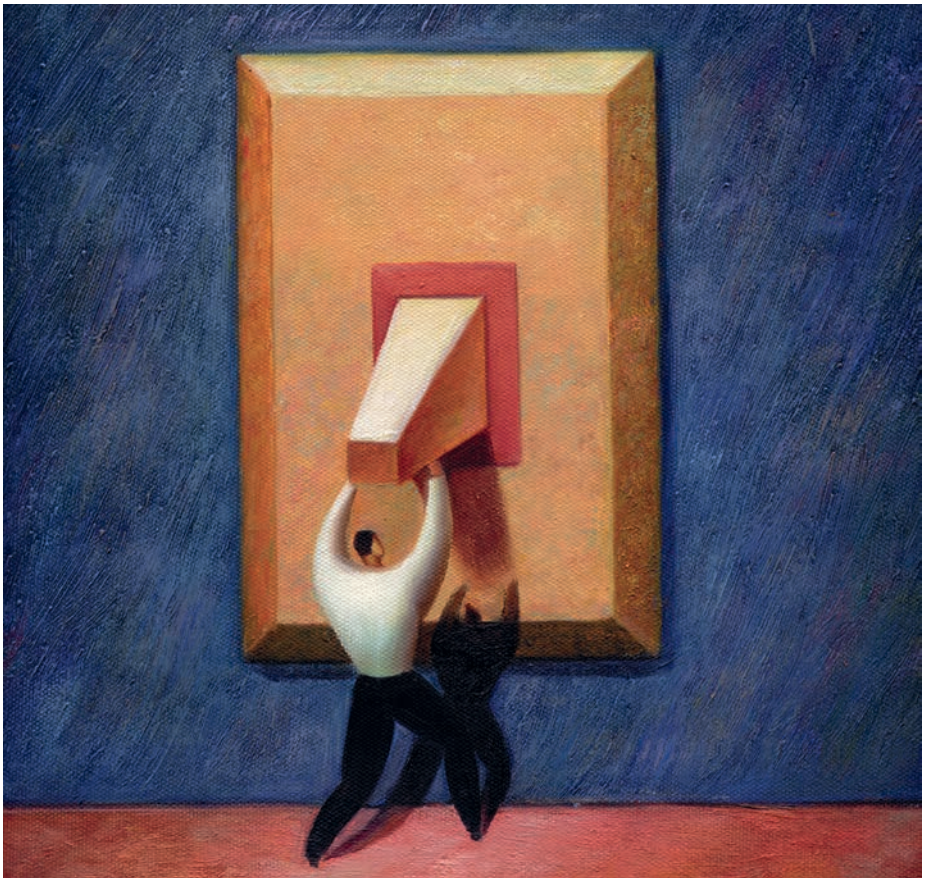
Switching experts

What can be done when your expert's opinion changes? Chris Pamplin reports



IN BRIEF

- If the expert can no longer support the case of the instructing party, it is the expert's duty to say so.
- Whether to grant a party permission to adduce expert evidence, particularly where the application involves a change of expert, is a discretionary decision entrusted to the first instance judge.
- The party must adduce good reasons for changing the expert. The fact the chosen expert has modified or even changed his or her opinion is not enough.

In these days of austerity and with a cost-conscious judiciary, less leeway is likely to be given to parties in matters of procedure, including late applications relating to expert evidence.

Charles Terence Estates

In *Charles Terence Estates Limited v Cornwall Council* [2011] EWHC 1683 (QB); [2011] All ER (D) 38 (Jul), the court dismissed an application to adduce expert evidence that was made two weeks before a scheduled trial date. In refusing the application, Coulson J considered the relatively few authorities that exist in relation to the exercise of the judge's discretion in granting such applications. These included the case of *Swain-Mason & Others v Mills & Reeve* (a firm) [2011] EWCA Civ 14 in which the Court of Appeal gave guidance as to the interplay between the overriding objective and interlocutory applications made late and close to trial. Coulson J attached particular relevance to the words of Lloyd LJ that: "It is always a question of striking a balance. I would not accept that the court [seeks] to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim...However, I do accept that the court is, and should be, less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

Guided by this, Coulson J sought to follow similar lines and gave helpful guidance in his judgment. He indicated that in allowing or dismissing an application to adduce late expert evidence the court should consider:

- the importance of the application in the context of the case as a whole;
- the justification, if any, for the delay;
- the consequences if the application was allowed and the consequences if the application was refused.

In *Charles Terence Estates*, Coulson J could see no justifiable reason for the delay, and neither was he persuaded that the expert evidence in question was reasonably required to resolve the proceedings.

In reaching his judgment, he next weighed the consequences of both allowing and refusing the application. He was mindful that allowing the application would inconvenience the innocent party, who would also be left with other disadvantageous consequences. Conversely, refusing the application would preserve the trial date, spare inconvenience to the innocent party but deprive the applicant's ability to call expert evidence on a peripheral matter. He concluded that any prejudice to the applicant was slight and was, anyway, a consequence of its own failure to comply with an earlier order.

Guntrip

The Court of Appeal gave further guidance in April 2012 when Lewison LJ delivered his judgment in *Guntrip v Cheney Coaches Ltd [2012]* EWCA Civ 392. In that case the court considered a claimant's application for permission to adduce evidence from a new expert witness after the parties' experts had produced a joint statement.

The claim was one of negligence against an employer for injuries sustained while driving in the course of employment. Each side instructed an orthopaedic surgeon, and the two experts produced a joint statement following their meeting. The joint statement was not supportive of the claimant's case, and the claimant sought permission to instruct a fresh expert. The district judge refused permission, so the claimant appealed to a circuit judge who overturned the decision on grounds including that:

- the claimant's case would fail unless he was permitted to change his expert and that this took the case outside the ambit of previous authority; and

- the district judge had overstepped his discretion by considering the content and value of the proposed new expert's evidence.

Leave was given to refer the matter to the Court of Appeal.

The Court of Appeal was required to consider two factors when hearing the application. First, the broader question of whether new expert evidence should be allowed when an expert has changed his mind and, second, whether it was right to permit such fresh evidence at a relatively late stage in the proceedings having regard to the effect on time and costs.

When an expert's opinion changes

Dealing with the broader question, Lewison LJ said the expert's overriding duty applies not only to the preparation of an initial report, but also to the preparation and agreement of a joint statement, as well as to evidence given orally in court. If at any time the expert can no longer support the case of the instructing party, it is the expert's duty to say so. Indeed, if the expert forms that view it is far better to say so sooner rather than later before the litigation costs escalate.

It is partly because an expert's overriding duty is to the court that the court discourages expert shopping, particularly when a party has had a free choice of expert and has put forward an expert report as part of its case. The party must adduce good reasons for changing the expert. The mere fact that the chosen expert has modified or even changed his or her opinion is not enough. After all, the change of opinion may be based on new evidence.

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In exercising his discretion in accordance with the overriding objective, a trial judge is required to deal with cases justly. Justice does, of course, involve justice to the defendant as well as the claimant. The Court of Appeal held that the trial judge had exercised his discretion correctly and had considered the effect on both parties.

Whether to grant a party permission to adduce expert evidence, particularly where the application involves a change of expert, is a case management decision. It is a discretionary decision entrusted by the rules to the first instance judge. The discretion must, of course, be exercised judicially, having regard to the overriding objective. Lewison LJ took the view that the real issue in this appeal was not whether the circuit judge had exercised his discretion correctly, but whether he was entitled to interfere with the district judge's exercise of his discretion. Lewison LJ held that he was not, and ruled that the district judge's original decision not to allow the change of expert should stand. **NLJ**

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