

**Neutral citation number: [2023] EWHC 1681 (Comm)**

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**IN MANCHESTER**  
**CIRCUIT COMMERCIAL COURT**

Case No: CC-2022-MAN-000068

Courtroom No. 42

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester  
M60 9DJ

Wednesday, 19<sup>th</sup> April 2023

Before:  
HIS HONOUR JUDGE HODGE KC  
Sitting as a Judge of the High Court

B E T W E E N:

POLYPIPE LIMITED

Claimant

and

PETER RUSSELL DAVIDSON

Defendant

**MISS TAMARA OPPENHEIMER KC and MR MAX KASRIEL (instructed by Squire Patton Boggs (UK) LLP) appeared on behalf of the Claimant**  
**MR CHRISTOPHER COOK (instructed by Mills & Reeve LLP) appeared on behalf of the Defendant**

**APPROVED JUDGMENT**

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**HIS HONOUR JUDGE HODGE KC:**

1. This is my extemporary judgment on applications in a claim brought by Polypipe Limited against Mr Peter Russell Davidson in the Circuit Commercial Court in Manchester in proceedings under case number CC-2022-MAN-000068. The claim form was issued on 30 April 2021 in the Commercial Court in London. The claim arises out of alleged breaches of warranties contained in an agreement for the sale by Mr Davidson of shares in the Alderburgh Group of companies, which was involved in the design, supply, manufacturing and installation of building protection products and systems, including, specifically, pluvial cubes for the collection of rainwater.
2. The breaches of warranty relate to three projects in Ireland and the claim is for a sum in excess of £1.7 million. The case management conference took place before Cockerill J in London on 8 July 2022. The judge made an order transferring the proceedings to the Circuit Commercial Court in Manchester; and she gave procedural directions which have led to the matter being listed for trial before HHJ Bever in Manchester on several dates in June 2023.
3. There is a pre-trial review presently listed before HHJ Halliwell for an hour on Monday 22 May. Friday 16 June is set aside for pre-reading; and the trial is scheduled to commence on Monday 19 June and continue over the following six days, ending on Tuesday 27 June, which would be the seventh day of the actual trial. Three further days, from Wednesday 29 June to Friday 1 July, have been set aside for HHJ Bever to consider his judgment.
4. Cockerill J's directions included provision for expert evidence in three separate fields, including ground engineering. Paragraph 9.2 of her order confined that expert evidence to a number of specified issues. However, no expert in the field of ground engineering was identified, nor was any provision made for any such expert to be identified within any particular period of time. It is that omission which has given rise to certain of the difficulties in the present case. As a matter of standard practice, I normally include provision either for a named expert in any identified field, or for such expert to be identified within a relatively short timescale, in order to preserve the court's control over any potential

change in the identity of the expert. It is regrettable that that was not done in the instant case.

5. The case management directions for expert evidence included provisions for simultaneous exchange of expert reports no later than 4pm on 19 January 2023, for a meeting of experts of like disciplines by 9 February 2023, and for a joint written statement by 4pm on 23 February 2023, with any short supplemental expert reports being exchanged simultaneously by no later than 4pm on 9 March 2023. If the expert reports could not be agreed, the parties were to be at liberty to call expert witness evidence at trial, limited to those experts whose reports had been exchanged under that order.
6. Although it is not clear whether it has in fact been sealed, those time limits were subsequently extended by a consent order agreed between the parties on 13 October 2022, whereby the period for exchanging expert reports was extended until 4pm on 9 March 2023, with the time for short supplemental expert reports being extended until 4pm on 27 April 2023. Those time extensions would not have threatened the trial date.
7. What has led to that trial date proving impracticable is the fact that on 16 March 2023, a further claim was issued by the claimant for further alleged breaches of warranties in the share purchase agreement arising out of the failure of tanks at two further sites in County Kildare in Ireland. That claim is proceeding in the Circuit Commercial Court in Manchester under claim number CC-2023-MAN-000020. The matter has proceeded as far as particulars of claim and an acknowledgment of service; but there is, as yet, no defence to those proceedings.
8. That state of affairs has led to the issue of three applications. The first was issued by the defendant on 8 March 2023 and is supported by a witness statement from Mr Richard Dawson-Gerrard dated 8 March 2023. He is a solicitor at Mills & Reeve LLP, representing the defendant. That application seeks an order striking out a witness statement of one of the claimant's intended witnesses at trial, Mr Steven Wilson. It also seeks disclosure of a draft report from Mr Wilson, and the suspension of the case management directions, including the vacation of the existing trial dates. That application is opposed by the claimant, which relies upon a witness statement of Mr Christopher Webber (his third)

dated 5 April 2023. Mr Webber is a solicitor with the practice representing the claimant, Squire Patton Boggs (UK) LLP.

9. The second application, which has effectively been superseded, was an application by the claimant, dated 9 March 2023, to suspend the litigation timetable. That has effectively been overtaken by a further application from the claimant, dated 17 March 2023, seeking directions for the new claim to be case managed and tried alongside the present claim which is presently listed for trial before HHJ Bever in June. That application is supported by the second witness statement of Mr Webber, dated 17 March 2023.
10. I should refer to the terms of the application notices in more detail. The defendant's application notice - the first - estimated the time for this hearing at one day. It expressed an intention to apply for orders that: (1) the witness statement of Mr Wilson be struck out, in whole or in part, in accordance with paragraph 5.2 of the Practice Direction 57AC; (2) that the claimant must disclose to the defendant (a) all reports, and draft reports, of its former expert, Mr Wilson, relating to the matters which are the subject of these proceedings, and (b) any other material containing, or expressing, Mr Wilson's opinion in relation to the matters which are the subject of these proceedings; and that the trial listed on 19 June be vacated and relisted, and new directions given.
11. The reasons for the application are said to be that the witness statement of Mr Wilson is non-compliant with the Civil Procedure Rules and Practice Direction 57AC in that it consists largely of opinion; and that the claimant has chosen to change its expert, and without any adequate explanation, and should be required to disclose all of the claimant's previous expert's reports, and all other material containing its previous expert's opinion; and that there is not enough time to complete the experts' phase of the litigation before the trial. The claimant has also indicated that it intends to issue new claims, and to apply to have them joined into these proceedings, which will require a further round of pleadings, disclosure and witness evidence.
12. The claimant's first application, issued the following day, was simply that the existing timetable in the proceedings be suspended, including the deadline for exchange of expert reports, it being intended that new directions will be agreed between the parties, or ordered

by the court, in due course. The reasons given for that were that the defendant's application of 8 March includes provision for such an order and the claimant consents to that aspect of the defendant's application. The claimant's second application was for the two cases to be managed together, for the reasons set out in Mr Webber's second witness statement.

13. The defendant is represented by Mr Christopher Cook (of counsel); and the claimant is represented by Miss Tamara Oppenheimer KC, leading Mr Max Kazriel (also of counsel). Both counsel have produced detailed written skeleton arguments which I had the opportunity of pre-reading. There is a hearing bundle which extends to almost 400 pages. There was also a consolidated bundle of authorities which extends to almost 250 pages.
14. Because this application was listed for only one day, at the outset of the hearing I imposed a timetable limiting Mr Cook to one and a half hours for his submissions, although in the event he took about 15 minutes more than that. I restricted Miss Oppenheimer to a similar hour and a half, although in the event she took a little less than that; and then Mr Cook replied for about 15 minutes.
15. At the outset of the hearing, I indicated that whilst, had it been practical to do so, I would have limited any extension of time for expert evidence so as to preserve and accommodate the existing trial dates, rather than granting the more generous time extensions sought by both parties, since it was clear that the new proceedings should be heard with the existing proceedings, because this would save judicial time and lead to a saving of costs for the parties, and also avoid any risk of potentially inconsistent decisions if the second proceedings were to be listed before a judge different from HHJ Bever, I would reluctantly accept that the existing trial date needed to be vacated; and, subject to any appropriate court-directed revisions, would approve revised draft directions to enable both cases to come on for trial sometime in the late spring of 2024.
16. Thus, the focus of this hearing has been upon the first two limbs of the defendant's application: the application to strike out Mr Wilson's witness statement, on the basis that it is effectively an expert's report masquerading as a witness statement; and also Mr Cook's discrete application for the disclosure of earlier documentation directed to the production of an expert report from Mr Wilson, a process that was apparently only abandoned at the

beginning of February 2023, prior to which the claimant is said to have proceeded on the basis that Mr Wilson would be performing the function of the claimant's permitted ground engineering expert.

17. I have been taken by both counsel through a considerable number of authorities concerning the relationship between witness evidence of fact and expressions of expert opinion. Mr Cook has taken me to the requirements in CPR 32.4, relating to the service of witness statements for use at trial. He emphasises that a witness statement is a written statement, signed by a person, containing the evidence which that person would be allowed to give orally.
18. Although Practice Direction 57AC now relates to trial witness statements in proceedings pending in the Business and Property Courts, it is clear that it has not changed the law concerning the admissibility of witness evidence. Practice Direction 57AC prescribes the contents of witness statements. They must relate to issues of fact, and they must set out only matters of fact of which the witness has personal knowledge. They must identify the relevant documents to which the witness has been referred, and they must be prepared in accordance with the statement of best practice contained within the appendix to the Practice Direction.
19. Mr Cook has referred me principally to three authorities. The first is the case of *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch), a decision of Sir Terence Etherton when Chancellor of the High Court; and the case is reported at [2013] 1 WLR 3296. There, a witness statement by Mr Goldberger was struck out because it was said to contain a recitation of facts based on the documents, commentary on those documents, argument, submissions, and expressions of opinion, particularly on aspects of the commercial property market. However, it should be borne in mind that Mr Goldberg was a director of the company who had had no prior involvement in the subject-matter of the litigation. He was not qualified to express any expert opinions.
20. At paragraph 39 of his judgment the Chancellor made reference to the version of the *Chancery Guide* (7<sup>th</sup> ed) that was current in 2013; and he stressed that a witness statement should contain only evidence that the maker would be allowed to give orally. It should

cover those issues, but only those issues, on which the parties serving the witness statement wished the witness to give evidence-in-chief at trial. It should not provide commentary on documents in the trial bundle, or set out quotations from such documents, nor should it engage in matters of argument; and it should not deal with other matters merely because they might arise during the course of the trial.

21. At paragraph 40, the Chancellor emphasised that Mr Goldberger would not be permitted to give expert opinion evidence at the trial. However, the Chancellor went on to recognise that a witness of fact may sometimes be able to give opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account. Mr Goldberger, however, had expressed his opinions on market practice by way of commentary on facts of which he had no direct knowledge, and of which he could give no direct evidence. In that respect, he was said to be purporting to act exactly like an expert witness giving opinion evidence, but permission for such expert evidence had been expressly refused.
22. At paragraph 41, the Chancellor also recognised that the rules as to witness statements and their contents were not rigid statutes. It was conceivable that in particular circumstances, they might properly be relaxed in order to achieve the overriding objective of dealing with the case justly; but the Chancellor could see no good reason why they should not apply to Mr Goldberger's witness statement in the present proceedings.
23. I was also referred to paragraph 39 where it was stated that:

“Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact”.

Mr Cook points out that here, there are already directions for expert evidence in the first set of proceedings; and there will be a need for similar expert evidence in the new claim.

24. Mr Cook next took me to the decision of Marcus Smith J in *New Media Distribution Company SEZC Ltd v Kagalovsky* [2018] EWHC 2742 (Ch). There it was held that a



witness statement was not the proper vehicle for the giving of expert evidence, and certain paragraphs were excluded from the witness statement of Mr Kagalovsky. At paragraph 10 the judge said that:

“It is not right for a factual statement to be used to adduce expert evidence, when there are clear procedural rules of this court that no party may call an expert or put in evidence an expert’s report without the court’s permission. It is not right for these provisions in CPR 35 to be circumvented simply by attaching the expert statements to a statement of fact”.

25. At paragraph 11 the judge explained that:

“There are a number of problems with this course. One loses, in their entirety, the safeguards that exist regarding the adduction of expert evidence, such as an expert’s duty to the court, the expert declarations that one normally sees”.

In that case, however, it is clear that Mr Kagalovsky had no expertise in the law of Ukraine. He was not competent to express any opinion as to that law. In the present case, Mr Wilson is an expert in the relevant field.

26. The final authority relied upon by Mr Cook was the Tolstovian judgment of Jackson J in the Wembley Stadium case of *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC). Mindful of the need to preserve trees if possible, Mr Cook only took the Court to Chapter 4 of Part 1 of the monumental judgment, comprising paragraphs 657 to 676. There, the judge acknowledged that a witness of fact might sometimes be able to give opinion evidence as part of their account of admissible factual evidence, but they should not trespass into actual expert evidence. The matter was essentially one of fact and degree.

27. Whilst it is necessary to have regard to the whole of that section of Jackson J’s judgment, it is right to emphasise the following. First, the judge recognised that:

“As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR rule 35. However, such evidence is usually valuable and it often leads to considerable saving of costs”: paragraph 671.

28. Second, in construction litigation - and the same would apply elsewhere:

“... an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer after describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes that this was appropriate to the known ground conditions or [and perhaps more pertinently here], an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to his experience of rectifying comparable building failures in the past”: paragraph 672.

29. Third, in the particular case, Mr Taylor, who was an expert engineer giving evidence of steps he had taken, had included within his witness statement a

“... narration of facts which are within Mr Taylor’s knowledge, expressions of engineering opinion upon those facts, relevant comments based upon his own experience, statements of opinion on matters outside his expertise, argument and gratuitous comment on matters which were for the judge to decide”: paragraph 673.

30. Had the claimant’s objections *“been raised at the outset of the trial, a pruning exercise could have been carried out and the statements could have been re-drafted”* but that exercise was no longer realistic. In addition, and because of the stage of the trial at which objection was taken, the judge proposed to apply the principles he had set out and have regard only to those parts of the statements which were admissible by reference to those principles: paragraph 674. Finally, *“The unfortunate and partisan manner in which Mr Taylor’s statements have been drafted tended to reduce the credibility of his evidence.”*

31. Miss Oppenheimer took me to a number of authorities from which she distilled five broad principles:

(1) There is no rigid rule that a factual witness statement cannot contain opinion evidence. The rules about witness statements are not rigid statutes.

(2) The object of the exclusion of expert opinion evidence is to avoid any commentary by a witness of fact on matters of which that witness has no direct knowledge and on which he

can give no direct evidence. However, when a factual witness does have direct knowledge, and cannot properly be characterised as a third party (such as Mr Goldberger had to be in the *Wetherspoon* case), then it may be appropriate for a witness who possesses a particular expertise to give expert evidence. In support of that submission, Miss Oppenheimer relied, in particular, upon observations of the Chancellor at paragraphs 32 and 39 of his judgment in the *Wetherspoon* case. She also emphasised the second sentence of paragraph 40 of his judgment in that case:

“A witness of fact may sometimes be able to give opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account”.

She also placed emphasis upon paragraph 672 of Jackson J’s judgment in the *Multiplex* case; and she emphasised his earlier citation (at paragraph 670) from paragraph 26 of the judgment of Brooke LJ in the case of *DN v London Borough of Greenwich* [2004] EWCA Civ 1659 where, having recognised that in professional negligence cases a defendant may often give evidence to a judge constituting the reasons why he considered that his conduct had not fallen below the standard of care reasonably to be expected of him, Brooke LJ commented:

“Of course a defendant’s evidence on matters of this kind may lack the objectivity to be accorded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not to its admissibility. That such evidence was in principle admissible should have been reasonably apparent from the judgments in this court in *ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2003] EWCA Civ 1284 at [24], [31]-[32] and [41] ...”.

(3) It can be helpful to the court to hear evidence of opinion from a suitably qualified expert factual witness. In that regard, Miss Oppenheimer referred me to paragraph 13 of Sir Michael Burton’s judgment in *MAD Atelier International BV v Manes* [2021] EWHC 1899 (Comm), reported at [2021] I WLR 5294. At paragraph 13 of that case it was said that:

“The evidence by the claimant’s witnesses, which counsel had sought to exclude, may turn out to be self-serving or unreliable, particularly if not supported by documents, but is not in my judgment inadmissible and is either itself factual evidence or evidence of opinion given by those with knowledge of the facts and by reference to the factual evidence which they each give, albeit that one witness was not regarded by the claimant as sufficiently important to be a custodian for the purposes of disclosure. It does not seek to get round the absence of expert evidence, but rather enables the independent expert evidence to

be better tested. I have read the passages in question and I am satisfied that they are all admissible and should not be struck out”.

(4) Opinion evidence in a factual witness statement was not in itself inherently objectionable. What was objectionable was trying to accord it the same status as expert evidence. The appropriate approach was to treat it with the weight that was due to it, bearing in mind all the circumstances attending such evidence.

(5) Even if some evidence were to be held inadmissible or contrary to the Practice Direction, the court had a broad discretion. In the majority of cases, the nuclear option of striking out the whole of a witness statement would be wholly disproportionate. Any strike out should be limited to any offending paragraphs. Alternatively, and as in *Multiplex*, the appropriate approach would be to deal with it as going to the weight of the evidence. Miss Oppenheimer had expanded upon those five broad principles in her skeleton argument at paragraphs 21 through to 25. I do not find it necessary to repeat what she has there said in this judgment.

32. I turn then to the application of those principles to the present case. Mr Cook submits that Mr Wilson’s witness statement is plainly a version of a previously intended expert’s report and that it plainly contains opinion in the nature of an expert’s report which should not be permitted. The claimant will be calling a new expert, who can, and should, opine on the matters properly within his remit. The fact that expert evidence is involved is said to be apparent from paragraph 14 (b) of the witness statement, which refers to “*the report*” rather than “*the witness statement*”, suggesting, according to Mr Cook, that the wording has simply been lifted from a previous draft expert’s report.

33. In his witness statement, at paragraph 8, and extending to a full two and a half pages, Mr Dawson-Gerrard had made specific reference to certain matters within the witness statement which he said constituted a quasi-expert’s report. Mr Cook took me in detail through those paragraphs in the limited time allotted to him for his oral submissions; and in her reply, Miss Oppenheimer responded to all of those criticisms.

34. Mr Cook submits that Mr Wilson does far more than set out the details of such factual investigations as he was able to undertake as to the manner of installation of the cubes at the sites in question. Indeed, Mr Cook emphasises that in the case of Carrigtohill, Mr Wilson

had not even been able to attend the site because the relevant tank failures had occurred during the restrictions imposed by the Covid lockdown between June and September 2020 when travel restrictions were in place, so he was reliant upon the investigations conducted under Mr Wilson's instructions by a Mr Frank O'Mahoney.

35. Rather than giving direct factual evidence, Mr Wilson considers, in the manner of an expert, the forensic testing of pluvial cubes at the sites, and he opines on applicable industry standards. He provides his opinion as to the causes of the alleged failures. Mr Cook submits that the requirements discussed in *Wetherspoon* have been exceeded, and the safeguards set out in the *New Media* case have been lost. He submits that the witness statement falls on the wrong side of the line discussed in *Multiplex*.
36. Mr Cook submits that the witness statement is framed entirely as a quasi-expert's report and it would not be practicable to separate out any factual matters to which Mr Wilson can properly attest. He submits that the whole witness statement and its accompanying exhibits should be struck out. If the claimant wishes to seek permission to adduce any new written statement from Mr Wilson, confined to matters of fact, then it is for the claimant to make that necessary application.
37. In the course of his oral submissions, Mr Cook had begun by indicating that the factual matters in Mr Wilson's witness statement were so intertwined with matters to which he speaks in an expert capacity as to render it appropriate for the whole to be struck out.
38. In short, I accept the premise of Mr Cook's submission to that effect; but I would reject its conclusion. I would accept that factual matters have been intertwined with matters to which Mr Wilson is speaking using his expert knowledge and experience; but I would reject the conclusion that that leads to the remedy of striking out the witness statement, either as a whole or in part. I prefer the competing submissions of Miss Oppenheimer. The status of Mr Wilson as an expert does not prevent him from giving factual evidence, and from expressing permitted opinions in the course of doing so.
39. What I am satisfied about is that Mr Wilson's witness statement contains a mixture of both factual matters and permissible opinion on those facts of which he has either direct or

hearsay knowledge, and permissible commentary on matters arising from those facts within his own particular expertise.

40. Miss Oppenheimer, in her skeleton argument, had advanced the proposition that the witness statement contains no, or no substantial, opinion evidence.
41. What Mr Wilson does, as explained at paragraph 12, is to describe his investigations and advice in relation to the failures of the tanks at the three sites to which these proceedings relate, and investigating and advising the claimant in relation to those tank failures, and other pluvial cube attenuation tank failures which have occurred after the start of these legal proceedings. In the course of giving evidence as to his investigations into the tank failures, he relates the views and opinions he formed at the time, and the advice he gave to the claimant in that regard.
42. In her oral submissions, Miss Oppenheimer accepted that parts of the witness statement do offer opinion evidence, but no more than was permissible in any witness statement from a witness of fact, or instances of such expressions of opinion fall within the scope permitted by Jackson J in the *Multiplex* case. Miss Oppenheimer accepted that those expressions of opinion should not be given the same status as formal expert opinion evidence from an expert permitted under CPR 35.4, but it would be a matter for the trial judge to determine the weight to be given to those expressions of opinion, if any. The court would be assisted by evidence from Mr Wilson at trial because of his contemporaneous involvement in the matter.
43. I reject Mr Cook's counter-submission in response that the entire witness statement is written as though it were the report of an expert permitted under CPR 35.4. I reject his submission that it does not contain first-hand evidence of defects which he has actually identified. Some of the evidence may not be first hand, but reliant upon reports submitted by others, such as Mr O'Mahoney instructed by Mr Wilson; but nevertheless they are matters on which Mr Wilson is entitled to give factual evidence, and about which he is entitled to express opinions and to comment.
44. The difference between this case and the *Wetherspoon* case is the fact that here Mr Wilson,

unlike the witness in that case, does have relevant expertise, and is entitled to put that expertise before the court, not as an independent expert, but as a witness of fact. Mr Cook asked rhetorically, if this witness statement were to be admitted, what is the purpose of CPR 35.4? He submitted that it would entirely abrogate the court's power to restrict expert evidence. In reality, Mr Cook submitted, this is a quasi-expert's report which stands outside, and circumvents, the rules.

45. I do not accept that. I have read, and been taken by both counsel through, the witness statement in detail. As Sir Michael Burton said, at the end of his judgment in *MAD Atelier International BV v Manes*, having read the passages in question, I am satisfied that they are all admissible and should not be struck out. The weight to be given to them is entirely a matter for the trial judge.
46. That then brings me to the second limb of the application, which I hope I can take somewhat more shortly. Mr Cook starts from the undoubted proposition that although Mr Wilson has had prior involvement with the claimant, that was no bar in principle to him being proffered by the claimant as their expert witness in this case. Mr Cook submits that the expressed reasons given by the claimant for the change of expert witness from Mr Wilson do not stand up to scrutiny, when tested against the chronology of events. As a result, he submits that there has been a lack of candour and plausibility on the part of the claimant which gives rise to an inference of expert shopping, although he submits that that is not an essential ingredient, or pre-condition, to an order for disclosure of the kind he seeks.
47. He has relied, in particular, upon two authorities: the decision of HHJ Grant in *Allen Tod Architecture Ltd v Capita Property and Infrastructure Ltd* [2016] EWHC 2171 (TCC), reported at [2016] BLR 592, and the decision of Mr Alexander Nissen QC in *Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd* [2021] EWHC 1807 (TCC), reported at [2021] BLR 519. Mr Cook submits that there is a sliding scale between flagrant expert shopping at the one end and the unexpected need to replace an expert due, for example, to illness or retirement at the other. The court is more likely to impose more exacting conditions on any grant of permission in the former case than the latter.

48. *Allen Tod* was a case where it was common ground that the court's permission was required to call an expert witness to give evidence at trial orally. It was also accepted that, as a result, the court had the power to impose conditions, such as those relating to disclosure of preparatory material sought by the defendant. The *Rogerson* case was one where there was no prior direction for expert evidence at all and therefore, in the exercise of its discretion under CPR 35.4 to permit a party to adduce expert evidence, it was open to the court to impose a condition that a prior expert report should be disclosed.
49. In his skeleton argument, as in the application notice and in the supporting witness evidence of Mr Dawson-Gerrard, the claimant had advanced no jurisdictional peg upon which to hang an order for disclosure of the kind sought. In response to questions from the bench at the end of his oral submissions, Mr Cook identified two jurisdictional pegs upon which an order for disclosure might be hung. The first was the claimant's need to obtain an extension of time for service of its expert evidence in the first proceedings. The second was the need for a court order giving permission for expert evidence in the second proceedings.
50. Miss Oppenheimer submits that it is clear, on the authorities, that it is essential for Mr Cook to identify some vehicle through which the court has the necessary jurisdiction to impose a condition for the disclosure of earlier expert evidence. She took me to paragraph 31 of Mr Nissen's judgment in the *Rogerson* case, where he cited from the earlier judgment of Stuart-Smith J in *Vilca v Xstrata Ltd* [2017] EWHC 1582 (QB), reported at [2017] BLR 460, at paragraph 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 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”.

51. I am entirely satisfied that Mr Cook must identify some appropriate jurisdictional peg upon which the court can consider exercising its discretion to order disclosure of any previous expert report of Mr Wilson or associated documentation.
52. I accept Miss Oppenheimer’s submissions: First, that it is not relevant that in this case the claimant had previously identified Mr Wilson as its intended expert since this was not specified in the case management order of Cockerill J, which is the appropriate litmus test. Secondly, I accept that it is not permissible for the court to use its general case management powers to impose a condition of the kind sought by Mr Cook. Thirdly, I accept Miss Oppenheimer’s submission that reliance cannot be placed on the slip rule in order to make any variation of Cockerill J’s order.
53. Miss Oppenheimer then went on to make various submissions as to why Mr Cook’s suggested vehicle of an extension of time for expert reports would not work on the facts of the present case. She made the following points: First, that the direction now sought arises out of the new proceedings, and not from any change of expert in the present case. The request to vacate the trial was not the product of any change in the identity of the claimant’s expert, but because the claimant wished to bring the present proceedings on with the new proceedings. There was, therefore, no relevant nexus between the need to vacate the trial and the change in expert.
54. Second, she said that the parties had approved revised directions and they were now before the court for its approval. The defendant was opposing nothing in those directions. The only dispute arose in relation to the second limb of the relief sought on the defendant’s own application.
55. Third, Miss Oppenheimer made the point that it was purely a matter of case management convenience that this application was being heard with the application to vacate the trial. If the matters had been dealt separately, there would have been no arguable vehicle for

ordering disclosure. The effective reason for the vacation of the trial, as the court had made clear in its preliminary observations, was not any difficulty over the expert evidence, but because of the initiation of the new claim in respect of two additional sites.

56. Fourth, at no point had the claimant issued any application for an extension of time for expert evidence founded upon the change in the identity of its expert. It was the defendant's application which had been the first in point of time; and that, too, had sought an adjournment of the trial. Fifth, the defendant's application had never been put on the basis that any vehicle for ordering the relief sought had been afforded by the new case management directions requested, or the extension of time for expert evidence.
57. Sixth, that was not even the basis upon which the application had been advanced in Mr Cook's skeleton argument. Seventh, it would not be a permissible exercise of the court's powers for it effectively to fabricate a vehicle for ordering disclosure from the need for an extension of time for expert evidence. In that regard, it was submitted that this would be contrary to the approach of the court in the case of *Hajigeorgiou v Vasiliou* [2005] EWCA Civ 236, reported at [2005] 1 WLR 2195. There, at paragraph 21, Dyson LJ, delivering the judgment of the Court of Appeal, had declined to treat the need for a further inspection of the claimant's restaurant as a suitable peg on which to hang the condition of disclosure.
58. As far as that is concerned, I do not consider that the Court of Appeal was approaching that matter as one of any point of principle but, rather, were dealing with the matter on the basis of the specific circumstances of the individual case. In any event, Miss Oppenheimer submitted that it would not be appropriate, in the circumstances of the present case, for the court to impose any requirement for disclosure. That was because there was no proper basis for the defendant's assertion that the claimant had been engaged in any form of expert shopping.
59. In my judgment, Mr Cook has identified an appropriate vehicle whereby the court could, if satisfied that it was proper to do so, impose a requirement for the disclosure of any earlier version of a draft expert report from Mr Wilson. I am satisfied that the need for the claimant to obtain an extension of time for expert evidence is an appropriate vehicle in the

circumstances of the present case. Mr Cook took me to the letter of 3 March 2023 from the claimant's solicitors that addressed the position of Mr Wilson's witness statement and the need for a change of expert.

60. Under the heading 'Trial', Squire Patton Boggs agreed that the timetable for exchange of expert reports needed to be extended, and they recorded that they had already made proposals in that regard. I am satisfied that at least one of the reasons for the need for the exchange of experts' reports to be extended was the late decision to change the status of Mr Wilson from that of expert witness to witness of fact. In his witness statement in support of the defendant's application, at paragraph 1, Mr Dawson-Gerrard made it clear that the defendant was seeking the disclosure now sought and the vacation of the trial. At paragraph 42, he made it clear that the defendant was, in principle, agreeable to an extension of the timetable for the experts' reports; but the defendant maintained that such extension should be conditional upon the claimant disclosing its previous expert's opinion, as sought by the application. At paragraph 46, the defendant agreed that the timetable must be extended, subject to the conditions of disclosure. I am satisfied that it is entirely open to the defendant to seek an order for disclosure as a condition of the court extending the timetable for expert evidence. I note that by virtue of CPR 29.5, the parties had no power themselves to extend the time for expert evidence in a way which would imperil the trial date. I am satisfied, therefore, that there is the necessary jurisdiction to make this order.
61. However, I am also satisfied that it would be entirely inappropriate for the court to do so. I accept that there is a spectrum of cases along a scale running from a clear case of expert shopping to a clear situation where that is no reason for the change in expert. In the present case, I am entirely unpersuaded that there is any reason to think that the change in Mr Wilson's status from expert witness to witness of fact is due to any concern about his views in relation to the claimant's case. I see no reason to reject the explanation proffered by the claimant's solicitors for the decision to substitute Mr Wilson as a witness of fact rather than as an expert witness.
62. I accept Miss Oppenheimer's submission that it is easy, but wrong, to say, with hindsight, that the issue of Mr Wilson's close association with the claimant, and its perceived impact upon the judge's assessment of his independence as an expert witness, should have been

focused upon earlier by the claimant's solicitors; but I see no reason whatsoever to question the reason that they have given for the change. I see no reason to question their expressed concern as to the appearance of Mr Wilson as being too closely associated with the business and interests of the claimant. I can see why they would have wanted to instruct an apparently more remote, and independent, expert in this field.

63. There is, however, a further factor to be borne in mind. This is not a case where Mr Wilson is being jettisoned from this trial altogether. He is being put forward by the claimant as a witness in support of their case, albeit a witness of fact who is also venturing to express his expert opinions, and commenting upon the facts of which he has some knowledge. He will be exposed to cross-examination at trial.
64. At the end of her submissions, I asked Miss Oppenheimer whether, if a question were put to Mr Wilson as to whether he had ever entertained views different from those expressed in his witness statement, or had ventured to change any views, the claimant would be entitled to object to such question as inadmissible. Miss Oppenheimer accepted that there would be no reason to object to such questioning. It will be open for counsel cross-examining Mr Wilson to put questions of that kind to him at trial.
65. It is difficult in those circumstances to see how it can properly be said that this is a case of changing an expert witness because a party is concerned about the evidence that they may give to the court. I accept Miss Oppenheimer's submission, at the end of her reply, that this is a fishing expedition on the part of the defendant.
66. I would, for those reasons, refuse the disclosure application sought. Had I been minded to order disclosure, then I would certainly, at least in the first instance, have limited it to the draft of Mr Wilson's report that had been used for the purposes of the mediation on a without prejudice basis; but in the event that does not arise.
67. Therefore, that concludes this extempore judgment.

**End of Judgment**

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