FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Costs, mediation & expert evidence

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd

[2021] EWHC 1414 (TCC)

In Issue 551, we looked at Mr Justice Fraser's comments on the expert evidence in this case. The Judge also had to consider one or two issues relating to costs. The pleaded value of the claim was £3.7 million, and the claimants made a in the sum of £1.7 million. In contrast, Canham made a Part 36 offer, on 21 December 2020, offering to pay the claimants £50,000 plus costs of certain elements of the claimants' claim. The final award of damages was only £2,000, which meant that the Part 36 offer would ordinarily entitle Canham to be paid its costs from the last date of acceptance, namely 11 January 2021, with the claimants entitled to their costs up to that point. However, Canham sought an order for all of its costs from the start, to be assessed on the indemnity basis. This was for a number of reasons, including the criticisms of the structural engineering expert.

The claimants relied upon what was said to be an unreasonable refusal on the part of Canham to mediate at any time prior to early 2021, when a mediation was eventually held. There was also criticism of the type of mediation used, which was the only type in which Canham would agree to participate. As a starting point, Mr Justice Fraser commented that:

"It is crystal clear that there must be something that takes the case out of the norm for indemnity costs to be awarded."

He also said that:

"The claim was essentially speculative and opportunistic. It has been advanced at great length and by the assertion of a plethora of causes of action, all of which have been maintained to the last possible moment, no doubt upon instructions ... The litigation has been gargantuan in scope, involving a five-month trial and 373 trial bundles. But it was based on no sound foundation in fact or law and it has met with a resounding, indeed catastrophic, defeat. The fact that it has done so arises in large measure as a result of facts and matters which were known to the Wempens before the case started."

Mr Justice Fraser agreed that an unreasonable refusal to engage in mediation can justify a departure from what would otherwise be the ordinary costs consequences in any proceedings. However, here, it was necessary to consider the state of play of the proceedings when Canham was pressing for a mediation to take place. In particular, there was an issue where the defence expressly raised the point that the foundations were not constructed to the design that Canham produced. Mr Justice Fraser had noted in his judgment that the Particulars of Claim had "*entirely omitted this important fact*." Further, Canham had said in reply to a Request for Information in March 2020 that the foundations were: "*constructed in accordance with the Defendant's design, as far as the details in the design could be discerned.*"

The Judge said that this answer was: "*completely factually inaccurate. This is a more polite way of saying directly untrue.*" From that point in time, the claimants were advancing a plainly untruthful case on a major and central point in the litigation. There was simply no excuse for this. In those circumstances:

"The refusal by Canham during 2020 to engage in mediation was not unreasonable in all the circumstances of the case. This refusal came at a time when the claimants were advancing, and continued to advance, a factually untruthful case."

The type of mediation adopted in 2021 was "*blind bidding*". The Judge described it as "*a cheaper method*" but one involving a mediator. In all the circumstances of the case, the Judge was: "*reluctant to impose a qualitative analysis upon different types of mediation*," especially as he did not consider that Canham's position was unreasonable in relation to when it was prepared to mediate.

Although the Judge did not consider that the conduct of the claimants' expert was such, that would have itself justified an award of indemnity costs, he went on to discuss what he termed as a "worrying trend generally which seems to be developing in ter*ms of failures by experts generally in litigation complying with their duties*." Practice Direction 35 makes the position very clear:

"2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate."

A clear warning for all experts and those who instruct them.

The Judge concluded that this claim:

"*was wholly opportunistic. It was unjustified and extremely thin, at least so far as the quantum case was concerned. That quantum case was entirely far-fetched, and wholly irreconcilable with the contemporaneous documents.*"

Considering all of the factors in the case, the Judge decided to make no order as to costs, in either party's favour, up to the date of the service of the Further Information on 13 March 2020; thereafter, Canham recovered all of its costs on an indemnity basis. From that point on, the claimants conducted the litigation on a wholly false factual basis, something that must have been known to their directors.

Expert evidence

Dana UK AXLE Ltd v Freudenberg FST GmbH

[2021] EWHC 1413 (TCC)

This was a claim arising out of the alleged premature failure of pinion seals manufactured by FST and supplied to Dana during a period between about September 2013 to February 2016. The seals were fitted by Dana, a manufacturer and supplier of automotive parts, onto vehicle rear axles which Dana then supplied to Jaguar Land Rover for installation onto nine different vehicle models. On Day 7 of the trial, Dana applied to exclude FST's technical expert evidence. At the Pre-Trial Review (PTR), Dana had pointed out a number of defects in FST's technical expert reports, including that:

(i) Contrary to paragraph 55 of the Guidance for the Instruction of Experts in Civil Claims 2014, none of the three technical expert reports FST identified the documents on which the expert had relied. There was reference to academic texts, but no list of the documents provided by FST or its solicitors. There was concern that material containing technical information had been made available to FST's experts long before it had been provided to Dana's experts.
(ii) It was apparent from the reports that two experts visited FST factories, without notice to Dana, thereby not giving Dana's experts a similar opportunity to inspect FST's operations.
(iii) When referring to data or other information, the reports of FST's experts did not always reference the document or source of data relied upon, thereby causing prejudice to Dana's legal team in trying to read and understand those reports.

At the PTR, an order was made permitting FST to rely upon the reports provided that they complied fully with the CPR. At the trial, the Judge decided to exclude the evidence of the FST experts. First, FST had failed, in breach of the PTR order, to provide full details of all the materials provided to the experts, whether by FST or its lawyers. There was no detail of any factual information provided orally by FST and no list of all the documents which had been provided to the experts. Further: *"the experts had unfettered and unsupervised access to the Defendant's personnel"* and were provided with information by FST during calls and virtual meetings. However, there was no record of any of these calls or meetings.

This always matters, and here it mattered because it appeared that the FST experts were seeking (and receiving) guidance and approval from FST's in-house technical team on the content of their reports, which went beyond contact limited to providing logistical assistance by locating documents or technical information. The Judge noted that:

"It is essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field. Experts should be focussed on the need to ensure that information received by them has also been made available to their opposite numbers."

Where experts liaise directly with their clients to obtain information which is not recorded: *"there can be no transparency around the information to which they have been privy and no equality of arms with their opposing experts of like discipline."*

The Judge also said that it was: *"entirely unacceptable for Dana and the Court to discover, during the course of the trial, that FST's experts had not only engaged in site visits about which they did not inform Dana's experts at the time and, in respect of which, they have apparently kept no records, but also that there were, in fact, more site visits than had previously been disclosed in their reports."*

This led the Judge to comment that it was: *"difficult to come to any conclusion other than that the guidance in the TCC Guide at 13.3.2 as to the need for experts to 'co-operate fully' with one another, including in particular 'where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed' has been ignored."* The Judge went on to comment on further conduct on the part of FST and the experts beyond the failure to comply with the PTR Order, identifying the following breaches:

(i) There was a "*free flow exchange*" of information between the experts and FST's employees, through email exchanges, telephone and video conferences and at site visits, apparently with no, or very little, oversight from the legal team. This went beyond "*logistics*" and it was inevitable that the experts were privy to information that was not shared with Dana's experts.
(ii) This flow of information continued during the period between the joint expert meetings and the signing of the experts' joint statement and the FST experts ultimately relied on information provided by FST at this time in the joint statement and in their reports. Paragraph 13.6.3 of the TCC Guide makes it clear that legal advisers should not be involved in the negotiating or drafting of joint statements, and the Judge said that it must follow that the same prohibition applies to the parties.
(iii) The experts' analyses and opinions appeared to have been directly influenced by FST. The Judge said 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."*

The Judge concluded that:

"The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts; all the more so in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in this jurisdiction. For reasons which have not been explained, there has been no such oversight or control over the experts in this case. 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 ... the use of experts only works when everyone plays by the same 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."

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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