

Legal Briefing

Ted Lowery on an attempt to disbar expert witnesses

Blackpool Borough Council v Volkerfitzpatrick Ltd and Range Roofing and Cladding Ltd & Ors [2020]

Before His Honour Judge Stephen Davies

In the Technology and Construction Court

Judgement delivered 25 February 2020

The facts

The council commenced proceedings against Volkerfitzpatrick for alleged breaches of contract in relation to the design and construction of a new tram depot in Blackpool. The court gave permission for evidence from structural engineering and corrosion experts who were directed to devise and carry out a joint inspection and testing procedure and produce a joint statement. The council retained Mr Davis and Dr Clarke for structural engineering and corrosion expertise respectively.

During May 2019 the parties' experts agreed a joint inspection and testing procedure which included provision for sampling and testing of corroded roof sections to be carried out by an independent body. Following enquiries by the experts, Socotec UK Ltd was engaged by the council to carry out this work but with the cost to be shared between the parties.

The experts subsequently failed to agree a joint statement and during September 2019 Mr Davis separately instructed Socotec to carry out additional corrosion testing work solely on behalf of the council. Mr Davis stipulated that all communications concerning the council's separate instruction should be kept apart from communications between Socotec and the experts relating to the on-going jointly instructed tests. The results of the jointly instructed tests were provided to the experts during November 2019 and at the same time Mr Davis circulated Socotec's findings in relation to the separate instruction.

At the PTR on 10 January 2020 Volkerfitzpatrick obtained an order that all communications between the experts and Socotec should be disclosed. Having viewed the exchanges concerning the separate instruction Volkerfitzpatrick complained that Mr Davis and Dr Clarke had contacted Socotec without copying in the other corrosion experts, had procured testing directly relevant to the proceedings, had directed Socotec as to how its

testing should be carried out and had told Socotec to keep the existence of the separate instruction secret. Volkerfitzpatrick contended that this conduct reflected a lack of independence contrary to CPR Part 35 and applied for orders that the council should not be permitted to rely upon the evidence of Mr Davis or Dr Clarke and that the council's claim should therefore be struck out.

The council responded that the separate instruction had been issued in order to obtain additional and necessary test results more quickly than would be possible via the joint instruction arrangements and that it had always been intended that the results would be made available to all of the parties.

The issue

Should Mr Davis and Dr Clarke be disbarred from providing expert evidence?

The decision

The judge rejected Volkerfitzpatrick's submission that Socotec was in the position of a single joint expert: Socotec's role under the joint instruction was limited to undertaking investigations and providing material for the parties' experts to consider and the joint instruction had not been issued pursuant to Part 35 Rule 8 nor was analogous to such an arrangement. Hence the principle that there should be no unilateral contact with single joint experts did not apply.

Regarding the separate instruction, whilst accepting that the council may have had genuine concerns that further testing would be delayed, the judge thought that some attempt should have been made to notify the other parties that Socotec was to be separately instructed. However, the council's unilateral approach to Socotec was not a deliberate breach of the court's orders and the judge did not think that would it have been apparent to Mr Davis or Dr Clarke that their involvement was plainly contrary to their duties as Part 35 experts.

The judge observed that there is no general obligation upon a party to notify the other parties to litigation that it was instructing a testing house to undertake inspections at its own property with a view to making the results generally available. Equally, Part 35 did not oblige Mr Davis and Dr Clarke to notify the other experts of tests/investigations

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that were being separately instructed. The judge accepted the council's submission that there was no obligation upon experts to provide their counterparts with a running commentary on their investigations.

Commentary

The court has the power to disbar expert evidence at an interlocutory stage but the judge's firm conclusion here was that although Mr Davis and Dr Clarke had not followed best practice, their conduct did not call into question their independence nor come close to justifying their disbarment.

The judge also questioned the motivation for the application observing that Volkerfitzpatrick had shown a readiness to find a sinister motive and a tendency to draw significant adverse inferences on a slender and insinuating basis.

Ted Lowery
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