

Civil Procedure Rules Update : Permission to substitute an expert under CPR r.35

CPR r35.4(1) states that no party may call an expert or put in evidence an expert's report without the court's permission. As a practical matter, the compliance with this provision does not always run smoothly. Delays in producing and exchanging such evidence are a common cause for case management timetables becoming unrealistic.

The rules assume that, before the case management directions are sought, the parties will have decided which expert they wish to appoint. In order to discourage "expert shopping", the rules provide that where an expert has been named and agreed by the court, the court's permission will be required to substitute the expert.

The recent case of *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392 considered this issue. In this case, the parties' named experts prepared a joint statement as directed under r.35.12. The claimant, at a late stage in the litigation, sought permission to rely on the evidence of another expert after having concluded that the statement of the joint experts could be fatal to the success of his claim. Rule 35.12 contemplates that, as a result of their discussion, experts may modify their previously expressed opinions. This reflects the fact that their overriding duty is to the court (which must exercise its discretion in accordance with the overriding objective) rather than to their instructing parties. Further, this discourages additional costs associated in the production of another expert's report.

In *Guntrip*, Lewison L.J. drew a parallel with late applications to amend pleadings. His lordship said that, nowadays the courts should be less ready to allow a very late amendment than it used to be in former times; a heavy onus lies on a party seeking to make a late amendment to justify it as regards to his own position and that of any other party in the litigation before the court. Although these principles have been applied to amendments to statements of case, they apply equally to late changes of experts.