Out for hire?

The independence of experts—can any more warnings be needed, asks Chris Pamplin

IN BRIEF

▶ Covers caselaw illustrating disastrous examples where solicitors have ignored the independence of experts.

It is always frustrating when expert witness independence has to be called into question. Just when you think you've seen the worst transgression, another two come along.

Surely everyone knows that experts must not act as 'hired guns'? Civil Procedure Rules (CPR) Part 35 makes clear that an expert's first duty is to the court, and this overrides any obligation to those who instruct or pay the expert.

Where the court directs discussions to take place between experts, neither the parties nor their legal representatives may attend, unless this has been ordered by the court or agreed by all parties and the experts. In the course of discussions, experts must give their own opinions to assist the court, and do not require the authority of the parties to sign a joint statement. The report must reflect the expert's own opinion, and it should not be influenced by the instructing party. Neither should experts venture into advocacy. If these rules have been breached, it is within the court's power to exclude the expert evidence.

Lawyers, keep out of joint statements!

In *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC), the defendant was alleged to have supplied defective automotive parts. To secure equality of arms, the court ordered each side to instruct its experts via solicitors rather than to engage them direct. All instruction material was to be disclosed, and each expert was to ensure their opposite number had access to the same material.

However, the defendant's expert reports did not detail the instruction materials the experts received. Nor did they identify the documents on which the experts relied in support of their opinions and analyses. Furthermore, the reports showed that the defendant's experts had visited the defendant's factories without informing the claimant's experts.

At the pre-trial review (PTR), the court ordered the defendant to remedy the failings. It did not do so, and the extent of the failings became clear at trial. The defendant's experts had not only engaged in site visits without informing the claimant's experts, but had also made more visits than they disclosed. It also remained unclear exactly what information had been provided to the experts during the various site visits. Furthermore, two of the experts had given manufacturing analyses without identifying the information they had relied upon.

In addition to the breaches of the PTR order, the defendant had been in breach of CPR 35 and the 2014 Guidance for the instruction of experts in civil claims. There had been the free-flow exchange of information between the defendant's experts and its in-house technical specialists. The experts had also been privy to information that was not shared with the claimant's experts. This had continued during the period between the joint expert meetings and the signing of the experts' joint statement. What's more, during this critical period, the defendant's experts had relayed information from the joint meetings to the defendant's in-house specialists, and had even sought assistance in how to respond. The analyses and opinions of the defendant's experts appeared to have been influenced directly by the defendant. This conduct called into question the independence and impartiality of their reports.

Granting the application to exclude the defendant's expert evidence, Mrs Justice Joanna Smith said all the breaches of the PTR order were serious and unexplained. Furthermore, the court was inclined to believe the failure to comply was not inadvertent, because compliance would have given the court and the claimant an insight into the defendant's numerous breaches of CPR 35.

The judge said it was important that all experts and all legal advisers should understand what is and what is not permissible in the preparation of joint statements. While experts can, if necessary, provide a copy of a draft joint statement to solicitors, the expert should not ask the solicitors for suggestions on its content. The solicitor could, in the judge's view, draw the expert's attention to any fundamental error of law or fact contained in the draft statement, but that must be done 'in the open' so that all parties and the trial judge may be aware. She quoted para 13.6.3 of the Technology and Construction Court Guide which states that, while the parties' legal advisers may assist in identifying issues the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement.

No, really, let the experts write them

More recently, the words of Joanna Smith J have been echoed in *Patricia Andrews & Others v Kronospan Ltd* [2022] EWHC 479, [2022] All ER (D) 58 (Mar). That case involved a claim by 159 householders who sought damages for nuisance caused by dust, noise and odour which were alleged to be emitted from the defendant's wood processing plant in Chirk, near Wrexham.

At the first case management conference (CMC), the court granted permission for each party to rely on expert evidence in the field of dust dispersion modelling. Subsequently, a further order allowed for each party to adduce additional evidence from an expert in dust analysis and modelling. The claimant party chose to rely on a single expert with knowledge and experience in both fields.

From the outset, the court acknowledged that these were very technical and specialist areas. Indeed, the issue of expert evidence in dust analysis had been considered at numerous hearings. There had been very little agreement about a common approach. For example, there was no agreement on the methodology to be adopted or the manner and monitoring of data collection. There was also no agreement on the identity of the joint expert responsible for the laboratory analysis, nor the letter of instruction to be sent to that joint expert.

In light of the many difficulties, and to ensure that the parties' experts were reporting on the same basis, Senior Master Fontaine made an order that the experts

were to continue discussions to agree their approach. Indeed, they were to prepare and file with the court a document in respect of each report.

The experts were given a list of areas they should consider specifically. Similarly, the order provided specific directions as to the areas and time periods for monitoring. Further, the experts had to agree the sites from which control samples were to be taken, as well as the number of samples from each site. The order also made provision for what should be included in the joint letter of instruction to the expert, who was to provide the chemical and scanning electron microscope (SEM) analysis.

Senior Master Fontaine acknowledged that it was somewhat unusual to make such a detailed order concerning experts. It seems, though, that in this case she felt driven to do so because of the continued lack of agreement between the experts, and the very technical nature of the work they were to undertake. Indeed, during the course of proceedings, the senior master had called the experts to attend a CMC so that she could explain to them directly what it was that the court required. Her hope was that this would help them address the objective of their reports, and to focus less on their disagreements. Consequently, it is not unreasonable to suppose that the experts had been left in no doubt as to what was required from them and the manner in which this was to be achieved.

From the date of the order, it took a further two years for the expert reports to be exchanged. Discussions between the experts commenced in the following month, May 2021. However, at the end of December 2021 it came to light that from the beginning of May to mid-November 2021 there had been frequent and ongoing communications between the claimants' solicitor and their expert. Working drafts of the joint statement had passed backwards and forwards between them, and there had been several telephone conversations in which the content of the joint statement was discussed.

Loss of independence = loss of report

The defendant made an application seeking revocation of the permission given to the claimants to rely on their expert.

Although some of the comments made by the claimants' solicitor on the various draft statements were merely in relation to typographical errors, or queries where there was a lack of clarity, 16 comments were made on issues of substance.

The defendant recognised that such an order by the court would be a drastic step, but argued that this was the only recourse. The conduct of the expert had demonstrated that he was not truly independent and had been acting as an advocate. It was submitted that both his conduct and that of the claimants' solicitor amounted to a failure to comply with the terms upon which the claimants were given permission to adduce the expert's evidence. There had also been a clear breach of CPR 35 and Practice Direction 35.9, which states specifically that legal representatives should not attend expert discussions.

The claimants' solicitor acknowledged their conduct had not been appropriate and admitted they had given advice and made suggestions in relation to the joint statement. Seeking to rely on the decision in *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC), [2018] All ER (D) 193 (Jul), however, they argued it would be disproportionate and potentially disastrous for the claimants if they were unable to rely on the expert evidence. It was pointed out that proceedings had been going since 2017, and the expert had been involved for three years. The expert's costs, to date, amounted to £225,000.

Allowing the application and revoking the permission given, Senior Master Fontaine said, given the gravity of the transgressions, which had occurred on numerous occasions over a period of many months, it would not be disproportionate to grant the application. She quoted, in her decision, the words of Joanna Smith J in *Dana*, that it was wholly inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement or, for that matter, for the solicitors either to ask an expert to do so or to provide input if requested. The senior master said:

> '... it is important that the integrity of the expert discussion process is preserved so that the court, and the public, can have confidence that the court's decisions are made on the basis of objective evidence.'

Considering whether to permit the claimants to rely on an alternative expert, the senior master acknowledged this would undoubtedly cause additional costs and delay to the proceedings. Of course, if this conduct had been uncovered only during cross-examination at trial, the claimants would not have been able to rely on any expert evidence. Although the claim was by no means at an early stage in the proceedings, no trial date had been set. The data had already been collected and analysed by an independent laboratory, so a newly instructed expert in dust analysis would not be involved to the same extent as had been the claimants' previous expert. She considered that it was still possible, at this stage in the litigation, to allow the claimants to seek new experts.

Both cases demonstrate the grave dangers inherent in any conduct by expert witnesses whose behaviour crosses the threshold into advocacy, or who allow themselves and their reports to be co-authored by those instructing them. The wasted costs and expenses in both cases were considerable. NLJ

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