Neutral Citation Number: [2022] EWHC 2750 (TCC)

Case No: HT-2019-000396

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: Wednesday 2nd November 2022

Before :

MR ROGER TER HAAR KC
Sitting as a Deputy High Court Judge

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Between:

THE UNIVERSITY OF MANCHESTER	**Claimant**
- and -	
(1) JOHN MCASLAN & PARTNERS LIMITED	
(2) LAING O'ROURKE CONSTRUCTION LIMITED	**Defendants**
-and-	
GIFFORD GLOBAL LIMITED	**Third Party**

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- -

Jessica Stephens KC (instructed by **Clyde & Co LLP**) for the **Claimant**
Mark Chennells KC and Nicholas Maciolek (instructed by **DWF Law LLP**) for the **First Defendant**
Rupert Choat KC and Arthur Graham-Dixon (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Defendant**
Charles Pimlott (instructed by **Penningtons Manches Cooper LLP**) for the **Third Party**

Hearing date: 6 October 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR ROGER TER HAAR KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 02 November 2022 at 10:30am.

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Mr Roger ter Haar QC :

1. This matter came before me on 6 October 2022 for a Costs and Case Management Conference.

2. In the oral argument before me the time was almost entirely taken up with argument as to the conditions (if any) which should be attached to the permission to be granted to the Claimant to adduce expert evidence.

3. Because time ran out, it was agreed that I would deal with issues in respect of cost management and an issue as to disclosure on the papers.

4. This case had previously come before me on 10 October 2020 when there was a difference between the parties as to the adequacy of the particularisation of the Claimant's case. I handed down judgment on those matters on 25 November 2020 ([2020] EWHC 3198 (TCC)).

Factual Background

5. These proceedings concern claims by the Claimant ("UoM") against both the First Defendant ("JMP") and the Second Defendant ("LOR") for breaches of contract relating to the design and construction of a building project at the University of Manchester.

6. The project includes three large connected buildings, referred to as Blocks 1, 2 and 3. Block 3 is known as the Jean McFarlane Building and Blocks 1 and 2 as University Place.

7. The north ends of Blocks 2 and 3 are eight-storey service/circulation towers, housing lift and stair cores and plant. Block 1 is 6 storeys. Elsewhere, and more generally, the principal accommodation stands seven storeys above ground level.

8. Blocks 2 and 3 are broadly rectangular buildings, each approximately 32 metres by 44 metres on plan with brick-clad northern and southern elevations. Each have central full height zinc-clad bays dividing the brickwork façade in two and both have curtain walling at ground floor level. The eastern and western elevations are also brick-clad and are punctuated by a regular arrangement of storey-height inset windows.

9. Block 1 comprises a rectangular brick-clad service tower attached to the northern end of a zinc-clad drum-shaped building.

10. All three buildings are connected by curtain walling clad circulation links.

11. The northern elevations of the buildings form the boundary of a large public open space. The buildings contain facilities that are used not only by students and faculty members, but are also used frequently by outside organisations for conferences and other events.

12. The claims in these proceedings concern alleged defects in and related to the facing brickwork to Blocks 1, 2 and 3. The brickwork was designed by JMP (and the Third Party, "Gifford") and built by LOR (or, more precisely, by its subcontractor Irvine Whitlock).

13. It is UoM's case that JMP was in breach of contract with respect to its designs (and its coordination and integration of the design of others) for the Blocks, in particular its designs for the movement joints in the brickwork cladding.

14. Further, it is UoM's case that LOR was in breach of contract with respect to the construction of the brickwork cladding and associated works. It is said that LOR's works were defective and were not carried out in accordance with the Building Contract nor with reasonable skill and care. It is also said that JMP is liable in respect of the defects in LOR's works, on the basis that JMP ought to have identified the defects during the project and taken appropriate steps to address them.

15. UoM says that in order to remedy the defects, significant remedial works are necessary including the wholesale replacement of the outer brick skin on all three blocks. In 2018 the estimated cost of remedial works was £5,961,060. It was said that with other consequential losses the claim amounted to over £10.2 million.

16. By February 2020 the sum claimed had mounted to £13,741,464, and is said by UoM now to be likely to be far higher still.

17. LOR has joined to the proceedings Gifford Global Ltd ("Gifford") as Third Party: Gifford are a firm of structural engineers said to be responsible for the movement joints in the allegedly defective brickwork.

The dispute as to conditions to be attached to permission to adduce expert evidence

18. UoM seeks permission pursuant to CPR 35.4(1) to adduce expert evidence from a structural engineering expert, Mr. Bob Stagg of Alan Conisbee Associates.

19. LOR submits that that permission should be made conditional on UoM disclosing the following two categories of documents (there was originally a longer list as I set out below):

    (1) Category 1: any report (draft or final), letter, email, note or other document produced by UoM's former experts, Dr Garvin, Dr Casson and Mr Conisbee (other than the reports expressly relied upon and provided by UoM), in which they expressed opinions:

        a) In relation to the dispute; alternatively

        b) On the issues of what would be an appropriate remedial scheme and the reasonableness of UoM's decision to replace the entire outer brickwork.

    (2) Category 2: any attendance note or other document produced by UoM's past and present solicitors (Eversheds and Clydes) recording (or purporting to record) meetings, telephone calls and other discussions with Dr Garvin, Dr Casson and/or Mr Conisbee evidencing their opinions on what would be an appropriate remedial scheme and/or the reasonableness of UoM's decision to replace the entire outer brickwork.

20. The premise of LOR's position is that UoM has changed its experts. This premise is not entirely accepted by UoM.

The Authorities

21. I was referred to a number of authorities.

22. In *Beck v Ministry of Defence*[1], the Court of Appeal considered a case in which defendants had lost confidence in the psychiatrist who had been instructed on the defendants' behalf. A District Judge granted the defendants permission to change expert.

23. In his judgment at paragraph [16] Simon Brown LJ referred to a previous decision of the Court of Appeal:

> "Before turning to the next paragraph of Judge Langan's judgment, it is convenient to cite the most directly relevant passages from Sachs LJ's leading judgment in *Lane v Willis* [1972] 1 WLR 326. There are three. At p 333 A-C:
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> > "The principles upon which a court should, in aid of obtaining a medical examination of one of the parties to an action, act when deciding whether or not to take the somewhat strong course of staying the action is a medical examination is not afforded, are by now clear. An order for a medical examination of any party to an action has been well said to be an 'invasion of personal liberty'. Accordingly, it should only be granted when it is reasonable in the interests of justice so to order. When the refusal of a medical examination is alleged to be unreasonable, the onus lies on the party who says it is unreasonable and who applies for the order to show, upon the particular facts of the case, that he is unable properly to prepare his claim (or defence) without that examination. The onus lies firmly on the applicant, as Mr Turner very rightly conceded."
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> "At p 333 H:
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> > "This is a serious neurosis case and it is right to emphasise that in such a case each successive examination of the unfortunate plaintiff must be apt to disturb him and to aggravate the very thing for which he is claiming compensation. To that extent a plaintiff in his position requires – as was given to him by his solicitors – every effort made to protect him against *unnecessary* examinations."
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> "At page 334:
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> > "it has become plain that in future cases of this particular type (if these should ever recur) such medical evidence should be produced: no room should be left for a plaintiff to wonder whether the application is really due to the reports of a defendant's medical expert being unfavourable to the plaintiff."

24. Simon Brown LJ said later:

> "20. …. What I confess to having had some difficulty in understanding is why the defendants should not be required to disclose Dr Goodhead's report. There are two aspects of this. Different considerations arise depending on whether disclosure is

[1] [2003] EWCA Civ 1043; [2005] 1 WLR 2206

said to be required (a) before the decision is taken either to allow or to refuse the application to change experts; or (b) as a condition of granting such an application. It appears that the argument in this case has hitherto focused exclusively on the first stage ….

" ….

"23. The burden of the defendants' argument in this regard is that, whilst it is one thing to assert, as clearly in general terms they were asserting, that their expert's report, essentially supportive of their case though it was, was in many respects unsatisfactorily set out and reasoned; it is quite another to be forced to make that argument by specific reference to the details of the report, every point thereafter becoming directly available against them if ultimately they are forced to rely upon his evidence. Put on that basis, and that must necessarily have been the basis upon which the point was understood by both judges below, I, for my part, am likewise disposed to accept it.

"24. Very different considerations, however, seem to me to arise once in principle it has been decided to make the order allowing a new expert to be instructed. At this point I can see no reason for continuing to withhold disclosure of the original report which is now to be discarded, and every possible reason why such disclosure should be made. In *Lane v Willis* [1972] 1 WLR 326 one notes, the Court of Appeal was told, on indicating that they proposed to allow the defendants to instruct a further expert, that the defendants would thereupon disclose their existing evidence. Roskill LJ, at p 355, described that as a very proper undertaking by counsel for the defendants:

> "that if this court makes the order which he seeks, at any rate in some form, the defendant's solicitors will, as soon as they get [the new report], send to the plaintiff's solicitors a copy not only of that report but of the various reports which Dr Carroll has already made as a result of his several examinations of the plaintiff. If the defendant does not wish to call Dr Carroll at the trial, it would then be open to the plaintiff to call him if he so desired."

"25. The disclosure of the original report, as a condition of being allowed to instruct a fresh expert, would also meet the concern expressed by Sachs LJ in the third passage of his judgment at p 334 cited above in para 16: "no room should be left for a plaintiff to wonder whether the application is really due to the reports of a defendant's medical expert being favourable to the plaintiff."

"26. I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible and certainly, to my mind, no such circumstances exist here."

25. In his judgment, Lord Phillips of Worth Matravers MR said:

"31. A claimant who brings proceedings for personal injury, whether physical or psychiatric, must accept that he is likely to have to submit to a medical examination

by an expert instructed by the defendant. A claimant can properly object, however, to being subjected to a second examination without good reason.

> "32. In this case the reason advanced for subjecting Mr Beck to a second examination is that the first expert instructed by the defendants has proved unsatisfactory. In my judgment a claimant can reasonably object to being examined again if this is, or may be, because the conclusions reached by the first expert have proved more favourable to him than the defendants had anticipated.
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> "33. I do not consider that the court should order a second examination or stay proceedings pending a second examination by a new expert if this is a possibility. So to order would be to permit the possibility of expert shopping which is undesirable. In this case, on the evidence of the defendants' solicitor, it is not said that Mr Goodhead's conclusions are unfavourable to the defendants, but that the form or manner in which those conclusions have been expressed in the report that he has prepared are so unsatisfactory as to have resulted in a loss of confidence in him as an expert.
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> "34. I do not consider that a claimant should be required to take such an assertion on trust. Equally, I can accept that it may not be reasonable, and has been found not to be reasonable in this case, to expect defendants to advance specific criticisms of an expert's report at the time when the possibility remains that the defendants will be driven to rely upon that expert because the application to replace him has been refused.
>
> "35. The answer in this case, and in any case where a similar situation arises, is that proposed by Simon Brown LJ that the permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. Such a course should both prevent the practice of expert shopping, and provide a claimant in the position of Mr Beck with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done."

26. In *Vasiliou v Hajigeorgiou*[2], the Court of Appeal considered a case where permission had been granted to "instruct one expert each in the specialism of restaurant valuation and profitability". The defendant instructed an expert who visited restaurant premises in respect of which there was a claim for breach of a covenant of quiet enjoyment and prepared a draft interim report. Subsequently, deciding that he did not wish to rely on that report, the defendant instructed a second expert and sought permission to rely on his evidence.

27. On appeal, as summarised in the headnote, the Court of Appeal held that the original order plainly and unequivocally identified the experts only by their field or expertise, and the failure to name the first expert in the order had not been an accidental slip which could be corrected under the slip rule; that, therefore, the terms of the order did not of themselves require the defendant to obtain the permission of the court to rely on the evidence of an expert other than the first expert; that since CPR r 35.4 empowered the court to grant permission not to "instruct" an expert but to "call" or "put in evidence an expert's report" the order was to be construed as granting permission to call and put in evidence a report from one expert; that, therefore, the fact that the first expert had been

[2] [2005] EWCA Civ 236; [2005] 1 WLR 2195

instructed did not mean that the order had been carried into effect and did not of itself require the defendant to seek the court's permission to rely on the second report; and that, accordingly, the defendant did not need the permission of the court to rely on the evidence of the second expert.

28. On that basis, the Court of Appeal did not need directly to consider issues of expert shopping in reaching its conclusions. However, the Court of Appeal did go on to consider the proper approach to applications to change experts.

29. Dyson LJ said:

> "29. The principle established in *Beck v Ministry of Defence* … 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 B in place of expert witness A, 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.
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> "30. A question that was not considered in *Beck's* case is whether the condition of disclosure should relate only to the first expert's final report, or whether it should 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 only report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion."

30. That decision was concerned with a case where, for the purposes of the above dicta, the assumption was that permission to adduce evidence from a second expert was needed.

31. That assumption raises the question, in what circumstances is permission to adduce evidence from a second expert needed? That issue was addressed by the Court of Appeal in ***Edwards-Tubb v J D Wetherspoon plc***[3].

32. Again to take the facts from the headnote:

> "After the claimant was injured at work, his solicitors followed the procedure under the pre-action protocol for personal injury claims in the Civil Procedure Rules by giving notice in a letter before action to the defendant of the names of three orthopaedic surgeons they might instruct so that any objection might be made. With no objection having been taken, the claimant instructed one of the nominated experts who examined the claimant and made a report. The defendant admitted liability for the claimant's injury, and only the extent of the injury and quantum remained in issue. A few months later the claimant instituted proceedings with particulars of claim supported by the medical report of a different and unnominated

[3] [2011] EWCA Civ 136; [2011] 1 WLR 1373

orthopaedic surgeon. That report mentioned that the claimant had seen an orthopaedic surgeon previously."

33. At paragraphs [25] to [27] Hughes LJ said:

"25. When giving permission for this second appeal Sedley LJ acutely raised the question whether there exists a difference in principle between privileged pre-issued reports and privileged post-issue reports. The claimant's case before us depended upon such a distinction, but that was because Mr Grice felt constrained by the *Beck* and *Vasilou* cases to accept that the power to impose a condition exists where a party is asking the court to vary an existing order identifying expert A, so that expert B can be substituted. However, even if Mr Grice is right about that, the question still remains: in what circumstances should the power to attach a condition of disclosure be exercised, or should it be the normal order? It seems to me that in order to dispose of this appeal on a principled basis, and to be of some assistance to courts in the very large number of personal injury cases which come before them, we must address the question asked by Sedley LJ.

"26. The first thing to note is that CPR Pt 35 is concerned with experts who are instructed "for the purpose of proceedings". That is made clear by the definition contained in rule 35.2. as the notes to the CPR (at 35.2.1) make clear, this creates a distinction between an expert instructed to advise a party privately and one who is instructed to produce a report for the purpose of proceedings. Whilst reputable experts will no doubt treat each instruction the same, and whilst it may be wise to do so since it is always on the cards that a preliminary report may then be required for use in court subsequently, the formal duty to the court which dominates the position of an expert within CPR Pt 35 when he is instructed for the purpose of proceedings.

"27. I am quite unable to see any difference in 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 "Lave 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 r 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 normally not 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."

34. A little later Hughes LJ said:

"30. Authority apart, it seems to me that the imposition of a condition 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 to be 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 r 35.4 in order to maximise the information available to the court and to discourage expert shopping. Whilst at the time of the Access to Justice report this development may not have been foreseen, the those 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 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….. An expert consulted at that time and not instructed to write a report for the court is in a different position, and outside CPR r 35.2."

35. Some important points for the case now before this Court emerge from the passages cited above:

(1) The court's discretion to require disclosure of a report from an expert which would otherwise be privileged applies when a party wishes to change expert whether the first expert has provided a "pre-issue" or a "post-issue" report, so long as that first expert has provided a report "for the purpose of proceedings", the significance of that purpose being that the expert owes a duty to the court in expressing his or her opinions.

(2) The court has a discretion whether to require disclosure in such a situation, but that discretion should normally be exercised in favour of requiring disclosure, but as with any other procedural discretion there can be departures from the norm if circumstances render that just.

(3) There are two reasons underlying this practice: firstly, to guard against expert shopping; and, secondly, to ensure that the court has relevant material before it.

36. The guidance given was in the context of reports in personal injury cases, but the underlying policy reasons apply in respect of cases other than those cases. There are two points which might be made in making a comparison between personal injury cases and cases before this division of the High Court. Firstly, in cases such as *Beck*, a consequence of granting permission to a defendant to appoint a new expert in a personal injury case may be to require a claimant to undergo a further medical examination or medical examinations, which is something to be avoided if possible. This is unlikely to have direct parallels in TCC cases. Secondly, in personal injury cases the records in a medical report of what doctor A recorded in examinations of a claimant may be of great significance in resolving issues of prognostication. In this latter instance there may be some parallels in TCC cases where expert A has noted relevant information, for example, about the physical condition of a building. Here the problem is not necessarily the loss of access by the court to the opinion evidence of expert A, but the potential loss of primary factual evidence, for example as to progression of deterioration in a building.

37. In the latter respect, it seems to me legitimate for a court in deciding what condition(s) of disclosure it should impose to take into account the need to ensure so far as possible that relevant factual evidence is available to it and the parties before it.

38. In *Edwards-Tubb* the Court of Appeal went no further than indicating that disclosure of expert A's earlier report(s) should normally be required.

39. In *BMG (Mansfield) Ltd v Galliford Try Construction Ltd*[4], Edwards-Stuart J. was required to consider the application of these principles to a TCC case. In that case the expert evidence under consideration was the evidence of an architect. His report had been disclosed to the defendants in 2006 before proceedings were issued. Proceedings were issued in 2010. Through 2011 the parties exchanged documentation. In May 2012 there was an unsuccessful attempt at mediation.

[4] [2013] EWHC 3183 (TCC); [2014] C. P. Rep. 3

40. In 2013, before the first Case Management Conference had taken place, the claimants decided that they wished to call expert evidence from a fresh expert. The claimant pre-empted the CMC by applying for permission to call the new expert.

41. The defendants submitted that the circumstances of the claimants' expert's withdrawal from the case were suspicious. The defendants requested, as a condition for the grant of permission to call a new expert, an order that the claimants disclose all undisclosed expert reports and any communications from the expert to the claimant containing his opinion on the issues in the claim.

42. The learned judge said:

> "28. I am prepared to accept that the conditions that the court can impose on a party applying for permission to call an expert are not limited to an expert's "final" report (meaning the report prepared for disclosure pursuant to CPR r.35), but may extend to other reports containing the substance of the expert's opinion: see *Vasiliou* at [29]-[31].
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> "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.
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> "30. While it may be said that the second difficulty can be overcome by appropriate redaction, as so often happens when confidential or even privileged documents have to be disclosed for one reason or another, this will not prevent the problem which always occurs with such disclosure; namely that the disclosed passages very often have to be read in the context of the redacted passages in order for the meaning of the disclosed passages to be properly understood.
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> "31. Another problem which arises out of the first difficulty is that BLM may wish to check with Mr Streeter that what they have reported him as saying in a particular attendance note is correct. What is to be done if Mr Streeter does not wish to co-operate or does not agree that the note correctly records what he told the solicitors? It may be that he would have to make a witness statement and, if necessary, give evidence. It is hard to see how the costs of this exercise would be proportionate, even in the context of a case as substantial as this one.
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> "32. These considerations lead me to conclude that there would have to be a very strong case to justify a condition that such solicitors' attendance notes should be disclosed in addition to any reports or draft reports by the expert."

43. On the facts of that case Edwards-Stuart J. decided as follows:

> "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 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.
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> "39. However, I will order the Claimants to disclose any other report or document provided to BLM by Mr Streeter in which he expressed opinions or indicated the substance of such opinions on the matters in issue in these proceedings. I understand that there may be no such report or documents, but I do not see why the Defendants should not have the comfort of such an order in case any such documents should hereafter come to light."

44. In respect of the passage just cited, I would echo:

(1) The learned judge's recognition that an order of disclosure may "result in a significant invasion of the Claimants' privilege";

(2) The learned judge's caution in recognising a potential for a wide disclosure order to add considerably to the costs of proceedings; and

(3) The learned judge's conclusion 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".

45. In two cases H.H. Judge Grant summarised the effect of the authorities. Firstly in *Coyne v Morgan*[5], he said this, at paragraph [31]:

> "[31] 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 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 3.1(2)(m).
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> (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 paras [27] and [29] of his judgment in *Vasiliou*.

[5] (2016) 166 ConLR 114, [2016] BLR 491

(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 para [30] of his judgment 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 arises irrespective of the occurrence of any "expert shopping". It is a power to be exercised 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 judgment when referring to the range of circumstances which might lead to a change of expert, and Edwards-Stuart 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 paras [29]-[32] of the judgment of Edwards-Stuart J in *BMG*."

46. The summary also appears at paragraph [32] of his judgment in ***Allen Tod Architecture Ltd (in liquidation) v Capita Property and Infrastructure Ltd***[6].

47. In ***Vilca v Xstrata Ltd***[7], Stuart-Smith J. said this (emphasis added):

> "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

[6] [2016] EWHC 2171 (TCC); (2016) 168 ConLR 201
[7] [2017] EWHC 1582 (QB); [2017] BLR 460: this case was not itself cited by the parties before me, but is referred to in the case of ***Rogerson***, which was.

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.

> "26. The second question, which arises if the court has determined that it has case-management powers, is how they should be exercised on the facts of the particular case. I have already said that they should always be exercised in accordance with the overriding objective. The cases to which I have referred above do not establish some different principle. What they establish is that the court will always have regard to the possibility of undesirable expert shopping and the instinctive desire for the court to have full information (with the associated desire for the other party to be assured that the court's process is not being abused). **The Court of Appeal has consistently said (albeit in slightly differing terms) that the object of imposing a condition that reports of previous experts should be disclosed is to prevent expert shopping and to ensure that full information is available.**
>
> "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."

48. I was also referred to the decision of Mr. Alexander Nissen KC in *Rogerson v Eco Top Heat & Power Ltd*[8], which contains a useful review of the authorities.

The documents sought and the documents provided

49. I have set out at paragraph 19 above the categories of documents which LOR contends should be disclosed as a condition of UoM relying upon the evidence of Mr. Stagg.

50. Originally the list was longer, but much documentation has already been provided. The following table from the skeleton argument of Ms. Jessica Stephens KC (counsel for UoM) helpfully sets out the position:

Class of document requested by LOR in CMS' letter of 11 August 2022.	**University's position**
The instructions issued to Dr Garvin, Dr Casson, Mr Conisbee and Mr Stagg.	Without prejudice to the University's position in relation to the allegations of expert shopping, these documents were

[8] [2021] EWHC 1807 (TCC); (2021) 198 ConLR 23

	provided under cover of our letter of 13 September 2022. We note your query regarding the discrepancy in relation to the date of the appointment letter for Mr Conisbee which we are investigating although our early investigations suggest that the reference to October 2014 is a typo. In any event, this does not go to the allegations of 'expert shopping'.
The brief produced by Mr Conisbee dated 5 December 2019	Without prejudice to the University's position in relation to the allegations of expert shopping, this document was provided under cover of our letter of 13 September 2022 noting that the brief was produced by Mr Stagg and not Mr Conisbee.
Any report (draft or final), letter, email, note or other document produced by Dr Garvin, Dr Casson and Mr Conisbee which expresses an opinion in relation to the dispute.	LOR is already in receipt of the reports of Dr Garvin, Dr Casson and Mr Conisbee. With regard to the other classes of documents, as set out in our letter of 13 September 2022, it was held in *Allen Tod Architecture Ltd (in liq) v Capita Property and Infrastructure Ltd [2016] EWHC 2171 (TCC)* that the Court would require strong evidence of expert shopping before imposing a term that a party disclose documents other than the report of the first expert. While the University strongly denies any allegation of expert shopping, it is noted from your letter of 27 September 2022 that your assessment is that there is a "*degree and/or appearance of expert shopping which is stronger than, but at an absolute minimum, faint*". Even in the event that LOR is correct, which is denied, faint evidence of expert shopping is not sufficient for a Court to impose disclosure of this class of documents. There is certainly no strong evidence, and LOR does not assert that there is.
Any attendance note or other document produced by the University's past and present solicitors recording (or purporting to record) meetings, telephone calls and other discussions with Dr Garvin, Dr Casson and/or Mr Conisbee evidencing their opinions in relation to the dispute.	The University declined to provide copies of this class of document by reference to *BMG (Mansfield) Ltd v Galliford Try Construction Ltd [2013] EWHC 3193 (TCC)* in which the Court highlighted the difficulty of requiring disclosure of this category of document. On that basis the Court found that it would have to be "*a very strong case to justify a condition that such solicitors' attendance notes should be disclosed*". Even on LOR's assessment, it is clear that this is not a very strong case.

51. As set out above, the dispute now revolves around the third and fourth categories of documents.

52. Mr. Mark Chennells KC, for JMP, supports LOR's position in respect of the third category but not the fourth.

UoM's experts

53. LOR's submission (as set out above) is that conditions should be attached to the grant of permission to call Mr. Bob Stagg, a structural engineering expert.

54. There is a dispute between UoM and LOR as to whether I should regard this as being UoM's application for permission to adduce expert evidence, or LOR's application that the grant of permission should be subject to conditions.

55. Mr Rupert Choat KC, for LOR, argues that this is a case in which there has undoubtedly been a change of expert on the part of UoM and therefore it is for UoM to justify that change.

56. Ms. Stephens does not accept that there has been a change of expert engaging the Court's discretion.

57. Whether there has been a change of expert or not (which I discuss below), in my judgment, given that the normal course in this Court is to grant permission for relevant expert evidence (which in this case would undoubtedly include evidence from a structural engineer), it is for LOR to persuade the Court that conditions should be attached.

58. My view in that regard is strengthened by two factors in this case:

(1) The fact that LOR suggests that there has been at least an appearance of expert shopping; and

(2) The fact that UoM has already made substantial disclosure.

59. In those circumstances, it would have been helpful to have had a witness statement in support of LOR's position and an answering statement in support of UoM's position: at any rate witness statements in support of both positions would have been helpful, but in neither case was forthcoming.

The experts

60. I have had placed before me a report from Dr. Garvin, a Construction Director at the Building Research Establishment, dated December 2013.

61. This report describes defects identified in the UoM buildings and concludes at paragraph 6.2:

> "The findings and conclusions of the investigations indicate that remedial works are required from the SCAN Building. The failure of bricks represents not only an immediate health and safety risk, but will also impact on the long term durability and performance of the brickwork.

> "Remedial options have been considered to remediate both the damage and the underlying causes of the failures. Simply repairing the spalled bricks and areas of cracking would not return the brickwork to a properly designed and constructed state. The remedial works need to be extensive (Option 4 in Section 5) and it is recommended that complete façade replacement is undertaken in order to provide a building that is free of the defect and aesthetically acceptable."

62. Next, I have before me a report from Dr. Casson dated 24 February 2016. Dr. Casson is a Senior Associate at the firm of Bickerdike Allen Partners: he is a Construction Technologist and brickwork expert. He sets out outline suggestions for remedial works.

63. Thirdly, I have a report from Ms. Gavey, a Partner at Bickerdike Allen Partners. Her report is dated 15 April 2016. She was instructed to provide an opinion in the form of a preliminary report as to whether the architect and lead consultant for the development (JMP) exercised reasonable skill and care in connection with the design of the brickwork facades in the UoM buildings.

64. Fourthly, I have before me two reports from Mr. Conisbee dated 4 November 2016 and 18 May 2017. Mr. Conisbee is a structural engineer.

65. The evidence of Mr. Stagg is intended primarily to replace the evidence of Mr. Conisbee.

The scope of necessary remedial works

66. It is clear that there is a significant dispute between the parties as to the extent of any necessary remedial works.

67. Associated with this is a dispute as to the extent of identifiable defects: there was an argument as to the sufficiency of UoM's pleading which I considered in my previous judgment. In that regard UoM relied upon investigations carried out by BRE and Bickerdike Allen Partners.

68. It is LOR's suspicion that Mr Conisbee in particular took a view as to remedial works less favourable to UoM than that of Mr Stagg.

69. It may be that this is the case, although my reading of Mr. Conisbee's reports appears to me to show more of an evolution of views than a firm view as to what would be required: thus in his second report at paragraph 6.3 he said:

> "The full extent of the work required will not become clear until the remedial works have commenced. It should be anticipated that the remedial work will become more extensive than here specified."

Expert shopping?

70. In their letter of 11 August 2022 LOR's solicitors set out LOR's position as follows:

> "As you know the parties are presently considering Lists of Issues for Disclosure in relation to the above proceedings as well as preparing more generally for the CCMC in October. As part of the foregoing, LOR has considered the extent to

which the University should make disclosure of documents arising out of the University instructing experts who it no longer instructs.

"Three experts fall into this category:

1. The University instructed Dr Stephen Garvin of the BRE to investigate and report on the brickwork façade issues at University Place in April 2013. A report from Dr Garvin was shared by the University with LOR (among others) in December 2013. LOR were also provided with a response by Dr Garvin to comments made on his report by LOR and others in April 2014. This makes clear that Dr Garvin had been and continued to be instructed at a time when a process of engagement between the experts for the purposes of litigation had occurred. When the University subsequently wrote to LOR in November 2014 advising that it had *"now formally appointed Dr Ron Casson and Ms Philippa Gavey, of Bickerdike Allen Partners, and Alan Conisbee and Associates trading as Conisbee, as the University's experts"*, no explanation was given as to why the University did not wish to continue with Dr Garvin as its expert (despite our letter to Eversheds dated 19 January 2016). However, the University continues to rely upon parts of the work of Dr Garvin, which the University has selected (to support its case on the alleged defects in the brickwork and how they should be remedied). For example, the Cross-Referencing Document referred to at paragraphs 63-68 of the Judgment dated 25 November 2020 stated: *"All defects pleaded in the PoC have been noted during inspections (including those undertaken by BRE which, as noted in the introduction to App 1 are not collated in App 1, and by UoM's appointed experts)"* (see also the reference to *"photographs in the BRE report"* on the second page of the Cross-Referencing Document). We understand the reference to *"BRE"* to be to Dr Garvin.

2. Reports from Dr Casson and Mr Conisbee were provided to LOR in February 2016 after the University's Pre-Action Protocol Letter of Claim. Since that time, Dr Casson has not been involved in the claim on behalf of the University. Nevertheless, the University continues to seek to rely upon parts of the work of Dr Casson, which the University has selected (to support its case on the alleged defects in the brickwork and how they should be remedied). See the introduction to Appendix 1 to the Amended Particulars of Claim dated 9 March 2021, which refers to Dr Casson's report dated 24 February 2016. It is also understood that Appendix 4 thereto was produced to Dr Casson or under his supervision.

   We infer expert shopping in respect of the University ceasing to instruct Dr Garvin and Dr Casson given the absence of any explanation for the same. LOR can only reasonably infer that their opinions were developing or had developed in such a way that the University considered that their evidence would be adverse to its case. In addition, in respect of both experts (and Mr Conisbee – see below), the inference of expert shopping is greatly reinforced by the cumulative effect of the University having ceased to instruct three different experts.

3. Mr Conisbee has been replaced by his colleague, Mr Bob Stagg. As we have noted previously, in essence, Mr Conisbee had advocated a repair

rather than replacement scheme in sections 10-11 of his report dated 10 October 2019 (see LOR's Defence at paragraph 192.2). Mr Stagg now advocates a replacement scheme. Any suggestion that the University could reasonably proceed to replace the entire brickwork façade of Blocks 1-3 based on Mr Conisbee's opinion at that time would have been hopeless. His evidence was very likely to be fatal to the quantum case advanced by the University and would have required the University to alter the claimed remedial works and costs. In contrast, Mr Stagg's current position appears to be broadly supportive of the University's pleaded case. We note that Mr Conisbee is said to have been unable to continue having retired because of illness. However, we note that Mr Conisbee is still today named on his firm's website as a consultant and appears to be held out as available for work. In this regard, Mr Stagg (who, at 69 years old, is only 3 years younger than Mr Conisbee, and also past retirement age) is held out in the same way (as a consultant) on the same webpage. We note that both are stated on the website as having retired as directors. We understand that Mr Conisbee retired as a director on 7 July 2017 but continued to work on this matter for another 2½ years.

Given the foregoing, we infer expert shopping. In addition, it is reasonable to infer that ever since 10 October 2019 (*at the very latest*) the University had been seeking to change to an expert who would endorse a replacement scheme and that the University would have changed expert whether or not Mr Conisbee retired. For the avoidance of doubt, in light of paragraphs 3.1.1, 4.1.1 and 5.1.1 of Mr Stagg's draft report of 22 May 2020, it is not tenable for the University to suggest that Mr Stagg's opinion differs from that of Mr Conisbee as a result of further investigations which post-date Mr Conisbee's involvement; rather, those paragraphs make plain that Mr Stagg's view fundamentally differed from that of Mr Conisbee based on materially indistinguishable evidence.

Again, the University continues to seek to rely upon parts of the work of Mr Conisbee, as selected by the University (to support its case on the alleged defects in the brickwork and how they should be remedied). See paragraphs 102 and 103 of the Amended Particulars of Claim dated 9 March 2021 as well as the introduction to Appendix 1 thereto (which refers to Mr Conisbee's draft report dated 22 February 2016 and supplementary report dated 18 May 2017. The University also relies upon (including in Appendix 1) parts of the work of Martech, in particular a report dated 24 January 2020 which was produced in accordance with a brief produced by Mr Conisbee dated 5 December 2019."

71. UoM's solicitors (Clyde & Co) responded to that letter at length on 13 September 2022. Because of the allegations made on behalf of LOR, it is appropriate to set out UoM's response in full:

> "We refer to your letter dated 11 August 2022 in which you seek the University's agreement to disclose documentation relating to experts that are no longer instructed by it.

"You state that three experts fall into this category, Dr Stephen Garvin of the BRE, Dr Ron Casson of Bickerdike Allen Partners and Alan Conisbee of Alan Conisbee and Associates and allege (wrongly) that the University is 'expert shopping'.

"You infer that the University ceased to instruct these individuals on the basis that *"their opinions were developing or had developed in such a way that the University considered that their evidence before the Court would be adverse to its case."*

"These allegations are without merit, unsupported by any of the facts and, in some respects, disingenuous. The University sets out its position in relation to each of the three experts below.

Dr Stephen Garvin

"Dr Garvin (of BRE) was instructed by AA Projects Ltd on behalf of the University in 2013 to conduct a detailed site survey and prepare a concluding report. As you state in your letter of 11 August 2022, Dr Garvin was instructed at a time when a process of engagement and cooperation between the parties had occurred, such was the level of engagement at this time that Dr Garvin/BRE were selected from a list of potential candidates that had been circulated between the parties.

"This is confirmed by the letter of instruction dated 1 March 2013, a copy of which is appended to this letter, which states:

> *"In essence, the University is now looking for a suitably qualified and competent organisation to be employed as an independent specialist in this matter to carry out a detailed site investigation and prepare a concluding report. The whole construction team and University are still in open discussion about the problems being encountered and several members of the construction team have repeatedly emphasised their desire to rectify the problems to the University's satisfaction when a detailed solution is agreed (although this does of course remain to be seen)."*

"The University shared the BRE report in 2013 with all parties and then BRE's follow up comments in April 2014. The follow up comments responded to queries from JMP, LOR and Ramboll (now Gifford). At tis stage, all parties (i.e., The University, JMP, LOR and Ramboll) had and expressed concerns about the quality and completeness of BRE's investigations and felt further information was necessary before reaching a view on the cause of the problems and any potential repair scheme. This culminated in a proposal by the University that as new report be commissioned from a jointly instructed expert. It is simply wrong to suggest that LOR is not aware of and is entitled to know what views Dr Garvin expressed and why the University no longer instructs him. It is equally wrong to suggest that there is any 'expert shopping' in this regard.

"In the email exchanges which followed this proposal, Mr Dave Saville of LOR sent an email dated 29 May 2014 which said, *"Apologies for the time taken to respond but I now have "approval in principle" for us to jointly appoint an independent expert to commission a new report, as suggested by yourselves within the correspondence noted above."* The individual who LOR was providing its approval in principle to by way of its email of 29 May 2014 was Dr Ron Casson.

"However, as not all of the parties agreed to his appointment, the joint appointment did not proceed and the University instructed Mr Casson on a unilateral basis.

"On that basis, your comments that the University gave no explanation as to why it did not wish to continue with Dr Garvin as its expert are entirely disingenuous particularly in light of the correspondence between the parties at that time.

"Furthermore, as regards your comments that the University continues to seek to rely upon parts of the work of Dr Garvin, the University's pleaded case is contained within the Amended Particulars of Claim and accompanying appendices. Appendix 1 states *"Investigations also took place in 2013 but it has not been possible to identify the specific areas on each elevation that were investigated for those investigations."* For clarity, the 2013 investigations are the BRE investigations.

Dr Ron Casson

"The history to the appointment of Dr Casson has been set out above. Dr Casson was instructed as a Construction Technologist with specialist knowledge of construction materials. He was not instructed as an architect or structural engineer.

"LOR has been in possession of Dr Casson's report in this matter for some significant time, including copies of Dr Casson's instructions (appendix 2 of his report). His report was listed in UoM's initial disclosure.

"We note your assertion that Dr Casson's evidence is relied upon by the University particularly in respect of how to remedy the defects. However, we can see nothing in any of the material that you refer to that suggests this. Please clarify.

"Further, having been in possession of the reports of Dr Garvin and Dr Casson for some considerable time it is not understood the basis upon which you *"reasonably"* infer that their opinions were developing or had developed in such a way that the University considered that their evidence before the Court would be adverse to its case. There is no need for any inference to be made because you are in possession of the reports which make it clear that your assertions in this regard are incorrect.

Mr Conisbee

"Your interpretation of Mr Conisbee's report dated 10 October is incorrect. He did not advocate a repair scheme and the words of the report do not support your assertion.

"At section 10 of Mr Conisbee's report of 10 October 2019, Mr Conisbee was responding to three specific questions raised by us namely:

- Can the buildings be left as they are, without further investigation or remedial work?

- What temporary or permanent remedial works are needed to ensure the building is deemed safe?

- What further investigations are necessary to inform any future remedial works?

"Mr Conisbee's comments in section 10.2 of his report (referred to in LOR's Defence at paragraph 129.2) was in answer to our second question. At paragraph 10.1.3 of 10 October 2019, Mr Conisbee states *"In the course of investigations to date, a number of defects in the installation of brickwork support brackets have also come to light. These will need remedial action in the long term, but their full extent has not yet been established."* When read as a whole it is clear that Mr Conisbee's view is that further investigatory work was required in order to understand the extent of the remedial work required.

"As such, it is no surprise that Mr Stagg's opinion has developed since Mr Conisbee's retirement as further investigation works have taken place.

"As you know, Mr Conisbee was unable to continue in his role as an expert due to the effects of ill health …. this was reported to us in 2019 as the reason for his resignation from his role as expert structural engineer.

"As such, your suggestions regarding expert shopping are without foundation and entirely incorrect."

72. I am willing to accept that to the extent that UoM do not wish to call evidence from Dr. Garvin and Dr. Casson there has been a change of position which may engage the discretion of the Court discussed above. Certainly their evidence was originally deployed to support particularisation of UoM's case. What is not entirely clear to me is how far UoM will seek to rely upon their findings, but at a minimum their evidence will probably be part of the historical evidence as to the state of the buildings.

73. However, I accept that the position in respect of these two witnesses is as described in Clyde & Co.'s letter of 13 September 2022. To the extent that they expressed views as to the existence of defects, if to no greater extent, it seems to me that the experts now to be called (including Mr. Stagg) will be replacing them: the overlap may go further.

74. That seems to me to be sufficient on the authorities to engage the Court's discretion to impose a disclosure condition on the grant of permission for UoM to call Mr. Stagg.

75. That said, the case is a long way from the sort of abuse or possible abuse of the expert witness process in respect of which the authorities cited above show that the Court is astute to guard its procedure. What Clyde & Co's letter shows is an openness which runs contrary to the hidden abuse which "expert shopping" will typically involve.

76. On the other hand, it is right that their evidence should be available to the Court, the Defendants and the Third Party, not because of suspicions of expert shopping, but because it is or may be relevant evidence of primary facts.

77. That legitimate interest is, in my judgment, satisfied on the facts of this case by the disclosure already given.

78. For the above reasons, I have seen nothing in respect of these two experts to justify any suggestion of expert shopping, and certainly nothing which suggests such evidence of

expert shopping as to justify the disclosure of the wider categories of documents suggested.

79. In respect of Mr. Conisbee, who is the predecessor of Mr Stagg, the position is even stronger in favour of UoM.

80. There is in my view sufficient evidence before me to satisfy me that the reason why he is no longer to be called is because of an unfortunate deterioration in his health.

81. In those circumstances, I reject the suggestion that the reason why he is no longer to be called is anything other than for health reasons.

82. In any event, in my judgment the interests of the Defendants are sufficiently protected by the disclosure already given.

83. In reaching the above conclusions, I have kept well in mind the Court should be astute to consider cases of apparent or possible expert shopping, bearing in mind that the adverse parties will usually have limited visibility of the true reasons for decisions made by a party seeking to change experts.

84. However, in this case, it seems to me necessary to keep in mind that the heart of LOR's attack was that UoM was seeking to improve its case as to necessary remedial works. In that regard the fact that there were continuing investigations and changing perceptions of what remedial works might be necessary is unsurprising, and is not to be lightly regarded as evidence of UoM abusing the process of the Court by expert shopping.

85. What seems to me to matter most on the facts of this case is that the Court, the Defendants and the Third Party should have relevant primary evidence revealed by the investigations available to them. In my judgment the extensive disclosure already given suffices to satisfy any requirement as to the calling of Mr. Stagg.

86. Of course, in reaching that conclusion I am not pre-judging any issues which may arise hereafter as to the relevant scope of documentary disclosure.

Conclusion in respect of expert evidence

87. Accordingly I decline LOR and JMP's invitation to attach conditions to the grant of permission to UoM to call expert evidence.

Cost budgeting

88. In addition to the dispute as to the terms upon which expert evidence can be adduced, there is a dispute between the parties as to the approval of the cost budgets put forward.

89. In the correspondence, Clyde & Co on behalf of UoM tried to persuade the other parties to dispense with cost budgets. This attempt was unsuccessful, and before me Ms Stephens did not press an objection to the Court considering the budgets.

90. In this case, as I have set out above, when the proceedings were issued, the amount claimed was less than £10 million. It is now anticipated by UoM that the claim will

comfortably exceed £10 million. (Obviously liability and quantum are both very much in issue).

91. The relevance of the £10 million figure is the following provision in CPR 3.12:

> "3.12
>
> (1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except—
>
> (a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or
>
> (b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or
>
> (c) where the proceedings are the subject of fixed costs or scale costs or where the court otherwise orders.
>
> (1A) This Section and Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders."

92. Practice Direction 3E referred to in that Rule provides:

> "A. Production of Costs Budgets
>
> **Part 7 multi-track claims with a value of less than £10 million**
>
> 1. The Rules require the parties in Part 7 multi-track claims with a value of less than £10 million to file and exchange costs budgets: see rules 3.12 and 3.13.
>
> Other cases
>
> 2. In any case where the parties are not required by rules 3.12 and 3.13 to file and exchange costs budgets, the court has a discretion to make an order requiring them to do so. That power may be exercised by the court on its own initiative or on the application of a party. Where costs budgets are filed and exchanged, the court will be in a position to consider making a costs management order: see Section C below. In all cases the court will have regard to the need for litigation to be conducted justly and at proportionate cost in accordance with the overriding objective."

93. In *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*[9], Coulson J. said:

> "27. I take the view that the exercise of the court's discretion under CPR 3.12(1) is unfettered. There is nothing in the CPR to suggest otherwise. The discretion extends to all cases where the claim is for more than £2 million (old regime) or £10 million (new regime). In such a case, if there is an application for the filing

[9] [2014] EWHC 3546 (TCC); (2014) 6 Costs LR 1026

> and exchanging of costs budgets, the court has to weigh up all the particular circumstances of the case, in order to decide whether, in the exercise of its discretion, such budgets should be provided. There is no presumption against ordering costs budgets in claims over £2 million or £10 million, and no additional burden of proof on the party seeking the order.
>
> "28. Costs budgets are generally regarded as a good idea and a useful case management tool. The pilot schemes (including the one here in the TCC) have worked well. They are not automatically required in cases worth over £2 million or £10 million, principally because the higher the value of the claim, the less likely it is that issues of proportionality will be important or even relevant. A claimant's budget costs of £5 million might well be disproportionate to a claim valued at £9 million, but such a level of costs is probably not disproportionate to a claim worth £50 million. Thus, whilst the fact that the claim is worth over £2 million or £10 million means that the court has to exercise its discretion in favour of the application before the filing and exchange of costs budgets are ordered, it seems to me that such an exercise of discretion should take into account all of the relevant material, without prejudging or making any specific assumptions one way or the other."

94. I would also refer to the following passage from the judgment of Foskett J. in *Simpkin v The Berkeley Group Holdings plc*[10]:

> "[49] There is no doubt that on the figures deployed this is potentially an extremely large claim, possibly exceeding £10 million, and it might be said not the kind of claim where costs budgeting is to be considered, although the observations of Mr Justice Coulson in *CIP Properties (AITP) Ltd v Galliford Try Infrastructure Ltd* [2014] 6 Costs LR 1026 at para 27 are relevant in this regard. However, this is not a contest between two giant corporate entities – it is a dispute between a private individual and one giant corporate entity. The claimant may have been paid well during his time with the defendant and he may have, since his dismissal, acquired a job, that by the standards of many people, is well paid, but his resources for conducting litigation are minuscule by comparison with those available to the defendant. What the defendant chooses to pay its lawyers is, of course, a matter entirely for it to decide upon. Those lawyers will not be restricted to recovering from their clients sums well in excess of anything that may be permitted by the court by way of costs budgeting. However, the advantage of costs budgeting from the claimant's point of view is that he, or those who may in due course fund him, will know that it would have been assessed as reasonable in advance of proceeding further, rather than simply awaiting the outcome of an assessment in due course."

95. In the light of those authorities it seems to me that it was sensible of UoM to concede that the Court should consider the reasonableness of the cost budgets put forward.

96. However, when doing so, it seems to me that I should keep in mind that had UoM known what it does now when the proceedings were issued, so that a claim in excess of £10 million had then been put forward, UoM would have been in a position to argue

[10] [2016] EWHC 1619 (QB); [2017] 1 Costs LR 13

that no costs management order should be made. This seems to me an important factor in deciding whether the estimates put forward are proportionate and reasonable.

97. As to the general principles applicable, these are well established:

i) Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made: CPR 3.15(2).

ii) The court may not approve costs incurred before the date of any costs management hearing, but may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of budgeted costs: CPR 3.17(3).

iii) A costs management order must record the extent to which the budgeted costs are agreed between the parties. In respect of the unagreed budgeted costs, it must record the court's approval after making appropriate revisions: CPR 3.15(2)(a)-(b).

iv) When reviewing unagreed budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs "fall within the range of reasonable and proportionate costs": CPR PD3E, paragraph 12.

v) A costs management order concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes to assist the court in fixing a budget, it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget: CPR 3.15(8).

98. In paragraphs [9] and [10] of his judgment in *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC); [2015] 4 Costs LR 729, Stuart-Smith J. said:

> "9. The Costs Budgeting regime has led to disagreement about the extent of detailed argument that is appropriate when considering Precedent Hs. Experience in the TCC has shown that most costs budgeting reviews can and should be carried out quickly and with the application of a fairly broad brush. Only exceptionally will it be appropriate or necessary to go through a Precedent H with a fine tooth-comb, analysing the makeup of figures in detail. For reasons which will become apparent, however, this is an exceptional case which justifies a more detailed approach. The justification lies in the fact that the aggregate sum being put forward for approval is so disproportionate to the sums at stake or the length and complexity of the case that something has clearly gone wrong. The court's interest in maintaining a robust and just approach to costs management requires an investigation into what has gone wrong for two reasons. First, to enable it to reach a figure which it prepared to approve; and, second, so that the court's determination to exercise a moderating influence on costs is made clear.

> "10. The parties are agreed that the approach adopted by Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC) is applicable in the circumstances of this case. I also agree, though Coulson J's approach may better be seen as a guide rather than a straightjacket. On the facts of that case, he considered:
>
> "i) The Proportionality of claimant's Costs Budget [37-45];
>
> "ii) The Reasonableness of the claimant's Costs Budget [46-82];
>
> "iii) Summary of Options [83-95];
>
> "iv) Conclusions on the Available Options [96-98].
>
> "I shall follow his lead."

99. As I have said above, because of shortage of time at the hearing of the CMC, the parties agreed that I should consider the cost issues on the papers.

100. The headline figures proposed by the parties are as follows:

(1) UoM: £3,102,202.30 of which £1,538,496.50 has already been incurred, leaving £1,563,705.80 of estimated costs.

(2) JMP: £2,006,967.13 of which £809,427.67 has already been incurred, leaving £1,197,539.46 of estimated costs.

(3) LOR: £2,704,900.44 of which £856,337.94 has already been incurred, leaving £1,848,562.50 of estimated costs.

(4) Gifford: £968,347.27 of which £271,557.27 has already been incurred, leaving £696,790 of estimated costs.

101. The parties' incurred and projected costs are as follows:

Stage	UoM	JMP	LOR	Gifford
Pre-Action Costs	£567,853.13	£40,645.61	£101,495.70	£85,154.87
Issue/Statements of Case	£618,435.35	£240,681.93	£449,579.82	£77,415.50
CMC	£66,000	£46,641	£95,845.42	£30,000
Disclosure	£348,302.50	£336,254.69	£229,492.50	£120,035
Witness Statements	£98,750	£77,550	£47,775	£73,000
Expert Evidence	£386,645	£381,629.66	£580,827.30	£186,854.90
PTR	£39,425	£41,220	£58,600	£20,815
Trial Prep	£378,610	£343,157	£560,600	£167,120
Trial	£226,150	£306,485	£405,037.50	£95,750
ADR	£186,801.75	£192,702.24	£158,297.20	£51,197
Remedial Works	£185,229.02			
Amendments			£17,450	
Architect Expert				£61,005

102. As the authorities set out above show, I am required to approach this exercise "with the application of a fairly broad brush".

103. There is nothing in Gifford's budget which can sensibly be regarded as disproportionate or unreasonable.

104. Accordingly, what I am really concerned with are the budgets of UoM and the two Defendants. In considering those budgets, I do of course take into account Gifford's criticisms of LOR's budget as well as the cross-criticisms of the other three parties.

105. In considering those three budgets, I start, as I have already indicated, from the position that this is a relatively high value claim (now in excess, it is said, of £13,741,464). Given the likely amount of the claim, I do not view the amounts put forward by any of the parties as being immediately surprising.

106. Secondly, having considered the pleadings there is no doubt in my mind that this is a relatively complex case, involving a number of parties, and also very substantial areas of dispute both as to liability and quantum. Having regard to those matters, I do not find the estimates for disclosure or expert evidence surprising.

107. Thirdly, it is noticeable that both Defendants project costs in excess of £2 million, and that LOR's future estimated costs exceed UoM's.

108. I have considered the detailed submissions put before me in respect of the three budgets. In my view, using the required broad brush, none of those budgets is disproportionate or unreasonable. Accordingly, I approve each of those budgets.

Disclosure Review Document

109. LOR asks the Court to order that Clyde & Co. be named as custodians in respect of disclosure issues 15 and 16 (*"What advice … UoM received as to an appropriate remedial scheme … Whether UoM's decision to replace is/was reasonable"*).

110. In resisting this proposal UoM contends (inter alia) that any relevant and non-privileged documents held by Clyde & Co. will also be held by the University.

111. This seems to me to be likely to be correct. Accordingly I decline to order that Clyde & Co. should be named as custodians.

112. If in due course there appear to be omissions in the scope of documentation disclosed there can, of course, be an application for specific disclosure, supported by appropriate evidence.