

Expert selection

When instructing a new expert, is disclosure of an earlier report inevitable? Dr Chris Pamplin reports



© Stockphoto/George Clerk

IN BRIEF

► Does the report of an expert who is no longer able to act for a party have to be disclosed as a necessary condition of the party being able to appoint a new expert?

It is not uncommon for a party in possession of an unfavourable expert report to want to 'shop around' for an expert whose opinion is more supportive of its case.

Expert shopping is, of course, a practice that has been frowned upon by the courts. Indeed a body of case law and procedural practice has developed that aims to deter, and ideally prevent, such behaviour.

As a consequence, when a party makes an application for permission to change expert, the court, if granting the application, will usually impose a condition that the report of the outgoing expert should be disclosed. So common has this become that many presume that the imposition of such a condition is automatic.

A question of limitation

However, in *Daniel Alfredo Condori Vilca & Others v Xstrata Limited, Compania Minera Antapaccay SA* [2017] EWHC 1582 (QB), the High Court delivered a judgment that tests this assumption.

The defendant applied for a time extension to instruct a new expert. The claimants submitted that the court should grant the application only on condition that the defendant disclosed the reports of the previous experts. The claimants were Peruvian nationals employed at a copper mine owned by a company registered in Peru, but which was an indirect subsidiary of *Xstrata*, a company registered in England. The claimants had all sustained injuries during a protest at the mine and alleged that their injuries had been inflicted by Peruvian security forces.

Much of the argument surrounded whether liability was to be determined by Peruvian, English or EU law. The question of determining law was an important one as, under Peruvian law, the defendant would be able to argue that all of the claimants' claims were barred by limitation, on the basis that the protests were in May 2012. The limitation period under Peruvian law is two years. No

claim under Peruvian law was introduced until service of the Amended Particulars of Claim in mid-2015. The trial has been set to run during the later part of the year and is expected to determine whether the defendant might be liable under Peruvian law for acts committed by the security forces.

Both sides were ordered to serve evidence from experts in Peruvian law by mid-May 2017. Early in the proceedings, the defendant replaced its first expert with a more experienced expert when it was realised that the case was unlikely to be settled before trial. However, the second expert had to withdraw in May 2017 due to ill health. The defendant applied for an extension of time to instruct a new expert, and it was at this point that the claimants sought a condition that the reports of the defendant's first and second experts be disclosed. The defendant objected.

A two-stage process

Stuart-Smith J considered the existing case law. He determined that the question of whether the court could or should impose a condition was to be considered in two stages. First, whether the circumstances gave rise to any case management powers to impose a condition and, second, how those powers should be exercised on the facts of the particular case.

With regard to the first stage of this process, the judge had no doubt that the defendant's application for an extension of time brought into play the court's case management powers, and that these powers included the power to order that the substance of the opinion of prior experts be disclosed as a condition of granting the extension (*Beck v Ministry of Defence* [2003] EWCA Civ 1043).

The second stage, however, was not so clear cut. Stuart-Smith J observed that the authorities had consistently said that the object of imposing a condition that reports of previous experts should be disclosed was to prevent 'expert shopping' and to ensure that the court had full information. He considered the leading authorities of both *Vasilio v Hajigeorgiou* [2005] EWCA Civ 236 and *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136 and was unable

to find any suggestion in these authorities that the imposition of such a condition was mandatory.

Considering the circumstances of the application before him, Stuart-Smith J found that there was no sound basis for concern about undesirable expert shopping. Throughout, the defendant's explanation of the need to switch from the first expert to the second had been coherent and fully explained, and the judge had no good reason to doubt that, but for her ill health, the second expert would have been the defendant's expert at trial.

The judge acknowledged that there could be differences between the reports of the second expert and the new expert. Such differences of opinion were, he thought, inevitable and to be expected. While there was nothing to suggest that the new expert would change or exclude anything that might have been contained in the second expert's report, he considered that there was, in any event, equality of arms between the parties and that any errors or omissions in the new expert's report could be addressed adequately by the claimants' own expert.

Allowing the extension of time to instruct the new expert, the court held that it was not obliged to impose a condition that the party disclose reports of its previous experts if there was no concern about undesirable 'expert shopping' or abuse of process by the party, and if there was no other good reason to impose the condition.

Conclusion

The case is an interesting one and of some importance. Examples of expert shopping or other circumstances giving rise to sanctions, such as lateness of applications, should be readily identifiable. In other instances, though, where there are reasonable and fully explained grounds for instructing a new expert, it should not necessarily follow that the disclosure of an earlier report will be inevitable.

NLJ

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses and can be contacted on nlj@jpspubs.com. Website: www.jpspubs.com.