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Equality of Arms Between Experts: English High Court Offers Forceful Reminder by Excluding Expert Evidence Mid- Trial

A recent decision issued by the Technology and Construction Court has provided a helpful reminder for experts, counsel and clients of the importance of ensuring equality of arms between experts and, in that connection, of monitoring and recording the provision of information and documentation to experts.

In *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC), Smith J handed down a forceful judgment in which she granted a mid-trial application to exclude the Defendant's technical expert evidence because of the Defendant's failure to properly address these matters.

This decision is of particular relevance to those involved in construction disputes, where the engagement of delay, quantum and technical experts is commonplace and the scope of relevant project documentation to be provided to and considered by the experts can be extensive. Whilst this decision arose in the context of litigation in the English courts and the applicable requirements under the Civil Procedure Rules (CPR), the principles it underlines are recognised and increasingly adopted in international arbitration. Certainly, arbitral tribunals from an English law background, seated in London or applying English law can be expected to require equality of arms between experts so as to enable fair comparison and assessment of the expert opinions filed by the parties.

BACKGROUND

The case concerned the alleged premature failure of pinion seals manufactured by the Defendant (**FST**) and supplied to the Claimant (**Dana**).

On numerous occasions over the course of the proceedings, Dana's counsel expressed concern as to the lack of transparency regarding



information and documentation provided to FST's experts for the purposes of their reports, as well as FST's failure to provide copies of such information to Dana and its experts.

These concerns were raised at a pre-trial review, where Dana complained that FST and its experts had failed to comply with applicable requirements (including under Part 35 and Practice Direction 35 to the CPR and the Guidance for the Instruction of Experts in Civil Claims 2014 (**2014 Guidance**)) in the following respects:

1. None of FST's three expert reports identified the documents on which the expert had relied or included a list of documents provided to the expert by FST or its counsel (contrary to, in particular, paragraph 55 of the 2014 Guidance, which provides that "*Experts should try to ensure that they have access to all relevant information held by the parties and that the same information has been disclosed to each expert in the same discipline*");
2. FST's experts had undertaken site visits to inspect FST's operations, despite Dana's experts not being afforded the same opportunity. Furthermore, no details or records from the site visits were provided; and
3. When referencing data or other information, FST's expert reports did not always provide reference to the document or data source relied on.

An order was granted (**PTR Order**) entitling FST to rely on its expert evidence at trial provided that it filed and served revised expert reports which addressed the above issues.

Following FST's service of revised expert reports, Dana maintained that the reports remained non-compliant. Dana's concerns were exacerbated upon the late receipt of further documents from FST which were said to demonstrate a free flow of information between FST and its experts without oversight by counsel. While it was suggested in witness evidence filed for FST that these communications merely related to logistical matters and that further correspondence still under review was expected to be benign, Dana was neither convinced nor satisfied with this explanation.

On Day 7 of the trial, Dana made an application to the Court to exclude FST's expert reports on the basis of (a) breach of the PTR Order, including FST's continued failure to provide Dana with details of all materials provided to its experts; and (b) FST's failure to comply with CPR Part 35, PD 35 and the 2014 Guidance.

DECISION

The Court conclusively found in favour of Dana on each ground of its application, determining that:

1. Whilst FST had provided a list of documents on which each of its experts **relied**, it had never identified a list of all materials **provided** to the experts. Connected to this was the Court's finding that the experts had been granted "*unfettered and unsupervised access to the Defendant's personnel*" and that a significant amount of information had been provided to FST's experts of which there was no record and that had never been disclosed to Dana or otherwise identified; and
2. In respect of site visits, the 2014 Guidance had been ignored, commenting that "*Truly independent experts paying proper attention to their duties would not have attended site visits without first informing their opposite number ... and would not have felt comfortable receiving extensive information from their clients to which their opposite numbers were not privy.*"

In barring FST from relying on its expert evidence, the Court highlighted the importance of ensuring that experts of like discipline have access to the same material in order to ensure a level playing field and equality of arms, stating that:

"The provision of expert evidence is a matter of permission from the court, not an absolute right (see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules...If those rules are flouted, the



level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk.”

LESSONS LEARNED

This decision offers a number of lessons to experts, counsel and clients:

1. Whatever principles govern expert evidence, they must be complied with by both experts and counsel. In particular, when instructing and working with expert witnesses, counsel should ensure that clients and experts are aware of these obligations;
2. Counsel and experts should maintain detailed records of all information, data and documentation provided to experts; and
3. Clients should not engage directly with expert witnesses on substantive issues without the involvement of counsel, whether in-house or external. Direct contact, without counsel involvement, might also raise questions as to the client's influence on the expert's independence.

Failures to comply with the above, if extreme, can expose clients to sanctions (as occurred in this case). More typically, the extent of such failures will be less extreme, but may nonetheless give rise to questions regarding the value of the expert evidence and the credibility of the expert, counsel and their client.

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