



What is “Expert Shopping”? Is it allowed? If yes, under what condition(s)?



Hon Chi Yi, Ludwig

FHKIS

摘要

『專家證人』可否像「街市買菜」般公開搜羅？在這文章中，我將提出並討論三個近期的法院案例，去分析『專家證人』可否公開搜羅；若是可以，在甚麼情況下可以？

“**Expert shopping**” simply means shopping for and finding an expert on a given subject whose professional opinion is skewed toward the answer that the appointing party already prefers. This is commonly found in all walks in life.

I will go through three recent court cases in this article to show if “expert shopping” is allowed. If yes, under what condition(s)?

They are:

1. **Edwards-Tubb v J D Wetherspoon [2011]**
2. **Cecil Guntrip v Cheney Coaches, Ltd. [2012]**
3. **Adams & Ors v Allen & Overy & Ors [2013]**

In the first case, it was concluded that: “*Expert shopping is undesirable, wherever possible, the court will use its powers to prevent it,*” although “*The Court of Appeal has confirmed that, where a party wishes to instruct an alternative expert, a conditional order for [the] disclosure of the existing report should be the usual order.*”

In the second case, the Court of Appeal concluded that: “*...a heavy onus would [be] placed on any party wanting to change the instruction of their expert, and that a late change of expert should be discouraged, particularly where*

the party had had free choice over their expert in the first instance.” In this case, the application to change an expert was made on 16.2.2011, almost two years after the issue of the proceedings and a month before the trial. The Court finally concluded that: “*The case clarifies the law on expert shopping, which is to be strongly discouraged. Had the claimant been allowed to rely on further evidence, this would have set a dangerous precedent for all types of litigation...*”

The above two cases seemed to indicate that the Court discouraged the possibility of “expert shopping” for various reasons. However, the following case produced another decision.

Adams & Ors v Allen & Overy & Ors [2013]

Facts

1. The Claimant’s claim was related to the drafting of a sales agreement.
2. The Claimant’s expert, after discussions with his/her counterpart on the other side, produced a revised report that undermined the Claimant’s case, mainly due to some tax implications.
3. The Claimant and the expert mediated, but failed to find common ground.
4. The Claimant lost confidence in the expert and wanted to shop for another expert.
5. During a case management hearing, the Master refused to grant permission for a new expert based on the grounds of “no good reason”.
6. The Claimant brought this case to the Court of Appeal.

Held

1. The issues for the Court of Appeal to consider were if:
 - (a) the principles related to the change of expert in personal injury cases applied to this case;
 - (b) the Master had made a mistake in not considering the practical effect of his order; and
 - (c) permission had been granted to appoint a new expert should the Claimant bear all of the defendant's wasted costs.
2. The Court of Appeal allowed the appeal, holding that:
 - (a) the Court's general approach was that expert shopping was not permissible save for unusual or exceptional circumstances;
 - (b) this case was unusual and exceptional – there were a variety of ways to view the tax implications on which the expert might have a different opinion;
 - (c) the effect of the Master's refusal was disproportionate. This was because if it stood, the Claimant would be stuck with an expert who did not support the case and would not give evidence for the case. Refusing permission would leave the Claimant with no expert evidence at all;
 - (d) most importantly, the expert said on record that he was no longer prepared to give evidence for the Claimant. This was, in the opinion of the Court of Appeal, the main reason why it permitted a new expert to be appointed; and
 - (e) in relation to the belated change of expert, the Court held that the trial was 10-11 months away and a change of expert would not affect the trial date at all.

However, in the most recent case, **Adams & Ors v Allen & Overy & Ors [2013]**, the Court allowed for expert shopping and changing experts based on the grounds that the situation in this case was "unusual and exceptional". From this, I find that the Court always uses the fairness factor when deciding to grant or refuse permission on any application for expert shopping/changing, but will not simply strike out any application simply because it does not want to set a precedent for future litigation cases. For example, under the **Cecil** case, the change application was made two years after the proceedings and the trial was scheduled for a month later. The Court concluded that the application was too late. But in the **Adams** case, the trial was 10-11 months away, so the Court decided that a change of expert would not affect the trial date at all.

Case-by-case analysis is important, and that is my response to the question, "Is expert shopping allowed?" 

Comments

In the case, **Edwards-Tubb v J D Wetherspoon [2011]**, expert shopping was prevented by the Court. In the case, **Cecil Guntrip v Cheney Coaches, Ltd. [2012]**, expert shopping was highly discouraged and could set a very dangerous precedent for future litigation cases should expert shopping come into question again.