



LEGAL BRIEFING

Allen Tod Architecture Ltd (in liquidation) v Capita Property and Infrastructure Ltd

[2016] EWHC 2171 (TCC) His Honour Judge David Grant

The Facts

During 2006 Allen Tod Architecture Limited ('ATA') was engaged by Barnsley Metropolitan Borough Council ('Barnsley') to provide construction management services in connection with the renovation of Barnsley Civic Hall. ATA appointed Capita Symons, subsequently Capita Property and Infrastructure Limited, ('Capita') to provide structural engineering services.

The project was delayed as result of significant structural problems and in 2009 Barnsley issued letters of claim against ATA and Capita. ATA subsequently paid Barnsley around £2million in settlement of arbitration proceedings and claimed this sum from Capita.

During 2013 ATA commenced court proceedings against Capita. In September 2014 ATA instructed a structural engineering expert (referred to in the judgement as 'Expert A'). On 19 December 2014 Expert A produced some written notes on the issues and on 6 July 2015 he provided a summary of his views, described as a "preliminary report".

During January 2016 ATA issued a supplementary letter of instruction to Expert A who produced a draft report on 12 February 2016.

Following an unsuccessful mediation on 12 April 2016, ATA decided that because of Expert A's inability to properly manage the documents and express his views with clarity, a new structural engineering expert – Professor Roberts – should be retained.

During June 2016 ATA served Professor Roberts' report and provided Capita with the letters of instruction issued to Expert A in September 2014 and January 2016 and Expert A's draft report dated 12 February 2016. Capita requested that ATA disclose additional documents in the following categories:

- (i) Expert A's notes on the issues provided on 19 December 2014;
- (ii) the "preliminary report" provided by Expert A on 6 July 2015; and
- (iii) any documents in which Expert A provided his views prior to the mediation on 12 April 2016.

ATA resisted Capita's requests on three grounds:

- That the documents were privileged;
- That sufficient material had been disclosed to provide a proper basis for the Court to permit Professor Roberts' evidence to be heard so that it was not necessary or proportionate to order the disclosure of any further material as a condition of such permission; and
- Where the reasons for seeking the replacement of Expert A were administrative rather than as a result of him expressing unfavourable views, this was not an instance of "expert shopping".

The issue

Should ATA be required to disclose additional documents as a condition of being permitted to adduce expert evidence from Professor Roberts?

The Decision

On ATA's first ground, the Judge found that there was no difference in substance between a final/signed Part 35 expert's report (which would be ordinarily be served as evidence) and other documents in which an expert had set out the substance of his/her opinions (which would ordinarily remain privileged).

The general principle was that disclosure of the first expert's reports and written opinions was part of the price that had to be paid to secure permission to call a new expert. Thus if it wished to rely upon the evidence from Professor Roberts, ATA would be required to waive privilege in any documents in the three categories identified by Capita.

Regarding the second ground the Judge agreed with Capita's submission that the Court's power was not confined to requiring disclosure only of Expert A's final/signed report but also extended to any earlier draft or provisional report and any other documents in which Expert A had expressed his opinions on the issues.

On the third ground, the Judge considered that this was not a case of "*expert shopping*" or if it was it was only so to a faint degree. Nevertheless, even where ATA was apparently not trying to obtain a more favourable opinion, it was still necessary for ATA disclose all documents in which Expert A had expressed his views in writing as a condition of being granted permission to rely upon the evidence of Professor Roberts.

Commentary

The Court will exercise its powers to control expert evidence in a manner that discourages "*expert shopping*" i.e. changing experts for reasons of convenience. Applications to change experts will be considered on a case-by-case basis but the usual rule is that any reports prepared by the first expert must be disclosed to the other side as a condition of the Court exercising its discretion to admit evidence from a new expert. This judgement confirms that irrespective of the motivation for wanting to change experts, the "*reports*" to be disclosed will usually extend to all documents in which an expert has expressed his or her opinions in writing, to include notes and draft and preliminary reports.

Ted Lowery
September 2016
