

## Construction Law Update

### Proceed With Care - Entirety of Defendant's Expert Technical Evidence Excluded by the TCC due to Non-Compliances

In the recent case of *Dana UK AXLE Ltd -v- Freudenberg FST GMBH* [2021] EWHC 1413 (TCC), the TCC considered an application to exclude technical expert evidence mid-way through a trial.

#### Background

On 5 May 2021, a trial commenced in the TCC relating to a claim by Dana UK AXLE Ltd ("**Dana**") arising from the alleged failure of pinion seals manufactured and supplied by Freudenberg FST GMBH ("**FST**"). Given the technical nature of the claim, both parties had permission to call expert evidence in the fields of engineering/polymer science. A week into the trial, Dana made an application to exclude FST's expert evidence in full.

#### FST's Expert Evidence

FST's expert evidence had been served 8 days late and was deficient in numerous ways:

- (i) contrary to the Guidance for the Instruction of Experts in Civil Claims 2014 (the "**2014 Guidance**"), none of the expert reports identified the documents upon which each of the experts had relied;
- (ii) contrary to the TCC Guide, two experts appointed by FST visited FST sites without notifying Dana, thus denying Dana's experts the opportunity to inspect operations for themselves; and
- (iii) in some cases, the expert reports did not reference sources of data/documents relied upon, prejudicing Dana's lawyers in comprehending the reports.

Despite these shortcomings, a Pre-Trial Review order (the "**PTR Order**") granted FST relief from sanctions for late service and permitted reliance upon the reports at trial, provided that the non-compliances with Part 35 of the Civil Procedure Rules (the "**CPR 35**") and applicable guidance were rectified.

FST served revised expert reports, this time including lists of documents upon which its experts had relied. Dana was still not satisfied, however, and proceeded to pose targeted CPR 35 questions to FST's experts. Considering FST's experts' responses, Dana maintained that FST's expert reports were unsatisfactory and "*put down a marker*" in relation to the same in its opening submissions for trial. FST subsequently disclosed further documents (and lists of documents). Dana alleged that these "*revealed significant, repeated and fundamental breaches of the CPR*" by FST.

#### Application to exclude FST's expert evidence

On day seven of the trial, Dana applied to exclude FST's expert evidence on the grounds that:

- (i) FST had failed to satisfy the conditions in the PTR Order; and
- (ii) FST had failed to comply with CPR 35, Practice Direction 35 ("**PD35**") and the 2014 Guidance in respect of the instruction of, and interaction with, its experts.

#### Issue 1 - alleged breach of the PTR Order

##### **PTR Order Requirement 1: FST was to provide full details of all materials provided to its experts**

Whilst FST provided lists of documents upon which the experts relied, it never identified *all* the materials provided to the experts. To the contrary, FST's late disclosure revealed that information had been provided to the experts which had never been disclosed to Dana or otherwise identified via lists. Further, the experts had unsupervised access to FST's personnel but there was no record of the discussions held or the information ultimately provided by them.

The TCC concluded that the above amounted to a serious breach of the PTR Order, which was not merely technical, because it was *essential* for the court to understand the information and instructions provided to each parties' experts to ensure a level playing field.

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### **Requirement 2: FST was to disclose all documents, photographs, and notes produced/provided to experts during site visits**

This order arose out of concerns regarding unilateral site visits by FST's experts. The TCC considered that it was "entirely unacceptable" that FST's experts engaged in site visits without informing Dana, retained no records of the same, and had undertaken more site visits than had been disclosed in the expert reports.

Under the 2014 Guidance, experts on both sides should have access to the same information. In circumstances where FST's experts had exclusive access to various sites, FST had clearly disregarded the need for experts to "co-operate fully" with one another.

Save for a few paragraphs, no disclosure was provided in respect of various visits to the sites. FST's failure even to disclose the existence of various site visits until the trial was itself a breach of this requirement. In the circumstances it was "impossible to know whether [FST's experts] chose only information that suited FST's case" from the site visits.

### **Requirement 3: FST was to identify the sources of data/information relied on in support of each proposition/opinion**

When considering this requirement, the TCC concentrated on two striking examples within the expert reports. Namely, one expert did not require sight of detailed information upon which he placed considerable reliance whereas another expert made an important proposition without any reference to a document in support. In this regard, the experts' reports were unclear, ambiguous, and bare.

In finding breaches of this requirement, the TCC criticised the extent to which information had been provided directly by FST to its experts, without any oversight by FST's legal team. Indeed, the TCC noted that it was "a paradigm example of what can go wrong if an expert is left to obtain information direct from his clients without legal involvement..."

### **Conclusion on the PTR Order**

On the evidence, the TCC concluded that all three of FST's experts had breached the PTR Order and that the breaches were all "serious and unexplained". On this basis alone, permission for FST to rely on the expert reports was withdrawn.

### **Issue 2 - alleged breach of CPR 35 and guidance**

Whilst not strictly necessary given the above, the TCC identified the following further breaches of CPR 35 and the 2014 Guidance by FST/FST's experts:

- (i) FST's experts were privy to information that was not shared with Dana;
- (ii) FST ought not to have been involved in negotiation/drafting of the experts' joint statements;
- (iii) FST's experts attended site visits, depriving Dana's experts of the same information; and
- (iv) FST's expert reports were directly influenced by FST.

These breaches alone would have also been sufficient to justify refusal of permission for FST to rely upon the expert reports.

### **Analysis**

This case is a stark reminder of the consequences of non-compliance in respect of instructing and interacting with experts. The provision of expert evidence is a matter of permission from the court, not an absolute right. Failing to comply with applicable rules and guidance risks potential total exclusion of expert evidence which could be crucial to proceedings.

A "level playing field" between experts is particularly important, as is diligent and careful control of experts by the legal representatives that instruct them.

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