How to shop for experts

In cases where one of the parties wishes to change medical experts, there seems to be one rule for defendants and another for claimants, argues **Jonathan Wheeler**

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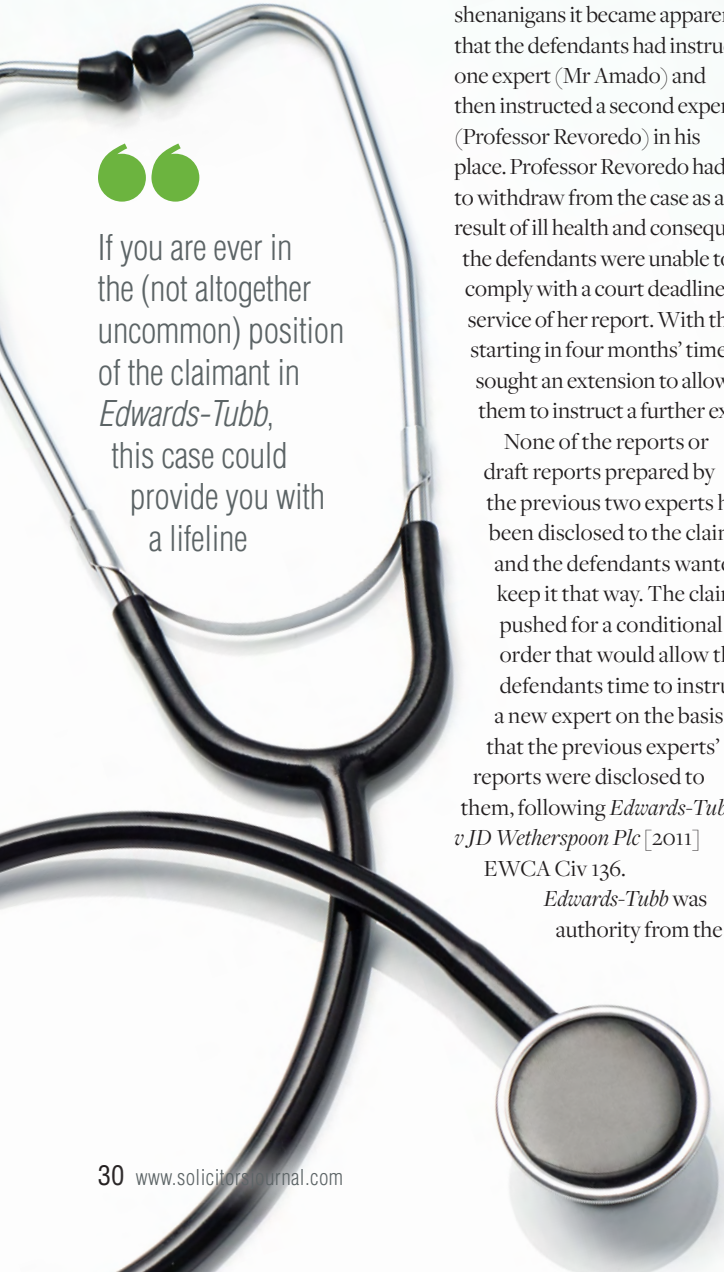

> If you are ever in the (not altogether uncommon) position of the claimant in *Edwards-Tubb*, this case could provide you with a lifeline

In *Vilca and others v Xstrata Ltd and another* [2017] EWHC 1582, the claimants were Peruvian nationals claiming for personal injuries sustained during the course of a demonstration at a copper mine in Peru. They sought to bring proceedings in England because the Peruvian mining company had a subsidiary here, and both sides were given permission to rely on experts on Peruvian law at trial.

In the course of pre-trial shenanigans it became apparent that the defendants had instructed one expert (Mr Amado) and then instructed a second expert (Professor Revoredo) in his place. Professor Revoredo had to withdraw from the case as a result of ill health and consequently the defendants were unable to comply with a court deadline for service of her report. With the trial starting in four months' time, they sought an extension to allow them to instruct a further expert.

None of the reports or draft reports prepared by the previous two experts had been disclosed to the claimant, and the defendants wanted to keep it that way. The claimants pushed for a conditional order that would allow the defendants time to instruct a new expert on the basis that the previous experts' reports were disclosed to them, following *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136.

Edwards-Tubb was authority from the Court of Appeal that such a conditional order should be made to prevent the heinous crime of 'expert shopping'. That case too was a personal injury claim: the claimant had nominated three medical experts to the defendant in the letter before claim; no objections were received. When the claimant served his medical evidence with proceedings, the reporting doctor was not one of those on the list, but his report did refer to another from one of those previously nominated, and which hadn't been disclosed (doh!). The defendant made an accusation of 'expert shopping' and the claimant was given permission to rely on the evidence of the medic whose report was served with proceedings only if the previous medic's report was disclosed.

Edwards-Tubb was a more recent articulation of the Court of Appeal's decision on a similar point in *Beck v Ministry of Defence* [2003] EWCA Civ 1043 when it was felt that where a defendant wanted to change medical experts, the original report should be disclosed so as to reassure the claimant that he and the trial judge would have access to all relevant information and that the courts' processes were not being abused.

Mr Justice Stuart-Smith decided in June this year that the issues for the defendant in wishing to rely on its third Peruvian legal expert were different. The judge accepted the defendant's submission that they had rejected their first expert simply because they wanted someone more eminent. There was no basis (the judge said) for suggesting that the defendants were engaged in the "potentially disreputable practice of ditching an expert because he would not, for reason good or bad, support a party's case". Had Professor Revoredo not been ill, she would have been the defendant's expert at trial, and the defendants would have been able to comply with the court's timetable. There was no abuse of process here, the defendants were entitled to keep their tinder dry, not to disclose previous reports, and have the directions timetable extended to allow them to instruct a third expert.

The question I ask as a (somewhat not very impartial) observer is: why could the defendants not serve Mr Amado's report to enable them to comply with directions? If that idea was unpalatable to them, bearing in mind they were now requesting the court's indulgence to extend the timetable, why should they not at least be required to disclose his report? It was true that the court had not actually named the experts to be used by either party in any of its directions, but since December 2014 the claimants had understood the defendants to be relying on Mr Amado's evidence when he was mentioned in connection with an application for summary judgment.

Justifying his decision, Stuart-Smith J noted that the substitution of Mr Amado with Professor Revoredo was done "with the intention of improving the quality and weight of the evidence that the defendants could adduce". How can this not be 'expert shopping'? It seems that there is one rule for defendants and one rule for claimants! But then I am probably paranoid. The point to take away here is that if you are ever in the (not altogether uncommon) position of the claimant in *Edwards-Tubb*, this case could provide you with a lifeline: "I am not expert shopping m'lud, just improving the quality and weight of my evidence." **SJ**