CA on appeal from the Central London County Court (His Honour Judge Cowell) before Brooke LJ ; Dyson LJ; Gage LJ. 10th March 2005.

**LORD JUSTICE DYSON :** this is the judgment of the court.

1. This is an appeal from the decision of His Honour Judge Cowell who in the course of a case management conference at the Central London County Court gave certain directions in relation to expert evidence which the defendant seeks to challenge. The judge gave permission to appeal because he considered that his decision raises an issue of practice and procedure affecting legal professional privilege which is of some importance.

2. The claimant started these proceedings on 1 Aug 2002. The details of the claim are immaterial for present purposes. Suffice it to say that the claimant seeks damages for breach of the defendant's covenant of quiet enjoyment in a lease of premises at Green Lanes, Palmers Green, London N13 which were intended to be used as a restaurant. On 7 April 2004, His Honour Judge Levy QC gave judgment in favour of the claimant on issues of liability and ordered an assessment of damages.

3. A case management conference was fixed for 21 July. In anticipation of the hearing, Mr Christou (the defendant's solicitor) produced a witness statement in which he set out the defendant's proposed directions. At para 22, he identified a number of issues which, he contended, only an expert could address. These included the value of the restaurant and what profit the restaurant would have made if trading had not been restricted as a result of the defendant's breach of covenant. He continued:

   *"23. I believe it is not in dispute that there is a tremendous lack of documentation on the part of the Claimant regarding the acquisition and refurbishment of the restaurant. In his evidence the Claimant stated that he had paid builders and contractors some £80,000.00 in cash and did not keep receipts and that in previous restaurants he had run again he was in the habit of not keeping receipts or having proper paperwork. The Claimant had no formal business plan and no formal financial arrangements. This makes it essential in my respectful opinion that these issues should be properly addressed by a restaurant valuation specialist who has given expert evidence on profitability cases.*

   *24. The Defendant has identified an expert who is anticipated will be able to deal with the above issues. The expert is Mr Trevor Watson, BSc, MBA, FRICS. A copy of Mr Watson's CV is exhibited hereto as CPC-10. Mr Watson has an impressive career history and the sample expert witness appointments specified in his CV cover, in my view, this precise situation including an expert appointment assessing the turnover of a fast food restaurant without formal accounting information.*

   *25. Mr Watson's initial fee to provide the report will be £4,000 plus VAT. Thereafter fees are based upon an hourly rate of £250 per hour plus VAT. In view of the costs claimed by the Claimant so far, which approach £150,000 this is not viewed as a disproportionate expense. Nor can such a criticism be levied when taking into account the size of the Claimant's claimed losses as voluntarily quantified.*

   *26. If the Claimant instructs an expert then it is likely that he would have to incur similar levels of expert's fees.*

   *27. The Claimant's own position as to expert evidence is not clear. However the Defendant concedes that if the Claimant should wish in turn to rely upon similar expert evidence, then there could be no objection in that respect.*

   *28. It was hoped that Mr Watson's report would be available by the beginning of July. As the Claimants have raised an issue as to whether there should be expert evidence on this point, the matter has been put on hold until the issue of leave is dealt with by this Honourable Court. If leave is granted the expert's report can be ready by the end on July 2004."*

4. Mr Christou exhibited a detailed curriculum vitae of Mr Watson.

5. The case management conference took place before Judge Levy on 21 July. It was common ground that each party should have permission to rely on an expert in the field of restaurant valuation and profitability, and we were told that there was little, if any, discussion about this before the judge. At the end of the hearing, counsel who appeared on each side prepared a draft order which they were satisfied accurately reflected what the judge had decided and/or the agreed directions which had been

approved by the judge. The terms of the draft agreed by counsel were incorporated in the court order and included the following directions:

*"3. Both parties do have permission, if so advised, to instruct one expert each in the specialism of restaurant valuation and profitability.*

*4. The Defendant do serve on the Claimant any expert's report pursuant to the permission granted under paragraph 3 of this order by 4pm on 4th October 2004.*

*5. The Claimant do serve on the Defendant any expert's report pursuant to the permission granted under paragraph 3 of this Order by 4pm on 31st October 2004.*

*6. The case be listed for a Pre Trial Review before His Honour Judge Levy QC on 19th November 2004, with a time estimate of half day.*

*7. The Trial of Assessment of Damages do take place on 13th December 2004 before His Honour Judge Levy QC with a time estimate of 5 days."*

6. Difficulties were encountered in implementing these directions. They led Mr Fleming (litigation manager for the claimant's solicitors) to prepare a witness statement dated 28 September in which he described the problems. It is only necessary to refer to what he said about the defendant's expert witness. He said that Mr Watson must have been appointed by the defendant as his expert, because some time after 30 July Mr Watson had attended the claimant's premises by appointment and had carried out an inspection. He went on to say that on 20 September, the defendant's solicitors wrote to the claimant's solicitors asking for access to be afforded to the claimant's premises the following day for inspection by *"a further expert, Mr Richard Negus, of Fleurets"*. Correspondence ensued in which the claimant's solicitors asked why another expert had been appointed, but no explanation was forthcoming. Mr Fleming also said that on 27 September he had telephoned Mr Watson and told him that the defendant's solicitors wished to instruct another expert: Mr Watson expressed surprise, saying that he knew of no reason which prevented him from acting, and that indeed he had already prepared his evidence.

7. This led Mr Fleming to submit at para 44 of his statement that (a) the defendant should not have permission to adduce the evidence of any further expert without an explanation, and (b) since Mr Watson's evidence was not privileged and may assist the court, disclosure of it should be ordered.

8. Mr Christou responded in a witness statement of 11 October. He said that Mr Watson had been appointed and had inspected the premises. He had prepared what was described as a "draft interim report". Subsequently, it had been decided that the defendant did not wish to rely on Mr Watson as his expert witness, and Mr Negus was instructed to prepare an expert's report. Mr Negus was willing and able to prepare a report within the timescale prescribed by the order of 21 July. Mr Christou said that he was not at liberty to disclose why the decision had been taken to instruct Mr Negus. He said that, since the order had not limited permission to a named expert, the defendant was entitled to change experts without seeking the permission of the court. But if that was wrong, then he asked the court for permission to rely on the report of Mr Negus, and for an order that he be granted reasonable access to the premises so that he could make any necessary amendments to his report in accordance with his duty to the court.

9. That was how matters stood when the case came before Judge Cowell on 18 October.

***The judgment***

*10.* First, the judge held that the defendant did need permission to rely on the report of Mr Negus. He decided that the order of 21 July gave the defendant permission to rely on the evidence of Mr Watson and no other expert in restaurant valuation and profitability, so that the defendant required the court's permission to rely on another expert in that field. At para 33 of the judgment, he said: *" There is no entitlement to call an expert in our law. There was mention of Mr. Watson in the evidence that led to the order of 21 July 2004. It is true that the order does not name him, but it is not certain that the same order would have been made had not paragraph 24 of the statement of Mr. Christou extolled the virtues of Mr. Watson. What was intended, even if not specified in the order, was that Mr. Watson would, as indeed he did, inspect and report. It must always be borne in mind that County Court orders are often hurriedly done, and often without any drafting or checking by the Judge."*

11. Secondly, having held that permission was required, he decided that he would give the defendant permission to rely on the evidence of Mr Negus, but only on condition that the report of Mr Watson was disclosed to the claimant. In deciding to impose this condition, the judge relied heavily on the unreported decision of this court in ***Beck v Ministry of Defence*** [2003] EWCA 1043, to which we shall refer later.

12. On behalf of the defendant, Mr Clarke submits that the judge reached the wrong conclusion on both issues. First, the judge should have held that, properly construed, the order of 21 July gave permission to both parties to instruct an expert in restaurant valuation and profitablilty: it did not give the defendant permission only to instruct Mr Watson. Secondly, even if that is wrong, the judge should not have made it a condition of granting permission for Mr Negus to be called as a substitute expert that the defendant disclose Mr Watson's report.

***CPR 35.4***

13. CPR 35.4 is headed "Court's power to restrict expert evidence and provides:

*35.4 (1) No party may call an expert or put in evidence an expert's report without the court's permission.*

*(2) When a party applies for permission under this rule he must identify*

*(a) the field in which he wishes to rely on expert evidence; and*

*(b) where practicable the expert in that field on whose evidence he wishes to rely.*

*(3) If permission is granted under this rule it shall be in relation only to the expert named or the field identified under paragraph (2).*

*(4) The court may limit the amount of the expert's fees and expenses that the party who wishes to rely on the expert may recover from any other party.*

***The first issue***

14. Mr Clarke's submission is quite simple. He draws attention to the fact that CPR 35.4(3) provides that permission to call an expert or put in evidence an expert's report shall be in relation to *"the expert named or the field identified"*. In the present case, there can be no doubt that the order did not identify a named expert; it identified the field of expertise of the expert for whom permission was given. If the order had named Mr Watson, Mr Clarke concedes that the defendant would have had to apply to the court for permission to rely on Mr Negus. It cannot be argued that the order was not correctly drawn, nor was it so argued before the judge. The order followed the wording of the draft agreed between counsel and submitted to the associate after the conclusion of the case management conference.

15. Mr Vasiliou (who was ably assisted in his submissions by Mr Fleming) contends that Judge Cowell was right to say that what was plainly intended by Judge Levy was to give the defendant permission to rely on the evidence of Mr Watson. He refers to ***Bristol-Myers Squibb v Baker Norton Pharmaceuticals*** [2001] EWCA 414 in support of the proposition that it is possible under the slip rule to amend an order so as to give effect to the intention of the court. CPR 40.12(1) provides that "the court may at any time correct an accidental slip or omission in a judgment or order."

16. The judge seems to have construed the order as giving the defendant permission to rely on the evidence of Mr Watson, but in our judgment the order plainly and unequivocally identifies the experts only by their field of expertise. Moreover, we cannot accept the submission that there was an accidental slip or error here. The terms of the order were agreed by counsel. Despite the details given by Mr Christou about Mr Watson and his rates of charging, it is not surprising that the parties agreed, and the judge approved, an order giving the defendant permission to rely on an expert in Mr Watson's field of expertise, rather than on Mr Watson by name. An order giving the defendant permission to rely on an expert in Mr Watson's field would have served his purposes just as well. The significance of giving the details of Mr Watson's expertise could have been no more than evidence of the fact that there are experts in this field. The relevance of Mr Christou's evidence of charging rates was not only to indicate that Mr Watson's rates were reasonable and not disproportionate, but also to show that, if the claimant were to instruct an expert, his or her fees were also likely to be reasonable and proportionate.

17. Even if it had been made explicitly clear that the defendant was asking for permission to rely on the evidence of Mr Watson, it would not have been perverse to make an order simply giving permission

to rely on one expert in the field of restaurant valuation and profitability (ie the expertise of Mr Watson). The mere fact that such an order was made in that situation would not, of itself, suggest that the order was an accidental slip on the grounds that it did not give effect to the intention of the judge who made the order.

18. We do not find it at all surprising that the order did not identify the name of the expert who could be relied on by the defendant in circumstances where he could not do the same in relation to the claimant. It would have been *possible* to make an order giving the defendant permission to call and rely on the report of Mr Watson, and giving the claimant permission to call and rely on the report of an unnamed expert in the field of restaurant valuation and profitability. But that would have been an unusual order to make. Judge Levy may well have taken the view that, if he could not restrict the claimant to a named expert, then it would not be right to restrict the defendant to a named expert. In these circumstances, we find it impossible to hold that the failure to name Mr Watson in the order of 21 July was an accidental slip.

19. It follows that in disagreement with the judge, we consider that the terms of the order of 21 July did not of themselves require the defendant to obtain the permission of the court to rely on the evidence of Mr Negus. Moreover, as we have pointed out, the judge was told that the defendant would have been able to serve the report of Mr Negus within the time specified by the order of 21 July.

***Were there other reasons for needing permission to rely on Mr Negus?***

20. Two other possible reasons for holding that the defendant needed permission to rely on Mr Negus were canvassed before us. First, Mr Fleming submitted that, once the defendant had instructed Mr Watson, he had implemented para 3 of the order of 21 July. The order had been carried into effect and, if the defendant wanted to instruct a second expert, he needed the permission of the court. The order did not envisage the instruction of a succession of experts. In our judgment, the court did not have power to give permission for the *"**instruction**"* of experts. CPR 35.4 contains the rules which govern the court's power to restrict expert evidence. They do not refer to *the "instruction"* of experts. They provide that no party may "call" or "put in evidence an expert's report" without the court's permission. It seems to us, therefore, that the words in the order *"permission, if so advised, to instruct one expert" should be construed as meaning "permission, if so advised, to call and put in evidence a report from one expert"*. If that is right, it must follow that the fact that Mr Watson had been instructed did not of itself require the defendant to seek the permission of the court to instruct Mr Negus.

21. Secondly, the question of permission arose in the context of a request for an inspection of the claimant's restaurant. The claimant did not in fact object to the appointment of Mr Negus on the grounds that Mr Negus wanted to inspect the restaurant, and that it was unreasonable to require the claimant to submit to a second inspection. Mr Fleming confirmed that this was not the basis of the objection. Moreover, as Mr Clarke pointed out, if the right to inspect had been denied to Mr Negus, this would not have prevented him from writing his report. If the court had indicated that it would give permission for Mr Negus to inspect the restaurant only on condition that the defendant disclosed Mr Watson's report, it is clear that the defendant would have instructed Mr Negus to write his report without the benefit of an inspection rather than disclose Mr Watson's report. In any event, we consider that to impose such a requirement as a condition of giving Mr Negus permission to inspect the premises would have been unreasonable and disproportionate. The circumstances here are a far cry from a personal injury case where a second expert wishes to conduct a second medical examination on the claimant, and issues such as those discussed in ***Lane v Willis*** [1972] 1 WLR 326 arise. We shall say no more about the question of inspection. But, having referred to the possibility of the court imposing a condition on the grant of permission to rely on a second expert that the party seeking permission should disclose the report of the first expert, we shall now turn to the second issue. If our conclusion on the first issue is correct, then, strictly speaking, the second issue does not arise. But in case we are wrong on the first issue, and since the second issue was argued before us and (as the judge recognised) is of general importance, we shall deal with it.

***The second issue***

22. We shall approach this on the footing that the order of 21 July gave permission to the defendant to rely on the evidence of a named expert, Mr Watson, and that the defendant needed the permission of the court to rely on the evidence of Mr Negus in place of Mr Watson. As we have seen, the judge decided that he would give permission to the defendant to call Mr Negus and rely on his report on condition that the report of Mr Watson was disclosed to the claimant.

23. Mr Clarke submits that this decision was wrong in principle. He argues as follows. The report of Mr Watson was privileged and the privilege had not been waived by the defendant. Legal professional privilege is a fundamental right which can only be curtailed by Parliament. The effect of the judge's order was to give the defendant the choice of either surrendering his right to privilege in Mr Watson's report (a report which, it may reasonably be inferred, was unfavourable to the defendant's case) or being prevented altogether from calling expert evidence at the assessment of damages in a case in which the defendant was facing a substantial claim for loss of profits. The practical effect of such an order was to compel the defendant to disclose Mr Watson's report and deprive him of his right to privilege in it. Mr Clarke submits that the case of *Beck* is distinguishable on its facts or was wrongly decided.

24. In ***Beck,*** the claim against the Ministry of Defence was for damages for psychiatric injury. The court gave permission to each party to call one (unnamed) psychiatrist. The defendant's first psychiatrist examined the claimant and produced a report which the defendant considered to be unsatisfactory. For this and other reasons, the defendant lost confidence in the expert. They asked the claimant's solicitors for facilities for a further psychiatric examination by another expert. This request was refused.

25. The defendant applied to the court for permission to change experts. No point seems to have been taken that the defendant did not need the permission of the court to change experts, because the court had not given permission by reference to named experts. The argument proceeded on the basis that the question was *"whether it can ever be appropriate to allow a party to substitute one expert for another without, at some stage at least, being required to disclose the first expert's report."* (para 2 of the judgment of Simon Brown LJ). To that question, Simon Brown LJ gave this resounding answer:

> *"26. I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible and certainly, to my mind, no such circumstances exist here.*
>
> *27. It seems to me that there clearly ought to be a condition attached to the order here permitting the defendants to instruct a fresh psychiatrist; namely that they should, on taking up such permission, forthwith disclose Dr Goodhead's report upon which they no longer seek to rely."*
>
> *Ward LJ said:*
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> *"30. Nevertheless, expert shopping is to be discouraged, and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again. I agree, for the reasons given by my Lord, that the appeal should be allowed to that limited extent."*
>
> *Lord Phillips MR said:*
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> *"31. A claimant who brings proceedings for personal injury, whether physical or psychiatric, must accept that he is likely to have to submit to a medical examination by an expert instructed by the defendant. A claimant can properly object, however, to being subjected to a second examination without good reason.*
>
> *32. In this case the reason advanced for subjecting Mr Beck to a second examination is that the first expert instructed by the defendants has proved unsatisfactory. In my judgment a claimant can reasonably object to having to be examined again if this is, or may be, because the conclusions reached by the first expert have proved more favourable to him than the defendants had anticipated.*
>
> *33. I do not consider that the court should order a second examination or stay proceedings pending a second examination by a new expert if this is a possibility. So to order would be to permit the possibility of expert shopping which is undesirable. In this case, on the evidence of the defendant's solicitor, it is not said that Mr*

*Goodhead's conclusions are unfavourable to the defendants, but that the form or manner in which those conclusions have been expressed in the report that he has prepared are so unsatisfactory as to have resulted in a loss of confidence in him as an expert.*

*34. I do not consider that a claimant should be required to take such an assertion on trust. Equally, I can accept that it may not be reasonable, and has been found not to be reasonable in this case, to expect defendants to advance specific criticisms of an expert's report at the time when the possibility remains that the defendants will be driven to rely upon that expert because the application to replace him has been refused.*

*35. The answer in this case, and in any case where a situation similar arises, is that proposed by Lord Justice Simon Brown that the permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. Such a course should both prevent the practice of expert shopping, and provide a claimant in the position of Mr Beck with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done.*

*36. For those reasons I concur in the solution to this appeal proposed by Lord Justice Simon Brown."*

26. It is surprising that this important decision has not been reported. Mr Clarke says that it was wrongly decided. He submits that the court did not appreciate that the effect of its decision was to abrogate or at any rate emasculate privilege. Alternatively, he seeks to distinguish it from the present case on two grounds. First, in that case, the defendant was prepared to disclose the first report if it was granted permission to call the second expert. Secondly, the defendant put forward an explanation as to why it wished to instruct a second expert and the condition was imposed so that the claimant could see that the explanation was true.

27. In our judgment, these factual differences are immaterial to the point of principle that was decided in ***Beck*** which is encapsulated in para 26 of Simon Brown LJ's judgment and are not a sufficient basis for distinguishing that case from the present. The court approached the issue that was before it on the footing that the defendant required permission in order to rely on a second expert. That is the basis on which we are approaching the second issue in the present case. The question of principle that was decided in *Beck* was that the court has the power to give permission to a party to rely on a second (replacement) expert which it should usually exercise only on condition that the report of the first expert is disclosed. This decision is binding on us. We cannot accept that the decision is wrong or that it is conceivable that the court was unaware of the fact that reports prepared for the purposes of litigation are, until they are disclosed, protected by privilege.

28. Clear support for this proposition is to be found in ***Jackson v Marley Davenport Limited*** [2004] EWCA 1225. The issue in that case was whether, if an expert makes an early report to his client before he makes the report which is later disclosed in the litigation, the law requires that the earlier report be disclosed. Longmore LJ said:

*"13. There can be no doubt that, if an expert makes a report for the purpose of a party's legal advisers being able to give legal advise to their client, or for discussion in a conference of a party's legal advisers, such a report is the subject matter of litigation privilege at the time it is made. It has come into existence for the purposes of litigation. It is common for drafts of expert reports to be circulated among a party's advisers before a final report is prepared for exchange with other side. Such initial reports are privileged.*

*14. I cannot believe that the Civil Procedure Rules were intended to override that privilege. CPR 35.5 provides that expert evidence is to be given in a report unless the court directs otherwise. CPR 35.10 then changed the previous law by providing in sub-rule (3) that the expert's report must state the substance of all material (whether written or oral instructions) on the basis on which the report was written. By sub-rule (4) it is, moreover, expressly provided that these instructions shall not be privileged. But the reference in Rule 35.10 to "the expert's report" is, and must be, a reference to the expert's intended evidence, not to earlier and privileged drafts of what may or may not in due course become the expert's evidence."*

*And Peter Gibson LJ said:*

*"22. It could have been provided in the Civil Procedure Rules that the privilege attaching to documents coming into being with a view to litigation should not apply to any document prepared by an expert with a view to producing a report. But that is not the way Part 35 is drafted. On the contrary, Part 35 makes clear how*

*limited is the waiver of privilege when the expert report is put forward by a party with a view to reliance on it. The order providing for an expert's report does not itself waive privilege in any document. That only occurs once the party decides that the particular report on which he wishes to rely should be disclosed."*

29. The principle established in *Beck* is important. It is an example of the way in which the court will control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it. It needs to be emphasised that, if a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that A's report is disclosed to the other party or parties, and that such a condition will usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so.

30. A question that was not considered in *Beck* is whether the condition of disclosure should relate only to the first expert's final report, or whether it should also relate to his or her earlier draft reports. In our view, it should not only apply to the first expert's "final" report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion.

31. In the present case, the first expert had produced a "draft interim report". It is reasonable to infer from the defendant's wish to change experts and refusal to provide an explanation that the draft interim report contains the substance of the first expert's opinion on some or all of the remaining issues in the case. In these circumstances, we consider that the judge was entirely justified in deciding that, if the defendant needed the permission of the court to rely on the evidence of Mr Negus, it should be a condition that he disclose to the claimant Mr Watson's draft interim report.

***Conclusion***

32. For the reasons given earlier, the defendant did not need the permission of the court to rely on the evidence of Mr Negus. But if he did need that permission, the judge was right to impose the condition that he imposed. But in view of our conclusion on the first issue, in our opinion this appeal should be allowed.

**ORDER:**

1. The order dated the 2nd December 2004 be amended by deleting paragraph 4 of the said order
2. The Respondent/Claimant do pay the costs of this Appeal [assessed in the sum of £10,310.63 inc VAT/ subject to a detailed assessment on the standard basis]
3. The Respondent/Claimant do pay the costs of the hearing before His Honour Judge Cowell on the 18th October 2004 subject to a detailed assessment on the standard basis.
4. Such orders for costs to be set off against the orders for costs previously made in the action in favour or the Respondent/Claimant.

(Order does not form part of approved Judgment)

Ivan Clarke (instructed by Messrs C.P Christou) for the Appellant
Vassos Michael Vasiliou appeared in person