IN THE BRISTOL COUNTY COURT **CLAIM NO. 6BS00303**

BEFORE MR RECORDER R MOXON BROWNE QC

B E T W E E N:

ANDREW CARRUTHERS

Appellant

-and-

(1) MP FIREWORKS LTD
(2) BALFOUR CONVENIENCE STORES LTD

Respondents

J U D G M E N T

1. This is an appeal from a case management decision of Deputy District Judge Howell sitting at the Bristol County Court on 14th August 2006, when he gave permission to the Claimant to rely on a pyrotechnics report from an expert, Mr Miller, subject to the disclosure to the Defendants of an earlier report which the Claimant had obtained from another pyrotechnics expert, Mr Harriman.

2. The relevant order was made in the context of a number of other directions for trial, including provision for medical expert witnesses, all of whom were identified by name, in accordance with modern best practice.

3. In giving permission for the Claimant to rely on a pyrotechnics report from Mr Miller only on condition that the earlier report from Mr Harriman was disclosed, the Deputy District Judge based himself on the decision of the Court of Appeal in *Vasiliou v. Hajigeorgiou* (2005) EWCA Civ. 236, where Dyson LJ said at paragraph 27:

"It needs to be emphasised that if a party needs the permission of the Court to rely on an expert witness B in place of expert witness A, the Court has 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".[1]

4. If the guidance proffered by the Court of Appeal in *Vasiliou* applies to the present case, the Deputy District Judge was plainly right to exercise his discretion as he did. However, if *Vasiliou* has no real application, it would follow that the Deputy District Judge's approach to the matter was inappropriately constrained, in which case the parties are agreed that I should look at the matter afresh, in the exercise of my own discretion.

5. The Appellant argues that the passage cited from *Vasiliou* by the Deputy District Judge applies only to those cases where a party needs the Court's permission to rely on a new expert *in place of* a previous expert, which is not the position in the present case, since the report from Mr Harriman had been obtained before the action started, and hence was never the subject of any direction by the Court naming him as the expert whose evidence the Claimant was permitted to call. Accordingly, argues the Appellant, while the Claimant needed permission to rely on Mr Miller's report, he did not need permission to rely on it *in place of* any report previously identified by the Court.

6. This argument was advanced to the Deputy District Judge at the hearing below, and was rejected, on the grounds that the general principle enunciated in *Vasiliou* is clear, and that in this context there is no relevant distinction between unidentified experts' reports obtained before an action is started, and identified reports obtained with the Court's permission after the action has started. The issue thus stated is in my view at the nub of this appeal.

The Facts

7. The Claimant was injured by an exploding firework manufactured by the First Defendant and sold by the Second Defendant, on 19th August 2003. He suffered serious injuries, including to his left eye. Prior to the commencement of proceedings, the Claimant instructed a fireworks expert, Mr Harriman, to report. The Claimant's solicitors told the Defendants' solicitors that they were taking this step, and I was told that at that time an undertaking was given that any testing of the remains of the

[1] In citing this passage, in his own judgment the Deputy District Judge mistakenly transposed "A" and "B". Nothing turns on this error.

firework by Mr Harriman would be *"non-destructive"*.

8. Mr Harriman has apparently provided a report, but the Claimant does not in the event wish to rely upon it, and has not disclosed it. As noted above, the Claimant now wishes to rely on Mr Miller as his pyrotechnics expert, and hence applied for permission to do so from the Court.

9. The reason for the Claimant's wish to change experts has not been explained; and nor has any information at all been provided about what work Mr Harriman has carried out, or what his views are. Absent a direction requiring the Claimant to disclose Mr Harriman's report, the Claimant is within his rights to keep its contents secret. But in doing so, without explanation, he is vulnerable to the inference that the reason for not wishing to rely upon or disclose this report is that its contents are to a greater or lesser extent adverse to the Claimant's case. In other words, it is a fair inference that the Claimant is *"expert shopping"*, which as the Deputy District Judge noted, is a practice which the Court of Appeal has said should be discouraged, and which can be discouraged by making the type of order made by the Deputy District Judge in this case. See *Beck v. M.O.D* (2003) EWCA 1043 per Ward LJ at paragraph 30 and Lord Phillips MR at paragraph 35; as well as *Vasiliou*, referred to above.

The Law

10. The Appellant relied on the decision of the Court of Appeal in *Carlson v. Townsend* (2001) EWCA 511 in support of his argument before the Deputy District Judge and in arguing this appeal before me.

11. *Carlson* was a case governed by the Pre-Action Protocol for Personal Injury Claims. In accordance with the Protocol, the Claimant gave the Defendant the name of a medical expert he proposed to instruct, and who was then instructed on the basis that he was an expert mutually acceptable to both parties. The Claimant then declined to disclose his report, and instead disclosed a different report from a different doctor, who had not previously been approved by the Defendant.

12. A District Judge ordered the first report to be disclosed, on the basis that it had been provided pursuant to the parties' joint instructions. The County Court Judge reversed this finding, and was upheld by the Court of Appeal (Simon Browne, Brooke and

Mance LJJ) which held that there was nothing in the Protocol to enable the Court to override the substantive law of legal professional privilege, which attached to the first report.

13. It is important to note that this issue was fought out entirely in the context of the Pre-Action Protocol. There was no question of applying to the Court for permission to rely on an expert's report, in an action which had already started, or of attaching conditions to such permission. The short question was whether a medical report obtained by one party with the approval of the other, pursuant to 3.14 of the Protocol, thereby becomes subject to disclosure. The answer was "no". The Court recognised that the second report had been obtained in breach of the Protocol, but noted that to override the Claimant's privilege in the first report was not a lawful sanction for such a breach.

14. However Brooke LJ may have gone a little further in adding, at paragraph 36:

"It was not [the] aim [of the Protocol] to deprive a Claimant of confidential pre-action advice about the viability of his claim, which he would be at liberty to discard if he did not agree with it".

15. This passage was relied upon by the Appellant as supporting a submission that prior to the commencement of an action, the Claimant has a right to shop freely for helpful expert advice, without fear of having subsequently to make disclosure of it, and that this right is only curtailed after the action has started and the Court has begun to give directions as to which particular experts (usually named) it will permit to be called.

16. While I can see that there might be some grounds for drawing such a distinction, I would observe that the Appellant's submission goes wider than anything actually said by Brooke LJ. On the face of it, all he is saying is that there is nothing in those detailed provisions of the Protocol which deal with the instruction of mutually acceptable experts, which has the effect of preventing a party from claiming privilege for a report prepared by such an expert.

17. *Carlson* was cited with approval in *Jackson v. Marley Davenport* (2004) EWCA Civ. 1225 (Peter Gibson, Tuckey and Longmore LJJ) in relation to the question of whether the privilege attaching to a report prepared by an expert for the purposes of a

discussion with lawyers is lost, if the same expert subsequently produces a further report upon which reliance is to be placed at the trial. The Court was emphatic that nothing in the CPR was intended to have the effect of overriding that privilege.

18. It is however also clear that if fairness and justice required the disclosure of an earlier, privileged, report as a condition of permission to rely on a subsequent report by the same expert, (or indeed another expert) the Court would have power to make that order. If for example the omission of material from an earlier report had the effect (or might be perceived to give rise to the risk) that a subsequent report was partial or incomplete, and hence potentially misleading, there is no doubt that the Court could order the first report to be disclosed so that the full picture was before both parties and the Court. See Longmore J at 18.

19. The imposition by the Court of a condition that an earlier report be disclosed if a later report is to be relied upon is illustrated by *Beck v. Ministry of Defence* (2003) EWCA Civ. 1043, a case where the Defendant, the Ministry of Defence had instructed an expert psychiatrist, and had obtained leave to rely on his report. The Ministry of Defence then wished to change to another expert, which required the leave of the Court, not least because the proposed change involved the need to require the Claimant to submit to a further psychiatric examination. A detailed explanation was given for why the Ministry of Defence wanted to change experts. It was not because their original expert had advised in terms which were adverse to their case, but simply that the report was of such poor quality that the Defendant had lost all confidence in its author.

20. The Court of Appeal affirmed permission for a new expert to be appointed, on condition that the abandoned report was disclosed along with the new report. The basis for this condition was variously expressed by each member of the Court of Appeal as follows:

At paragraphs 25 and 26 Simon Browne LJ said:

"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 Lane v. Willis (1972) 1 WLR 329, as to expert shopping, where he said] 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 ...

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 this would be properly permissible, and certainly to my mind no such circumstances exist here ..."

At paragraph 30, Ward LJ said:

"Expert shopping is to be discouraged, and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again".

At paragraph 34, Lord Phillips MR said:

"The answer in this case, and in any case where a similar situation arises, is that proposed by Simon Browne 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 the Claimant ... with the reassurance that the process of the Court is not being abused. In this way, justice will be seen to be done".

21. It is noteworthy that Simon Browne LJ was a party to the earlier decision in *Carlson*, referred to above; while *Beck* was cited in argument in *Jackson*, which was itself expressed by Longmore LJ to follow *Carlson*. To my mind it is really inconceivable that the Court in *Beck* did not have the decision in *Carlson* in mind, nor that the Court in *Jackson* was not similarly aware of the superficial difference between the approach in *Beck*, and the approach in *Carlson*. The point seems to me to be that disclosure of an earlier report can always be made a condition of permission to rely on a later report; but if no such permission is sought, the Court simply has no power to override the privilege in the earlier report.

22. This point seems to me clearly illustrated by the case upon which the Deputy District Judge based his decision in the present case; that is the case of *Vasiliou* 2005 EWCA Civ 236.

23. In *Vasiliou*, a case about property values, the Claimant wished to change valuation experts, and was permitted to do so on condition that he disclosed the earlier, abandoned report. On appeal, the Court of Appeal held that no such condition could be imposed, because (but only because) the Claimant already had the benefit of a direction permitting him to call any expert with the relevant expertise, rather than a particular named expert. The Claimant could therefore call any expert he liked, so long as that expert had such expertise.

24. Although the appeal was allowed on this ground, the Court went out of its way to emphasise it disapproved of expert shopping, and stated in terms that if the Claimant had needed permission to call the second expert, the disclosure of the earlier report would have been a proper condition to impose (see per Dyson LJ at paragraph 32).

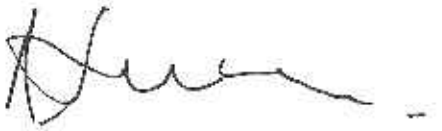
25. As pointed out above *Vasiliou* was the case relied upon by the Deputy District Judge in the present case, and strongly indicating that where permission to rely on an expert is sought, a condition ought to be imposed that any earlier report by another expert in the same discipline ought to be disclosed. I think the Deputy District Judge was right to impose that condition in this case. He had the power to do so, and he exercised that power correctly in accordance with clear guidance from the Court of Appeal.

My own view

26. If it fell to me to exercise my own discretion in this case, I would have taken the course followed by the Deputy District Judge, for the reasons given by him. In addition it is my view that where as in this case an expert has been instructed to perform tests on an exhibit (such as an exploded firework) open justice and fairness will usually demand that the results of those tests should be put before the other experts in the case, and before the Court. This will especially be so where there is a perception that those tests may have caused some physical alteration (albeit short of "destruction") to the exhibit in question. In such cases it is my view that justice will usually require the disclosure of the relevant report, whether or not its author is called to give evidence. In the present case the nature of the tests carried out by Mr Harriman, and their effect if any on the remains of the firework examined by him, are a secret in the hands of the Claimant. I think that is unfair, and at the lowest gives rise to the perception of a potential injustice. That seems to me an additional reason for

exercising a discretion in favour of ordering disclosure of Mr Harriman's report, as a condition of the Claimant's permission to rely on a further report from Mr Miller.

27. I therefore dismiss this appeal. I understand that it is agreed that costs should follow the event, and will so order. I will hear Counsel as to any further matters I should deal with.



R MOXON BROWNE QC
A DEPUTY JUDGE OF THE HIGH COURT