical necessity. Accordingly the order sought will have the effect of curtailing the operation of privilege by making waiver the price of being able to continue in

reliance on expert B. The suggested basis and justification for doing this is the need to prevent expert-shopping and, where it has taken place, to put before the court of trial the whole of the available evidence on the question at issue, and not only part."

26. At [25] Hughes LJ identified the need to grapple with the question of whether there existed a difference in principle between privileged pre-issue of proceedings reports and privileged post-issue of proceedings reports. In passages variously relied on by both counsel in the application before me, he said at [27], [30] and [31]:

> "[27] I am quite unable to see any difference of principle between a change of expert instructed for the purpose of proceedings pre-issue and a change of expert only instructed, for the same purpose, post-issue.
>
> i) A party has exactly the same privilege in an expert report which he has obtained whenever he obtains it.
>
> ii) Conversely, the damaging features of expert shopping are exactly the same whether it is undertaken before or after issue.
>
> iii) If the suggested distinction were to be the touchstone for the imposition of a condition of disclosure, that would create a quite baseless difference between the case where the court has made an order in the form "Leave to the claimant to rely on Mr A and the defendant on Mr B" and where it has made an order in the form "Leave to each party to rely on one consultant orthopaedic surgeon". That would be because in the former case the party changing experts would need to ask the court to substitute one name for another and in the latter case he would not. It may be that it is better practice for the order to name the expert, or to give the parties leave to notify the name within a limited period, but it may sometimes be almost a matter of accident which of these orders is made, especially if one or other party has not yet identified his expert. If, however, the condition can properly be attached where appropriate not merely to a variation of an order, but to the original CPR 35.4 order, this problem does not arise.
>
> iv) In fact, since CPR 16PD.4 requires a claimant to attach his preferred medical report to his particulars of claim, even if he changes his expert subsequently the occasion for a condition of disclosure will not normally arise, since *ex hypothesi* report A will have been disclosed at service of the claim.
>
> v) The whole ethos of personal injuries litigation since the introduction of the Civil Procedure Rules and its associated protocols is to expect of litigators and parties an equivalent level of openness and communication before and after issue. There may sometimes be costs complications in this "front-loading" of litigation, but the overall concept undoubtedly remains valid. It is an important pillar of the modern system of such litigation that the issue of proceedings should be rendered unnecessary to many claims, and the protocols are designed to achieve this by laying down good practice for pre-issue conduct, including the obtaining of

> evidence. Once the pre-action protocol letter is written the parties are expected to engage constructively in, among other things, the selection and instruction of experts. The expectation is that this will be accomplished largely, if not often wholly, before issue of proceedings.
>
> …
>
> [30] Authority apart, it seems to me that the imposition of a condition of disclosure is as justified in pre-issue as in post-issue cases. I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him. An expert who has prepared a report for court is different from another witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported. Thus although the instruction of a medical expert is a matter almost of course in most personal injury cases, it is appropriate for the court to exercise the control afforded by CPR 35.4 in order to maximise the information available to the court and to discourage expert shopping. Whilst at the time of *Access to Justice* this development may not have been foreseen, the ethos of litigation which it established is promoted rather than prevented by the exercise of this power.
>
> [31] For these reasons I would hold 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. 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. As Brooke LJ observed in Carlson (cited at paragraph 15(iv) *supra*), a party is then 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 in a different position, and outside CPR 35.2."

27. The fourth case of BMG (Mansfield) Ltd v Galliford Try Construction Ltd [2013] EWHC 3183, TCC is of some interest, it being a fire damage case decided in this Court. It was a case in which the expert himself wanted to withdraw for reasons of retirement. In that case, Edwards-Stuart J said this at [29], [33], [37] and [38]:

> "[29] What I regard as more problematic is disclosure of documents such as solicitors' attendance notes of telephone calls with the expert which record (or purport to record) the substance of his opinions. There are at least two difficulties in the way of disclosure of such documents, which are of course privileged. The first is that they will probably not record the expert's actual words, but rather the substance of what the solicitor understood the expert to say. The two may not be the same. The second is that the notes may well contain material that is not expert opinion: in this case, for example, Mr. Streeter's views on the other parties' experts, the thinking of the Claimants about the future conduct of the litigation, what Mr. Streeter thinks of the Claimant's own experts, and so on.
> …
>
> [33] In my view this is not a strong case of "expert shopping", or anything near it. There is no evidence that indicates that Mr. Edwards was approached at any time before Mr. Streeter indicated that he wished to withdraw from the case. But the Defendants appear to be inviting the court to infer that this was probably the case.
>
> …
>
> [37] It seems to me that, at best from the Defendants' point of view, this might just be said to be a case where there is an appearance of "expert shopping". In my judgment any such appearance is faint. I consider that the Defendants have pitched their submissions too high.
>
> [38] In these circumstances this is not a case where I am prepared to order disclosure of all attendance notes by BLM in which Mr. Streeter's opinions on any matter in issue have been recorded. To make such an order would result in a significant invasion of the Claimants' privilege which is not justified in the light of the evidence about the circumstances and timing of Mr. Streeter's withdrawal from the case. It would add considerably to the costs of this already expensive litigation with no certainty that it would provide the Defendants with any material that might significantly assist their case. I appreciate that the policy of imposing a condition requiring disclosure of a previous expert's reports is to deter the practice of "expert shopping", but it seems to me that there has to have been "expert shopping" or at least a very strong appearance of it, before disclosure of the type sought on this application should be ordered. I therefore decline to make an order of the type that the Defendants seek."

28. Another first-instance case of this Court was Coyne v Morgan [2016] BLR 491, TCC a decision of HHJ Grant. It is perhaps most useful for its derivation of the principles from the earlier cases at [31] as follows:

> "[31] Analysis
>
> 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 rule 3.1 (2) (m).

(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 judgement 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 judgement 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 judgement 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 judgement of Edwards-Stuart J in *BMG*."

29. Also relevant are paragraphs [32] and [33] where the Judge said this:

"[32] That analysis enables me to deal with Mr Rumney's submission, developed in paragraphs 3 to 5 of his note, that the court will only impose a condition of disclosing the report of expert A when giving permission to adduce expert opinion evidence from expert B in circumstances where there has been 'expert shopping'. In my judgement, on their proper understanding, the authorities cited above do not show that the incidence of 'expert shopping' is a necessary or essential prerequisite which must be established before the court will exercise its general power or discretion whether to impose such a condition when giving a party permission to rely on a second replacement expert. I therefore reject Mr Rumney's submission that the claimant would have to show that the defendant was expert shopping, in the sense of either rejecting the opinion of Mr Wells because they considered it to be unfavourable, or because they had lost confidence in Mr Wells, before the court could properly exercise its discretion to impose such a condition.

> [33] There are two aspects of the facts, as they appear from the material presently before the court, which indicate that the court should impose a condition that the defendants disclose the draft report of Mr Wells dated 10 November 2015 as a condition of being permitted now to rely on the expert opinion evidence of Mr Mason. They are:
>
> (1) the very fact that Mr Wells has already produced a draft report in the context of proceedings which had been issued previously on 4 March 2015; and
>
> (2) the fact that Mr Wells had (a) discussed the expert issues in the case, and subsequently (b) attended a joint inspection with Mr Duckworth, who was his 'opposite number' i.e. the opposing expert of like discipline.
>
> In my judgement either of the above factors indicates that the court should impose such a condition when granting such permission; the conjunction of the above factors makes it all the more so."

30. The same Judge had occasion to deal with these matters only a few months later in Allen Tod Architecture Ltd v Capita Property and Infrastructure Ltd [2016] BLR 592, TCC. At [41] and [42] he said this:

> "[41] I accept Miss McCafferty's submissions in this regard. In my judgment the court's power is not confined to directing disclosure of expert A's final and/or signed and/or Part 35 compliant report as a condition of permitting the applying party to rely on new expert B, but extends to any earlier draft or provisional report, or indeed to any other relevant document, in which expert A has expressed his or her opinion on the issues in the case.
>
> [42] I bear in mind the point made by Coulson J in *Odedra v Richard Ball* [2012] EWHC 1790 that "... there could be no general rule that everything is discloseable, regardless of privilege": see paragraph 48 of Mr Patten QC's written submissions. As set out in principle (4) in *Coyne*: the power of the court is one to be exercised reasonably on a case-by-case basis, in each case having regard to all the circumstances of the particular case. In the circumstances of the present case, the evidence indicates that expert A's notes and preliminary report are documents in which he expressed his opinion on the issues in the case. Accordingly, that power is to be exercised reasonably by ordering disclosure of expert A's notes and preliminary report as a condition of permitting the claimant now to rely on expert B."

31. In the seventh case, Vilca v Xstrata Ltd [2017] BLR 460, QBD, the expert had to withdraw from the case at a very late stage due to ill health. Stuart-Smith J said this at [25], [27] and [32]:

> "[25] Without in any way derogating from the statements of the higher courts to which I have referred, it seems to me that they speak with one voice on the central issue of principle that affects the present application. The first question for the court of first instance when it is faced with an application such as the present is whether the circumstances give rise to any power to impose a condition. In answering this

first question, *Beck* and *Vasiliou* stand as useful examples of cases falling on either side of the line. In *Beck* the Defendant needed the Court's permission for a second examination. That gave the Court the power to exercise its discretionary case-management powers, which are always to be exercised in accordance with the overriding objective. On the other side of the line, in *Vasiliou* the previous order of the Court had not specified a particular expert and the Defendant could have complied with all existing orders on time even with its new expert. When the Defendant raised the issue with the Claimant, there was nothing to give rise to further powers to control the conduct of the parties. No question of imposing a condition therefore arose.

…

[27] I do not exclude the possibility that there might be cases where the two limbs of the rationale identified by the Court of Appeal might be absent and yet there might be some other reason, specific to the facts of that case, which require or justify the imposition of the condition of disclosure. But I do not accept that it is established either on principle or by authority that there is a rule of practice or procedure requiring that the condition be imposed if the two limbs of the rationale are absent and there is no other good reason to impose it. Furthermore, while the usual course where the two limbs of the rationale are present will be that the condition will be imposed, it is not inevitable. In my judgment the court should in all cases apply its mind to what course will best meet any concerns that may exist and best advance the overriding objective. This requires the court to consider in any given case what weight, if any, is to be given to those factors that might support the imposition of conditions as well as to those which tend in the opposite direction.

…

[32] … The principles are now well-established: anyone competent to conduct litigation knows that, if there is a hint of undesirable expert shopping or that significant relevant material is being withheld, the imposition of the condition will be the usual order."

32. Lastly, there is another decision of the Court of Appeal, namely Murray v Devenish [2017] EWCA Civ 1016, CA. The facts are somewhat removed from the present case but, relevantly, Gross LJ said this at [15] and [16]:

> "[15] We were referred to the authority of Edwards-Tubb v Wetherspoon [2011] EWCA Civ 136, [2011] 1 WLR 1373, especially at [29] and [30]. Two principles emerge from the judgement of Hughes LJ (as he then was) in those paragraphs: (1) ordinarily a party will not be deprived of his or her expert of choice and will not be forced to rely on an expert in whom that party has lost confidence; but (2) "expert shopping" is to be and will be discouraged. In applying those principles the court will plainly have regard to the state of the litigation at the time, the consequences of permitting a change of expert and the conduct of the party concerned in the litigation to date. At some point a party having nailed its colours to one expert mast may find that it is simply too late to be permitted to change tack.

> [16] There was some discussion in argument today as to the meaning of "expert shopping". It is clear that a party does not have an unqualified right to change an expert. Conversely, not every change of expert either will be disallowed (as is clear from Edwards-Tubb) nor is it to be characterised in pejorative terms. In deciding whether what has happened constitutes expert shopping and is to be discouraged or refused, the court will first have regard to the state of the litigation at the time; secondly, to the reason given for the proposed change; thirdly, to the interests of justice; and fourthly, to the candour with which the application is approached. I do not for a moment suggest that those are an exhaustive list of considerations but they are plainly some which are bound to arise when the change is proposed."

The rival contentions (in brief)

33. On behalf of the Claimant, Mr Moody submits that on the facts of this case there is a very strong inference to be drawn of expert shopping. The Defendant has failed to be transparent and straightforward in its explanations about Dr Nagalingam, including the original engagement through UKPN, and its reasons for now instructing Ms Wilson. There is an obvious lack of candour. Whilst the pre-action protocol had not commenced at the time of his instruction, Dr Nagalingam had inspected the site and collaborated with the Claimant's experts in two joint meetings during which they interviewed witnesses and discussed the evidence together. The judicial direction of travel is in favour of requiring disclosure of documents in a case where an expert is changed and this is an egregious example of expert shopping.

34. On behalf of the Defendant, Mr Eklund accepts that the Court has jurisdiction to grant an order of the type sought because an application for permission to rely upon expert evidence pursuant to CPR 35.4 is a procedural vehicle to which such conditions may attach. However, the Court should not exercise its discretion to do so in this case. This is not a case of expert shopping. There were justifiable reasons for engaging Ms Wilson, having regard to her particular experience in cigarette induced fires, when compared to that of Dr Nagalingam. Dr Nagalingam's CV and experience were not as impressive. A clear distinction should be made between an expert instructed in the immediate aftermath of an event, such as a fire, for the purposes of taking private pre-protocol advice and one instructed once litigation is in prospect and the potential issues are known about. It would be unfair to allow this jurisdiction to reach back this far in time. The pre-action protocol process had not even commenced and there is no equivalent procedure to that which arises in personal injury cases. Overall, the litigation is still at a very early stage; no order approving any expert evidence has yet been made and the interests of justice would not now be impacted by the calling of Ms.Wilson. Dr Nagalingam will be called as a witness of fact in respect of his inspections. He has not produced any written report to the Defendant and has only provided a view on causation in a privileged discussion with solicitors, recorded in an attendance note. Disclosure of a note of this kind should be approached with the caution expressed by Edward-Stuart J in BMG.

Analysis

35. The Court plainly has the power to impose a condition in respect of the changing of experts even if it means disclosing privileged documents. This is not achieved by directly overriding privilege but by presenting the party with a choice in which the price to be paid for the leave of the Court to rely on Expert B is waiver of privilege in relation to Expert A: Edwards-Tubb at [11].

36. However, the Court cannot make an order imposing a condition of the type sought in this application unless there is a procedural vehicle to which it can be attached: see the references to CPR 35.4 in Edwards-Tubb at [27] and [30]. As I have noted, it is common ground that the occasion on which a party seeks permission to call an expert pursuant to CPR 35.4 is such an occasion. In that sense, this Court has jurisdiction to make the order.

37. In essence, there are two related considerations that specifically arise in the present case:

    (a) Is the Defendant really changing experts at all? Was the nature and timing of Dr Nagalingam's early instruction such that the subsequent decision to rely upon Ms Wilson does not amount to a change in expert at all?

    (b) If the Defendant should be regarded as seeking to change experts, should the Court exercise its discretion to impose the condition sought?

38. In law, it is clear that this jurisdiction can attach to privileged pre-issue reports or other expressions of opinion as well as post-issue reports: see Edwards-Tubb at [27]. So, it would be no answer to say (and the Defendant does not do so) that Dr Nagalingam was merely instructed before proceedings were commenced. However, where a party has elected to take advice pre-protocol at his own expense, the same justification for hedging privilege does not arise, absent some unusual factor. An expert consulted at an early stage e.g., to advise privately on the viability of a claim, who is not instructed to write a report for the court, is in a different position: see Edwards-Tubb at [31].

39. In personal injury cases, there is a pre-action protocol procedure whereby the solicitors for the parties embark on a process of co-operation in the selection of experts. In such cases, that is the point in time which the Court of Appeal regards as critical because the parties have then engaged with each other in the process of the claim: see Edwards Tubb at [31]. However, that selection process has no direct application in cases such as this. In the present case the parties have employed the Pre-Action Protocol for Construction and Engineering Disputes which involves an exchange of letters followed by a meeting of the parties, which can but does not usually involve experts.

40. I therefore have to decide where to draw the line in a case such as this, where there is no comparable process to that applicable in personal injury cases.

41. One particular difficulty which arises on the present application is that the Defendant has not disclosed the terms upon which Dr Nagalingam was engaged or for what purpose. That is the case notwithstanding that the Defendant says that he was retained initially by UKPN but that the Defendant later agreed to share responsibility for his fees. Disclosure of this evidence would have been easy to provide and no explanation for not doing it has been given. Nor has Dr Nagalingam provided any explanation in the form of a witness statement, as I assume he could have done, if asked. In this

context, I bear in mind the extent to which the Defendant has approached the present application with candour: Murray at [16]. In my judgement, the Defendant's failure to have provided any email, letter or other form of instruction means that the ambit of what Dr Nagalingam was asked to do is unclear. If, as the Defendant now seeks to suggest, I should draw a real distinction between an expert merely instructed for an initial inspection and report on the one hand and an expert instructed for the purposes of prospective litigation on the other, it behoves it to disclose the retainer to show it was the former and not the latter. Given the lack of candour I should approach the Defendant's submission that his role was limited with a degree of scepticism.

42. In this context, counsel were agreed that it is common in fire cases for experts to attend the place of the fire in the period shortly after, to carry out inspections and to interview witnesses. Mr Moody submitted that it was very common indeed for those experts to remain the ones called as experts in any subsequent litigation and that this would be the expectation. Mr Eklund suggested that it would be going too far for the Court to reach back to a point in time in the immediate aftermath of a fire, months if not years before litigation, and irredeemably hold a party to the choice of expert it then made. In my judgement, the type of process which occurred in this case is sufficiently analogous to the one applicable in personal injury cases for present purposes. It is apt to say that there was a process of co-operation and engagement by the parties with each other in the process of the claim. The particular features which are relevant here are:

(1) This was not one of those cases where a party was inspecting the site of a fire to see what may have caused it and whether it might, perhaps, give rise to a claim and/or legal proceedings. By the time the experts met together, it was already assumed in correspondence that litigation would occur. The parties had locked horns over the allegation that the Defendant's discarded cigarette had been the cause of the fire and the Defendant said it would "robustly" "defend any assertion of liability on its part". The Defendant had even asserted a claim for recovery of its own costs.

(2) That this was not a one-off private inspection undertaken by the Defendant's expert on his own; rather, there were two inspections undertaken jointly with the Claimant's experts;

(3) That the experts met with witnesses and engaged with each other in the discussion of possible causes. The level of liaison and engagement was therefore quite considerable.

(4) That Dr Nagalingam continued to exchange emails with the Claimant's experts after these meetings. These exchanges, concerning the availability of evidence etc, continued until at least October 2018.

43. I am satisfied that Dr Nagalingam was instructed as the Defendant's expert to carry out an inspection and to provide a report. At the very least, I would expect this to have been done with a view to (if not in fact) appointing him as the CPR 35 expert. I can see that in some cases it may not be appropriate to make any assumption that an expert instructed to investigate at the outset would, in due course, be so instructed but I make it in this case. I do so, firstly because litigation was already in prospect; secondly, because I have not been provided with Dr Nagalingam's letter of instruction to demonstrate that he was not instructed as a CPR 35 expert; and thirdly because, all other things being equal, it would make sense for a party to rely at trial upon the expert who

inspected at an early stage in a relatively uncomplicated case such as this when the likely issues were known. The simple truth is that when the Defendant's solicitors were asked who their expert was they named Dr Nagalingam. The answer was clear and unqualified.

44. I do not regard it as fatal to the application that Dr Nagalingam had not produced any written report for the Defendant. As Mr Moody submitted, that may have been precisely because there has been careful "curation" of evidence to ensure that his views were only expressed in a privileged conversation with the Defendant's solicitors. The absence of a written report is merely one factor, amongst others, to be taken into account. Other documents, including notes and preliminary materials, can fall within the ambit of this jurisdiction, all to be assessed on a case by case basis: Allen Tod at [41] and [42].

45. Mr Eklund submitted that the decided cases in which disclosure of pre-issue reports have been ordered are all cases in which the pre-action protocol process was well underway but that, in this case, it had not even begun. He submits that the limit to the early reach of this jurisdiction should be when a process of engagement for the purposes of litigation has occurred. I accept that is a useful way of looking at it. I consider that this has taken place in the present case whilst Dr Nagalingam was retained by the Defendant as its expert. Litigious correspondence had been written. Experts had liaised and engaged with each other. Witnesses had been interviewed. These are the type of circumstances indicated in Coyne at [33].

46. If, contrary to my view, Dr Nagalingam should be regarded only as an expert engaged for private pre-litigation advice, the same features as I have described, including the early pre-action engagement between experts, are sufficiently unusual factors in the context of civil litigation more generally to make this an appropriate case to treat him otherwise for present purposes: see Edwards-Tubb at [31].

47. Having concluded that Dr Nagalingam was a relevant expert, such that the decision to rely on Ms Wilson amounts to a change in expert, it is necessary for me to consider whether to exercise my discretion by imposing a condition upon the grant of permission to rely on Ms Wilson. The principle is clear namely that expert shopping is undesirable and to be discouraged: Beck at [30] and [33]. The power to impose a condition should usually be exercised once the parties have engaged with each other in the process of the claim: Edwards-Tubb at [31]. However, every case should be decided on its own particular facts. Both counsel agreed with my suggestion during argument that there would seem to be a sliding scale where, at one end, might sit a flagrant case of expert shopping simply because a party does not like the damaging views expressed by his current expert, and at the other end might be the unexpected need to replace the expert for objectively justifiable reasons such as illness or retirement of the expert in question. The closer the circumstances are to the former, the more likely it is that a Court will impose conditions commanding a high price e.g., in respect of the waiver of any privilege and the scale of material to be disclosed. The closer they are to the latter, the less onerous such conditions, if any, as may be imposed will be. A faint appearance of expert shopping would not justify the disclosure of solicitor's attendance notes of telephone calls with the expert, not least because of the risk that they do not properly record the expert's actual words: BMG at [29] and [37].

48. A view that there has been expert shopping will almost always have to be one reached by inference since conduct of that type, which is to be discouraged, is hardly likely to

be patent or admitted. On the material before me, I am prepared to draw the clear inference that expert shopping has occurred in this case, for tactical reasons, namely that Dr Nagalingam had concluded that a discarded cigarette was the likely cause of the fire and had told Keoghs this[1]. My reasons for drawing this inference are as follows:

(1) The unwarranted attempt to put some distance between Dr Nagalingam and the Defendant. This was done, firstly, by relying on the fact that he was initially instructed by UKPN rather than the Defendant. In fact, Dr Nagalingam had already been selected and instructed by the Defendant within ten days of the fire as Keoghs had confirmed on 21 June 2018. It was wrong to say in correspondence dated 8 April 2021 that Dr Nagalingam "was attending on instructions from UK Power Networks" on 4 and 16 July 2021 if, by that, statement the Defendant was seeking to infer that those instructions were not joint ones with it. Secondly, the suggestion by the Defendant that his instruction was limited ("to arrive at some basic understanding of this matter") without providing any evidence in the form of his retainer to show this was so. Thirdly, the unconvincing expression by Mr Houseago (of Keoghs) of his lack of understanding of Dr Nagalingam's email of 11 October 2018. It was obvious to me that the "principal" referred to by Dr Nagalingam was Keoghs who had drafted the Defendant's witness statements and sent them to Dr Nagalingam. No-one else met that description and Mr Houseago does not suggest any other credible candidate.

(2) The initial denial that Dr Nagalingam had given an expert opinion on causation at all (in the letters of 22 March 2021 and 8 April 2021[2]) followed by the belated admission (in Mr Houseago's statement) that Dr Nagalingam had in fact expressed a view on causation during the meeting with Keoghs on 2 October 2018. Following that meeting he was not asked by the Defendant to provide a report and, it seems, his services were no longer required. Given he expressed a view on causation, it is reasonably safe to assume he had always been retained to do so. Indeed, the inspections would have been pointless otherwise. As Mr Moody submitted, it would be surprising if Dr Nagalingam's services had been dispensed with once he had expressed a favourable view with which the Defendant was content. It would be less surprising if his view was one with which the Defendant was not content.

(3) The (admittedly) second-hand evidence, that Dr Nagalingam had expressed a view on causation to his fellow experts. If this was not a true description of what happened, the Defendant could have provided a witness statement from Dr Nagalingam to that effect. A decision has already been taken to call him as a witness of fact so it would not have been difficult to obtain a witness statement from him on this (or matters more broadly) if appropriate.

(4) Dr Nagalingam was a suitable expert for the role. His experience included a specialisation in fire investigation and he has investigated human agency fires, deliberate or otherwise. Doubtless that is why Keoghs instructed him in the first

[1] Of course, a conclusion that the fire was caused by a cigarette does not establish liability against the Defendant. The Claimant must still show the cigarette was discarded by the Defendant in circumstances where there may have been other smokers around. That will largely be a factual question although there may be some further expert issues arising from those factual matters such as the timing of the fire.

[2] In the latter, Keoghs said the Defendant's involvement with Dr Nagalingam was limited only to the extent of having access to his factual findings as to his attendance on site.

place. I cannot see the point of having sent him to investigate the site and interview witnesses if he was not suitably qualified to express a view on causation.

(5) I was wholly unpersuaded that the reason for instructing Ms Wilson, as submitted to me, was her far greater experience in cases of fire caused by smoking materials. It is not necessary for me to weigh in the scales their respective qualifications experience. It suffices to say that their experience was comparable. If this explanation had been the driving factor, it is surprising it was not made sooner than it was. Mr Houseago suggests that it was only in light of the allegations specifically made in the Claimant's letter of 4 February 2020 that he was told to instruct an expert whose expertise lay in fires caused by cigarettes and the like. But it was already as plain as can be from Keoghs' own letter of 13 June 2018, shortly before Dr Nagalingam's instruction, that the Defendant was defending a case resulting from the careless discarding of a cigarette. So, that can hardly be an explanation.

(6) Nor was I any more convinced by the original explanation given for the proposed substitution of expert, namely that lay evidence of the investigation and expert evidence should be separated. I cannot see why it would be best "to avoid necessarily combining Dr Nagalingam's factual evidence with any forensic expert evidence determining the critically important issue of causation". As the Claimant submitted, not calling him means that Ms Wilson has to give her expert evidence without having actually seen the aftermath of the fire (unlike the Claimant's expert) and having to rely on the notes and photographs taken by Dr Nagalingam. That is not an insuperable or even uncommon position but it does at least cause one to question why that decision has been taken, all other things being equal. Mr Moody was right to observe that this original justification appears to have disappeared entirely from the Defendant's response to this application. That fact, in and of itself, raises a suspicion that the real reason was a different one.

(7) Many of these points were raised by the Claimant in correspondence and/or in its evidence in support of this application. The failure by the Defendant to provide a full and candid response which explained away the inferences that might otherwise be drawn is, itself, telling.

49. For these reasons, I conclude that the Defendant had instructed Dr Nagalingam as its expert and is seeking to call a different expert for a reason which I infer to be or at least has the appearance of expert shopping. There is more than a "hint" of that: Vilca at [32]. This is beyond a "faint case": BMG at [37]. In my judgement it is a one from which the inference can clearly be drawn. Accordingly, notwithstanding the concerns expressed by Edwards-Stuart J in BMG, this is an appropriate case in which to impose a condition that the attendance note of the call of 2 October 2018 be disclosed.

50. I therefore conclude that the application succeeds in principle.

Relief

51. I now turn to consider each of the heads of disclosure sought by the Claimant in respect of the application. In each case, the Claimant contends that disclosure should be given as a condition of the Court granting permission to call Ms.Wilson:

(a) Any report, letter, attendance note or other document from Dr Nagalingam to the Defendant, its solicitors, loss adjusters or insurers which sets out or refers to his views on causation

According to the Defendant, there are no such documents. On that basis I conclude that no order is required.

(b) Any report, letter or attendance note or other document from Dr Nagalingam sent to UKPN which sets out or refers to his views on causation

In the unusual circumstances of this case, Mr Moody sensibly recognised that the Court could not make an order framed in this way on the basis of the evidence presently before it. I will therefore provide liberty to restore the application under this head. In the meantime, I direct the Defendant to provide a witness statement from its solicitors as to the terms by which Dr Nagalingam was retained and any changes to that retainer. If, in light of the further evidence, the Claimant elects to restore the application under (b), the Court should proceed on the basis that, in principle, the discretion should be exercised in favour of disclosure of any report prepared by Dr Nagalingam provided that: (i) it is a report in the control of the Defendant; and (ii) does not involve an incursion of privilege held by UKPN, unless that party is willing to waive it.

(c) Any attendance note by the Defendant's solicitors setting out or referring to Dr Nagalingam's views on causation

It is common ground that such a note exists. I therefore direct that it should be disclosed as a condition of the Defendant being able to call Ms Wilson but only to the extent that the note sets out or refers to Dr Nagalingam's views on causation. All other matters may be redacted.

(d) Any report, letter or attendance note or other document from the Defendant's loss adjuster and/or insurer setting out or referring to Dr Nagalingam's views on causation

I am satisfied that, as the Defendant submits, the Defendant's evidence is intended to state that there are no such documents, either in respect of the loss adjuster or in respect of the insurer. I therefore consider that no order is required.

(e) Any report, letter or attendance note or other document from the Defendant's loss adjuster setting out or referring to the loss adjuster's views on causation

According to the Defendant, there are no such documents. I therefore consider that no order is required.

(f) The site notes of the Defendant's loss adjuster and insurer

According to the Defendant, there are none. I therefore consider that no order is required.

(g) Dr Nagalingam's site notes including his notes of any interviews with the Defendant's witnesses

The Defendant has disclosed the site notes voluntarily. According to the Defendant, he did not interview the Defendant's witnesses. I therefore consider that no order is required.

Conclusion

52. In conclusion, pursuant to CPR 35.4, I direct that the Defendant may rely upon the evidence of Ms Emma Wilson of Prometheus Forensics Ltd on condition that the Defendant provides disclosure of Keogh's attendance note of 2 October 2018 to the extent that it sets out or refers to views expressed by Dr Nagalingam on causation. It may otherwise be redacted. I give liberty to restore the application under sub-paragraph (b) and make no other order on the remaining conditions.

53. The Claimant has already succeeded in this application whatever more may come of it. Accordingly, the Claimant is entitled to its costs, which were summarily assessed by consent in the sum of £32,000 payable in 14 days.