

EXPERTS UNDER SCRUTINY: TCC CONSIDERS RULES AND BEST PRACTICE IN COMMUNICATIONS WITH SINGLE JOINT EXPERTS AND REFUSES TO RULE EXPERT EVIDENCE INADMISSIBLE

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Legal Briefings - By **Emma Schaafsma**

In recent years the TCC has levelled forceful criticism of experts who have failed to display proper independence. However, in this latest TCC judgment, the court refused to grant an application for expert evidence to be ruled inadmissible and the claim that it supported be struck out. The court found on the facts that, while the experts may not have followed best practice, they had not breached their duties under CPR Part 35 or otherwise compromised their independence.

The case is particularly interesting as it addresses a common scenario whereby the parties jointly engage a third party testing house to undertake certain site tests and investigations for the party-appointed experts to use in their analysis. The defendant objected to the claimant's experts' unilateral communications with the testing house, and more so to their later request to the testing house to conduct further tests without informing the other experts. This will be a welcome judgment at a time when we are seeing an increasing number of threatened and actual challenges to experts in litigation and arbitration.

BLACKPOOL BOROUGH COUNCIL V VOLKERFITZPATRICK LTD & ORS [2020] EWHC 387 (TCC)

Blackpool Borough Council is seeking damages in the region of £6 million against defendant Volkerfitzpatrick for alleged breaches of contract in relation to the design and construction of a tram depot in Blackpool. The judge noted that the claimant's claim is heavily reliant on the expert evidence of its structural engineering and corrosion experts, Mr Davis and Dr Clarke respectively. By this application, heard less than two weeks before the 4 week trial was due to commence, the defendant (supported by the other parties) sought to have both the claimant's expert evidence ruled inadmissible and the claim be struck out (on the basis that without the expert evidence the claimant could not hope to succeed).

The defendant contended that the claimant's experts' conduct in communications with Socotec, the jointly appointed third party testing house, meant that their independence was compromised irreparably. The allegations included that the claimant's experts procured testing directly from Socotec without informing the other parties' experts, directed Socotec as to how it should carry out its testing without informing the others, and directed Socotec to keep the privately procured testing secret.

EXPERTS' DUTIES UNDER CPR PART 35

The court set out in some detail the legal position relied upon by the defendant, starting with the authoritative summary by Cresswell J in The Ikarian Reefer on the duties of an expert witness, as reflected in CPR Part 35.3 which explicitly provides that an expert's duty is to the court and that duty overrides any duty to the party instructing and/or paying them. The defendant also relied upon the guidance in CPR Practice Direction 3, and specific provisions in the Guidance for the Instruction of Experts in Civil Claims¹ (the **Guidance**) requiring experts to try to ensure that the same information is disclosed to each expert in the same discipline and that transparency in terms of all material instruction to experts "is imperative".²

With regard to single joint experts, CPR Part 35.7(1) provides that where two or more parties wish to submit expert evidence on a particular issue the court may direct that the evidence on that issue is to be given by a single joint expert (an **SJE**). The Court stated that, in such a situation, the SJE would be under the same obligations as any other expert permitted to give expert evidence in a case under CPR Part 35. As for unilateral communications and sole access to SJE's, this would "never" be permitted, following the Court of Appeal's ruling in Peet v Mid Kent Healthcare NHS Trust. The Guidance also contains specific provisions about communications with SJE's including that instructions should be copied to other interested parties (paragraph 39) and their overriding duty to the court and equal duty to all parties to maintain independence, impartiality and transparency at all times (paragraph 43).

DISTINGUISHING SINGLE JOINT EXPERTS

Given that the defendant's case was premised on the basis that Socotec was in the position of a single joint expert, the court first addressed the question of whether Socotec was an SJE within the scope of CPR Part 35.7(1), noting that two distinctions needed to be borne in mind:

(1) a distinction between genuine experts in a particular field and those who are appointed solely to undertake investigations and provide factual material upon which the experts may rely in reaching conclusions; and

(2) a distinction between experts instructed to give opinions on a wide variety of circumstances (giving the example of a valuation expert in a rent dispute) and experts who are instructed in litigation where the party instructing them has obtained the court's permission under CPR Part 35.4 to rely on expert opinion evidence.

The court considered the factual circumstances surrounding Socotec's appointment, and in particular the court's first case management order. That order gave the parties permission to reply on evidence from structural engineering experts and corrosion experts, and set out in broad terms a procedure whereby the experts would meet to seek to agree appropriate inspection and testing procedures.

Importantly, however, there was no express provision in that order for the inspection and tests to be done by an independent testing company, nor for any SJE to be appointed to undertake them. Instead, the experts had agreed between themselves that it would be appropriate and expeditious to appoint an independent third party for the sampling and testing work. While Mr Davis led the arrangements for obtaining quotes and ultimately engaging Socotec on behalf of the claimants, the engagement terms were clear that Socotec's costs would be shared equally between the parties. There was no suggestion that Socotec would be engaged as an SJE which, as the court noted, would have required the court's permission. Further, the work undertaken by Socotec did not involve it exercising any expert judgment nor offering any opinions on the results.

THE CONDUCT OF THE EXPERTS AND BEST PRACTICE

The court gave short shrift to the defendant's complaints about Mr Davis's unilateral communications with Socotec when making the necessary arrangements for the inspections and testing to take place and managing requests by other experts to obtain samples for further testing. While the court noted that Mr Davis ought to have copied the other experts into email correspondence, there was no basis for suggesting that he was seeking to exert improper control over the process. Indeed, the court appeared more critical of *"the readiness of the defendant and the other parties to read a sinister motive into these exchanges, which in my view ... is unattractive and reveals at best a careless and at worst a wilful misreading of these exchanges"*.

As for the more significant issue of the circumstances in which Socotec was instructed to undertake further inspection and testing on behalf of the claimant alone and not reveal this to the other experts, the court held that:

- The decision to instruct Socotec for the further tests was not a deliberate breach of a clear and express term of the case management order.

- While in the circumstances, there had been good reason for not following a procedure similar to that which had been contemplated in the original case management order for the first inspection and testing (including that time had been tight and the timetable had already slipped), *“the claimant ought at least to have made some attempt to [notify the other parties] before proceeding unilaterally”*. It would have been more appropriate to have attempted to seek the other parties’ consent in advance, failing which apply to the court for permission on an urgent basis.
- There is no general obligation upon a party to notify other parties to a litigation that it is instructing a testing house to undertake inspections and tests of its own property, with a view to putting the results to their experts. The obligation of transparency does not extend as far as giving a *“running commentary”* on the investigations that it is undertaking.
- Mr Davis properly circulated the results of the further testing to the other experts as soon as they were produced by Socotec; indeed there was no objection until almost a month later when solicitors for one of the parties reserved their position in relation to the material.

The court concluded by stating that it would have needed clear evidence that the expert’s conduct was intended to procure skewed or unreliable results to support the claimant’s case or to obtain some other unfair advantage in the litigation for the claimant, in order to find that the experts demonstrated a lack of independence such that their evidence should be declared admissible at trial. There was no evidence of this here.

COMMENT

The court acknowledged that where experts fail to perform their obligations of independence the TCC should be astute to take prompt and effective action. However, this judgment demonstrates that the court will not readily make an order to rule expert evidence inadmissible without clear evidence of impropriety.

That said, practitioners should heed the court’s comments on what it considers best practice in these situations. Challenges to experts are becoming increasingly common in construction disputes and all too often with little merit other than to disrupt proceedings. Following a transparent procedure in dealings with jointly appointed testing houses, in so far as it is possible and appropriate in the circumstances, should go some way in warding off unmeritorious and distracting challenges.

¹Issued by the Civil Justice Council in August 2014

²Paragraphs 30 and 55 of the Guidance

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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