



Neutral Citation [2023] EWHC 802 (TCC)

Case No: HT-2019-000359

**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: 5 April 2023

**Before :**

**Mrs Justice O'Farrell DBE**

-----  
**Between :**

**(1) AVANTAGE (CHESHIRE) LIMITED**  
**(2) CHESHIRE EAST BOROUGH COUNCIL**  
**(3) YOUR HOUSING LIMITED**

**Claimants**

**- and -**

**(1) GB BUILDING SOLUTIONS LIMITED (in  
administration)**  
**(2) PRP ARCHITECTS HOLDINGS LIMITED**  
**(4) PRESTOPLAN LIMITED**  
**(5) WSP UK LIMITED**  
**(6) MASCOT MANAGEMENT LIMITED**

**Defendants**

-----  
-----  
**Neil Hext KC** and **Tom Asquith** (instructed by RPC LLP) for the Claimants  
**Charlie Thompson** (instructed by Beale & Co Solicitors LLP) for the Second Defendant  
**Simon Kerry** (instructed by Clyde & Co LLP) for the Fourth Defendant  
**Simon Hale** (instructed by Weightmans LLP) for the Fifth Defendant  
**Ben Elkington KC** and **Hannah Daly** (instructed by DWF Law LLP) for the Sixth Defendant

Hearing date: 24<sup>th</sup> March 2023  
-----

**Approved Judgment**

This judgment was handed down remotely at 10.30am on Wednesday 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE O'FARRELL DBE

**Mrs Justice O'Farrell:**

1. The application before the court is the claimants' application to call a new expert, Dr Neil Ketchell, in place of (i) Ms Sarah Hooton, a forensic scientist, and (ii) Mr Peter Wise a fire engineer.
2. The application in respect of Ms Hooton is not opposed in principle but the defendants' position is that the court should make permission subject to conditions that Ms Hooton's earlier reports, opinions and investigation notes be disclosed.
3. The application in respect of Mr Wise is opposed on the basis that no proper explanation has been provided for the proposed substitution; alternatively, if permission is granted by the court it should be on condition that his earlier reports, opinions and notes should be disclosed.

*Background*

4. The claim arises out of a fire that occurred at Beechmere Retirement Village in Crewe on 8 August 2019, destroying almost the entire property.
5. The fire appears to have started as a result of 'hot works' which were carried out by a roofing contractor, MAC (Roofing & Contracting) Limited, on the top floor of the central part of the building.
6. The claimants seek damages of more than £40 million from the defendants in respect of alleged deficiencies in the design and construction of the property, including the absence of compartmentation, cavity barriers and sprinklers, resulting in a failure to inhibit the spread of fire:
  - i) the first claimant is the PFI contractor for the development of the property;
  - ii) the second claimant is the freehold owner of the property;
  - iii) the third claimant is the leasehold owner of the property;
  - iv) the first defendant ("Gleeson") was the contractor engaged by the first claimant, is dissolved and has never participated in the proceedings;
  - v) the second defendant ("PRP") was engaged by Gleeson to provide architectural and design services;
  - vi) the fourth defendant ("Prestoplan") was engaged by Gleeson as a sub-contractor to design, install and commission timber frames and compartment walls;
  - vii) the fifth defendant ("WSP") was engaged by Gleeson as a consultant in respect of fire engineering design services;
  - viii) the sixth defendant ("Mascot") was engaged by the first claimant as the employer's agent and clerk of works.

7. The proceedings were issued on 9 October 2019, although a stay was then granted for further investigations to be carried out and for the pre-action protocol to be implemented.
8. Following a case management conference, on 21 October 2021 Joanna Smith J ordered that the trial should start on 3 April 2023 with an estimate of 24 days plus 3 days' reading time and gave directions to trial, including the following in respect of expert evidence:

“18. The claimants have permission to call the following expert witnesses in respect of the following issues:

(a) Ms Katerina Hoey of Probin-Miers, an architect, to give evidence in relation to the adequacy of the design and construction of the property at Beechmere, in particular features which were designed to prevent the spread of fire.

(b) Mr Peter Wise of HKA, a fire engineer, to give evidence as to the adequacy of the fire strategy, whether the relevant elements of the design of Beechmere complied with the Building Regulations in force at the time of the project, and whether the design of Beechmere should have included sprinklers and, if so, what difference their inclusion would have made to the spread of fire.

...

(d) Ms Sarah Hooton, a forensic scientist, to give evidence in relation to the cause, origin and spread of the fire at Beechmere.

(e) A firefighting expert, to give evidence in relation to causation and the actions of the fire service ...

...

24. In respect of any expert evidence permitted under paragraph 18 to 23:

...

(c) Liability and causation experts' joint statements in accordance with rule 35.12(3) to be prepared and filed by 4pm on 21 October 2022.

(d) Liability and causation experts' reports, limited to those issues in dispute, to be served by 4pm on 9 December 2022...”

9. In October 2022 the parties stopped complying with the timetable whilst they endeavoured to reach a settlement of the dispute through mediation. The parties should have referred the matter back before the court so that the timetable could be revised at that stage but it is appreciated that they were optimistic that a resolution would be achieved; or, if not, that a recovery timetable would still enable them to be ready for trial.
10. On 10 February 2023, with the consent of all parties, the claimants applied for the trial to be adjourned as a result of a serious illness suffered by their main expert, Ms Hooton.
11. By order dated 28 February 2023, I adjourned the trial until 9 April 2024 with an estimate of 27 days, including 3 days for judicial reading, and ordered this case management conference.

*Application to replace Ms Hooton*

12. On 21 March 2023 the claimants issued an application, seeking permission to call Dr Neil Ketchell, in place of Ms Sarah Hooton, to give evidence in relation to the cause, origin and spread of the fire at Beechmere.
13. CPR 35.1 provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.
14. CPR 35.4 provides that the court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence.
15. The order dated 21 October 2021 gave permission for the claimants to call Ms Hooton, a forensic scientist, to give evidence in relation to the cause, origin and spread of the fire at Beechmere. Therefore, the court's permission is required for her replacement in respect of such expert evidence.
16. The court's power to permit a party to change the expert witness on which it relies, and the basis on which its discretion should be exercised, was considered in *The University of Manchester v John McAslan & Partner and others* [2022] EWHC 2750 (TCC) by Mr Roger ter Haar KC, sitting as a Deputy High Court Judge, who helpfully carried out a careful and detailed review of the material authorities.
17. The relevant principles can be summarised as follows:
  - i) The court has a general discretion to permit a party to change the identity of the expert on which it relies, pursuant to its specific power to control the use of expert evidence under CPR 35.4 or as part of its general case management powers under CPR 3.1(2).
  - ii) Such general discretion should be exercised having regard to all the material circumstances of the case and in accordance with the overriding objective.
  - iii) The usual rule is that the court should not refuse a party permission to rely on a new expert in substitution for an existing expert: *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136 per Hughes LJ at [30]; *Murray v Devenish* [2017] EWCA Civ 1016 per Gross LJ at [15]-[16].

- iv) Where a party requires the court's permission to rely on a new expert in substitution for an existing expert, the court has the power to give permission on condition that the original expert's reports, containing the substance of the expert's opinion, are disclosed to the other parties and such condition will usually be imposed: *Beck v Ministry of Defence* [2003] EWCA Civ 1043 per Simon Brown LJ at [24]-[26]; *Vasiliou v Hajigeorgiou* [2005] EWCA Civ 236 per Dyson LJ at [29]-[30].
  - v) The justification for imposing a condition that the original expert's reports should be disclosed includes (a) prevention of expert shopping and (b) ensuring that the expert's contribution is available to the court and all parties, regardless of the instructing party: *Vasiliou* (above) at [29]; *Edwards-Tubb* (above) at [30].
  - vi) The court's power to impose a condition on the grant of permission to change an expert may extend to other documents containing the substance of the original expert's opinion but the court must be cautious about encroaching upon areas of privilege and consider carefully the potential value of such other documents; in particular, there must be a strong case to justify disclosure of solicitors' attendance notes: *BMG (Mansfield) Ltd v Galliford Try Construction Ltd* [2013] EWHC 3183 (TCC) per Edwards-Stuart J at [28]-[32].
18. In this case, the ground on which the substitution is sought is Ms Hooton's serious illness, which requires treatment and prevents her from continuing to participate in these proceedings. Ms Hooton's role as an expert is critical to the claimants' case, as explained in the second witness statement of Ms Rebecca Carrera of RPC LLP dated 20 March 2023:
- “20. Sarah Hooton is the Claimants' expert dealing with cause, origin and spread of the fire. She is a forensic engineer with specific experience in design and construction defects in fire protection provisions in buildings. Her expertise includes the investigation of the cause of fires in residential and commercial premises and the impact of design/construction details on fire spread. She is also a fire engineer.
21. The issues that Ms Hooton dealt with are at the absolute heart of this case. They included (i) how and when and where the fire started (ii) the initial spread of the fire up into the roof space above Flat 131, (iii) the spread of the fire beyond that into the compartment above the staircase and (iv) the spread of the fire into the roof above Flat 132, towards the front of the building and laterally into the space above the corridor adjacent to those two flats.”
19. The claimants have identified an alternative forensic expert, Dr Neil Ketchell, who has the qualifications and expertise to assist and take over Ms Hooton's role.
20. There is no challenge to the grounds on which the claimants seek to replace Ms Hooton with Dr Ketchell and the application in respect of Ms Hooton is not opposed

in principle. However, the defendants' position is that the court should grant permission subject to conditions that the following documentation should be disclosed:

- i) Ms Hooton's expert reports, including drafts of the same, prepared for the purposes of the proceedings;
  - ii) Ms Hooton's site inspection reports or notes, including those taken at or following the investigations / inspections performed by Ms Hooton of Beechmere and sister properties (including an inspection of Willowmere on 20 August 2019, a three-day intrusive investigation at Beechmere in November 2019 and a further two-day site investigation at Beechmere prior to its demolition in January 2020); and
  - iii) Ms Hooton's notes of any interviews with witnesses or potential witnesses of fact, including in relation to the interview of the resident of Flat 131, Mr. David Scott, in February 2020 and subsequently as confirmed in Mr Scott's statement.
21. Further, Mascot seeks an additional condition for granting permission that the following categories of documents should be disclosed:
- i) any other report (draft or final), letter, e-mail, note or other document produced by Ms Hooton in which she expressed opinions in relation to the dispute, including as to the cause, origin and spread of the fire;
  - ii) any attendance notes produced by the claimants' solicitors recording meetings, telephone calls and other discussions with Ms Hooton evidencing her opinion on the cause, origin or spread of the fire.
22. The starting point for the court is that, as submitted by Mr Hext KC, leading counsel for the claimants, the claimants are not choosing to replace Ms Hooton with Dr Ketchell; for unfortunate reasons beyond the claimants' control, she is simply unable to participate further and they are forced to replace her. No criticism can be made of the claimants in changing experts and there is no question of expert shopping.
23. In those circumstances, I consider that it would be unjust to impose a condition that the claimants must disclose Ms Hooton's reports, draft reports or other documents setting out her opinion. It follows that there are no grounds for ordering the disclosure of attendance notes produced by the claimants' solicitors recording meetings, telephone calls or other discussions with Ms Hooton evidencing her opinion on the cause, origin or spread of the fire.
24. However, the court considers that there is more force in the submissions by Mr Thompson, counsel for PRP, supported by Mr Kerry, counsel for Prestoplan, Mr Hale, counsel for WSP, and Mr Elkington KC, leading counsel for Mascot, that Ms Hooton's notes of her early inspections and interviews provide a unique source of valuable information in the case that should be disclosed.
25. Ms Carrera sets out the early involvement of Ms Hooton in her first witness statement dated 10 February 2023:

“33. Ms Hooton has played a pivotal role on behalf of the Claimants in the litigation. She was initially instructed on behalf of the Claimants on 16 August 2019, just 8 days after the fire.

34. Ms Hooton inspected Beechmere's sister site, Willowmere, on 20 August 2019; and led a three-day intrusive investigation at Beechmere with 20-25 experts from interested parties in November 2019. Ms Hooton undertook a further two-day site investigation at Beechmere prior to its demolition in January 2020.

35. Ms Hooton interviewed the resident of Flat 131 (which is next to the patio on which hot works were undertaken on the day of the fire), Mr David Scott, in February 2020 to discuss the origin and detection of the fire. This, coupled with her first-hand knowledge of the defects observed at the remaining South-Eastern wing at Beechmere and its sister site, Willowmere, enabled her to give invaluable input into the letters of claim sent to the Defendants in March 2020.

36. Given that the Claimants' case is primarily one of fire spread, the Claimants' statements of case were prepared with substantial input from Ms Hooton who advised on the location of defects (observed from her site inspections) and the significance of those defects on the speed, spread and path of the fire.”

26. The notes and other documents produced by Ms Hooton in these early inspections will contain relevant evidence of primary facts, namely the condition of the property in the aftermath of the fire and the presence of defects. That evidence is not available from any future inspection because the remaining part of Beechmere that survived the fire has since been demolished.
27. It is likely that, if she continued to participate in the proceedings, Ms Hooton would have referred to such documents in discussions with the other experts and/or when preparing her report; if so, the documents would have been disclosed at that stage to the defendants. It is also likely that Dr Ketchell will have access to Ms Hooton's notes and other documents regarding such source material, whether or not he chooses to rely on it.
28. In those circumstances, fairness and transparency require that this material should be made available to all the relevant experts in the case. It is particularly important that Mr Michael Jones, Mascot's expert, should see such material because Mascot was not involved in the dispute at that point and therefore he did not participate in any of the early investigations.
29. Similarly, the notes or memoranda prepared by Ms Hooton when interviewing Mr Scott could contain details that might be significant to the experts but not recognised as such by Mr Scott, or no longer recalled by him and, therefore, not addressed in his



witness statement. Again, this documentary information should be made available to the other relevant experts as a matter of transparency and fairness.

30. In summary, there is no impropriety in the claimants' request to change their forensic scientist expert. They have been forced to make the change by the unfortunate illness of Ms Hooton, a matter over which the claimants have no control and for which there should be no court sanction. For that reason, the defendants' requests for an order that the claimants should disclose Ms Hooton's report(s), draft report(s) or other documents evidencing her opinion are refused. However, the court will order disclosure of Ms Hooton's reports and notes of site inspections and interviews on the basis that those documents contain relevant, primary information that is no longer available to the other experts.

*Application to replace Mr Wise*

31. On 21 March 2023 the claimants issued an application, seeking permission to call Dr Neil Ketchell, in place of Mr Peter Wise, to give evidence as to the adequacy of the fire strategy, whether the relevant elements of the design of Beechmere complied with the Building Regulations in force at the time of the project, and whether the design of Beechmere should have included sprinklers and, if so, what difference their inclusion would have made to the spread of the fire.
32. The order dated 21 October 2021 gave permission for the claimants to call Mr Wise, a fire engineer, to give evidence in respect of the above matters. Therefore, the court's permission is required for his replacement in respect of such expert evidence.
33. The grounds on which this application is made are more opaque. In her second witness statement, Ms Carrera states:

“79. Mr Wise's colleague, Mr Peter Todd, carried out the analysis with respect to sprinkler capability. Mr Todd is a sprinkler design engineer with more than 45 years of experience in sprinkler design and installation project management. Mr Todd is not, however, a fire engineer.

80. As the Claimants' primary expert on matters of fire spread, with a comprehensive knowledge and understanding of the facts that frame those issues, Ms Hooton had considered all aspects of this topic, including fire strategy. On 25 October 2022, the Claimants requested the Defendants' consent to a draft application that she replace Mr Wise ... The draft application was ultimately overtaken with settlement negotiations.

81. In the same way, as the Claimants' proposed replacement expert on matters of fire spread, Dr Ketchell will be considering all of the matters which Ms Hooton has considered. Indeed, Dr Ketchell will have the advantage of considering these issues in the context of both cause and the spread of the fire more generally. He is qualified to deal with all of these issues. Accordingly, the Court would benefit from hearing from

just one expert from the Claimants on these overlapping issues, rather than two. Dr Ketchell would be assisted by Mr Todd in relation to sprinkler capability.”

34. Further explanation has been set out in Ms Carrera’s third witness statement dated 23 March 2023:

“7. Mr Wise has produced 3 reports.

8. My firm has been clear of two things: (i) that there is considerable overlap between the evidence from the forensic expert (at that time, Ms Hooton; now Dr Ketchell) and that of Mr Wise, and (ii) that the Claimants' preference is to rely upon the forensic expert evidence, which takes into account the broader context of the spread of the fire more generally: see RPC’s email to the Defendants dated 25 October 2022 ...

9. The court will, I hope, understand that the Claimants are reluctant to go into detail as to the reasons for that preference in advance of a decision as to whether to permit them to rely upon Dr Ketchell instead of Mr Wise. Plainly, if that application were to be rejected, the Claimants would be obliged to continue to rely upon Mr Wise. It would not be appropriate to address the extent to which the Claimants have or have not been assisted by Mr Wise's reports or as to the content of those reports. As set out below, in the event that the application is successful, the Claimants accept that those reports should be disclosed as a condition of the permission they seek. And the parties will at that point see the substance of what Mr Wise says in them.

10. I can, however, outline the other concerns that my clients have as to the evidence of Mr Wise. These stem principally from the fact that the Claimants have had the benefit of the views of the other experts on matters within their respective remits. Mr Wise has expressed views on matters that are more properly covered by those other experts. For privilege reasons, I do not want to refer to the content of the views of those other experts. However, I can say that, as a result of the extent of Mr Wise’s expression of views, there is a potential for conflict. Moreover, it is also relevant that the views of the Claimants’ other experts have been given following careful and detailed review of the documents. Mr Wise has not undertaken a full review of those documents. In some relevant respects, the Claimants consider that the matters in question fall more properly within the expertise of the other experts, rather than that of Mr Wise.”

35. The application in respect of Mr Wise is opposed on the basis that there is no suggestion that he could not continue to act as an expert in these proceedings. No proper explanation has been provided for the proposed substitution and it is expert

shopping. Alternatively, if permission is granted by the court it should be on condition that the following documents should be disclosed:

- i) Mr Wise's expert reports, including drafts of the same;
- ii) any other report (draft or final), letter, email, note or other document produced by Mr Wise in which he expressed opinions in relation to the dispute, including as to the adequacy of the fire strategy and the design of Beechmere (including whether the design should have included sprinklers and, if so, what difference their inclusion would have made to the spread of fire);
- iii) any attendance notes produce by the claimants' solicitors recording meetings, telephone calls, and other discussions with Mr Wise evidencing his opinion regarding the adequacy of the fire strategy and/or the design of Beechmere, including sprinkler provision and what difference their inclusion would have made to the spread of fire.

36. I note the legitimate concerns raised by Mr Hale on behalf of WSP, the party most affected by this expert evidence, that this appears to be an exercise in expert shopping. Mr Wise is qualified and available to give evidence at trial on the issues he has been asked to address and he has carried out substantive expert work on the case.
37. Despite those concerns, I am satisfied that this is an appropriate case in which to allow the claimants to rely on the expert evidence of Dr Ketchell instead of Mr Wise. Although the reasons for the proposed change were unclear initially, Mr Hext has been frank with the court that the claimants are not happy with Mr Wise as an expert. It is in the interests of justice that the claimants should have permission to rely on an expert in whom they have confidence. The adjournment of the trial date and the revised timetable for expert evidence means that no prejudice will be suffered by the other experts as a result of the proposed change.
38. The claimants accept that the court will impose a condition that the three reports prepared by Mr Wise must be disclosed. For clarification, this must include any draft reports. It is also appropriate that any further documents in which Mr Wise expressed opinions as to the matters encompassed within the scope of the original permission ordered by the court, including the issue of sprinkler design and their impact on the spread of fire, must be disclosed.
39. However, I do not consider that this is a case in which the claimants' solicitors should be required to disclose attendance notes of their discussions with Mr Wise. Such an order would cause practical difficulties in producing redacted versions of the documents that were of any probative value. Further, such an order would constitute an unnecessary invasion of the claimants' privilege in circumstances where there is no suggestion of any culpable behaviour on the part of the claimants or their experts; they are simply unhappy with Mr Wise as an expert.
40. There remains uncertainty as to the role played by Mr Todd and the reliance placed or to be placed on Mr Todd's sprinkler analysis by Dr Ketchell. The court has not been asked to make any order in relation to Mr Todd but, quite properly, the defendants have reserved their right to object to Mr Todd's involvement, or make other

applications, once they have had an opportunity to consider this part of the expert evidence.

*Conclusions*

41. For the above reasons, the court grants permission to the claimants to call Dr Neil Ketchell, in place of Ms Sarah Hooton, to give evidence in relation to the cause, origin and spread of the fire at Beechmere, subject to conditions that the following documentation should be disclosed:
  - i) Ms Hooton's site inspection reports or notes, including those taken at or following the investigations / inspections performed by Ms Hooton of Beechmere and sister properties (including an inspection of Willowmere on 20 August 2019, a three-day intrusive investigation at Beechmere in November 2019 and a further two-day site investigation at Beechmere prior to its demolition in January 2020); and
  - ii) Ms Hooton's notes of any interviews with witnesses or potential witnesses of fact, including in relation to the interview of the resident of Flat 131, Mr. David Scott, in February 2020 and subsequently as confirmed in Mr Scott's statement.
42. The court grants permission to the claimants to call Dr Neil Ketchell, in place of Mr Wise, to give evidence in relation to the adequacy of the fire strategy, whether the relevant elements of the design of Beechmere complied with the Building Regulations in force at the time of the project, and whether the design of Beechmere should have included sprinklers and, if so, what difference their inclusion would have made to the spread of the fire, subject to conditions that the following documentation should be disclosed:
  - i) Mr Wise's expert reports, including any drafts of the same;
  - ii) any other report (draft or final), letter, email, note or other document produced by Mr Wise in which he expressed opinions in relation to the dispute, including as to the adequacy of the fire strategy and the design of Beechmere (including whether the design should have included sprinklers and, if so, what difference their inclusion would have made to the spread of fire).
43. All consequential or other matters, if not agreed, will be dealt with by the Court on written submissions or at a further hearing to be fixed by the parties.