



LEGAL BRIEFING

(1) BMG (Mansfield) Ltd and (2) The BMG (Mansfield) Ltd Partnership v (1) Galliford Try Construction Ltd and (2) Aedas Architects Ltd [2013] EWHC 3183 (TCC), Mr Justice Edwards-Stuart

The Facts

BMG (Mansfield) Ltd and The BMG (Mansfield) Ltd Partnership ("BMG") were the owners of a shopping centre which suffered a serious fire on 28 October 2004. BMG brought a claim against the shopping centre's design and build contractor, Galliford Try Construction Ltd ("Galliford Try") and the architect engaged by Galliford Try, Aedas Architects Ltd ("Aedas"). BMG's case was that inadequate fire protection and barriers in the roof space and eaves canopies of the shopping centre (for which Galliford Try and Aedas were allegedly responsible) caused the fire to spread further and cause more extensive damage than it should have done.

Shortly after the fire BMG's solicitors instructed an expert, Mr Streeter. Mr Streeter visited the site and took photographs in November 2004. Mr Streeter produced a report in April 2005, which was disclosed to Galliford Try and Aedas on a without prejudice basis in November 2006. No further reports by Mr Streeter were disclosed.

On 27 October 2010, BMG issued proceedings against Galliford Try and Aedas. As part of those proceedings, the parties' experts met on a without prejudice basis in April 2012. A mediation took place in May 2012, which was unsuccessful. Following that mediation, Mr Streeter (who was in by that time his late 60s and nearing retirement) indicated that he no longer wished to act as BMG's expert. BMG selected a new expert, Mr Edwards, who was instructed in mid-June 2012.

BMG's solicitors notified Galliford Try's and Aedas' solicitors of their wish to instruct Mr Edwards in June 2012. Galliford Try and Aedas objected, alleging that BMG was, or appeared to be, "expert shopping" for a more favourable opinion from a second expert.

BMG applied to the court for permission to call Mr Edwards as its expert. Galliford Try and Aedas suggested that to avoid any "appearance of expert shopping", permission to call Mr Edwards should be conditional upon BMG disclosing any communications from Mr Streeter to them or their solicitors that recorded any expression of opinion in relation to the issues in the proceedings. Galliford Try and Aedas wanted that category of documents to be wide reaching and include solicitors' attendance notes of conversations with Mr Streeter. BMG tried to limit the disclosable documents to reports prepared by Mr Streeter for use in the litigation.

The Issues

The issues here were whether BMG was permitted to call Mr Edwards, whether any such permission would be conditional upon the disclosure of relevant documents and, if so, the categories of those documents.

Decision

The Judge held that BMG was permitted to call Mr Edwards. Neither Galliford Try nor Aedas had argued that permission to call Mr Edwards ought to be refused. What they had sought was permission conditional upon BMG disclosing any other report or document provided by Mr Streeter in which he expressed opinions or indicated the substance of such opinions on the matters in issue in the proceedings. The Judge did not accept BMG's submission

that only reports prepared for the proceedings ought to be disclosable; any other reports that included the substance of the expert's opinion, including draft reports, were to be disclosed.

As to the extent of any additional documents (other than reports) which were to be disclosed, Galliford Try and Aedas wanted BMG to disclose their solicitors' attendance notes of relevant conversations with Mr Streeter. BMG resisted.

The Judge rejected any allegations of "expert shopping". He found that there was no evidence that Mr Edwards was approached at any time before Mr Streeter indicated that he wished to withdraw from the case. The Judge was not therefore prepared to order disclosure of all attendance notes kept by BMG's solicitors in which Mr Streeter's opinions on any matter in issue may have been recorded, as such an order would in the Judge's view result in a significant invasion of privilege, which was not justified in the circumstances.

The Judge did however order BMG to disclose any other report or document provided to BMG or their solicitors by Mr Streeter in which he expressed opinions or indicated the substance of such opinions on the matters in issue in these proceedings. Even if there were no such reports or documents, the Judge said that Galliford Try and Aedas should have the comfort of such an order in case any such documents should come to light.

Commentary

The courts have been keen to discourage litigants from "expert shopping" for a favourable opinion. Permission to call evidence from a new expert is therefore usually conditional upon the disclosure of any earlier reports (including drafts), and any attendance notes of meeting or telephone conversations in which opinions on the issues in the case are discussed, all of which are up to that point privileged. This condition usually deters parties to litigation from "expert shopping", as any less favourable previous opinions which are required to be disclosed will be used by the other party at the trial to undermine the (usually more favourable) position adopted by subsequent experts.

Where there are legitimate reasons to change experts, as there were in this case (Mr Streeter's age, imminent retirement and desire not to be involved in protracted litigation), the courts are likely to be less onerous in the disclosure conditions they impose. Even where the Judge had some sympathy with BMG and Mr Streeter, he still ordered BMG to disclose any other report or document prepared by Mr Streeter in which he expressed opinions or indicated the substance of his opinions on the matters in issue.

The Judge indicated that in other cases where there was no genuine reason for replacing an expert and "expert shopping" was suspected, in principle there was nothing to prevent the courts from ordering disclosure of solicitors' attendance notes of conversations with experts, as well as previous reports. Any such order made would be far reaching, intruding on what is normally considered to be privileged material. Changing experts ought in the light of this decision, and the warning from the Judge as to the categories of documents that might be disclosable, to be regarded as an option of last resort. The choice of an expert at the outset is therefore critical.

Andrew Davies
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