



TCC debars Defendant during trial from relying on its three technical expert reports following numerous breaches of CPR Part 35
By Angus Withington QC and Thomas Mallon

DANA UK AXLE LTD v FREUDENBERG FST GMBH (TCC), [2021] EWHC 1413; 26 May 2021 (Joanna Smith J).

1. The Claimant made an application on day 7 of a TCC trial to debar the Defendant from relying on any of its three technical expert reports and to debar those experts from giving evidence at the trial.
2. The judge, Joanna Smith J granted that application. The judgment contains an excoriating analysis of the conduct of the Defendant, its experts and its solicitors and their numerous breaches of CPR Part 35 and associated guidance.
3. Whilst the facts of this case are unusual, the judgment is a clear and salutary reminder of the importance of full compliance with the CPR when it comes to the instruction of experts and the control of communications with those experts throughout the litigation process.
4. The underlying claim concerns the supply of allegedly defective pinion seals by the Defendant to the Claimant which were then installed in axles fitted to a range of Jaguar Land Rover vehicle models, resulting in multi-million-pound warranty claims.

5. The mid-trial application had been preceded by another successful application by the Claimant at the Pre-Trial Review which resulted in an order by O'Farrell J:
 - i. striking out sections of one of the Defendant's expert reports which offered opinion evidence on an issue of significance but which had not pleaded by the Defendant; and
 - ii. requiring the Defendant to re-serve each of the three expert reports with, amongst other things, a full list of all materials provided to each of those experts by the Defendant.
6. The Claimant put the Defendant and the Court on notice that it did not consider that the reports re-served by the Defendant had fully complied with the requirements of the PTR Order. Further, the Claimant contended that its CPR Part 35 questions to the Defendant's experts had elicited further evidence of information and documents which had been provided to the Defendant's experts but not to the Claimant.
7. In opening submissions on the first day of the trial, the Claimant identified three emails which showed information being provided directly by the Defendant to its experts and submitted that it was necessary for the Defendant to provide a full list of all materials passed to its experts. The Claimant submitted that, as this was a manufacturing defect case in which the Defendant had unique knowledge of its own manufacturing processes, it was particularly important that a level playing field was maintained between the experts on both sides and that relevant information was not supplied unilaterally by the Defendant to its experts.
8. The Court shared the Claimant's concerns and directed the Defendant's solicitors to provide a witness statement explaining the extent of any contact

between the Defendant and its experts and details of all information and documents passed to those experts.

9. This direction led to the disclosure of 175 documents evidencing communications between the Defendant and its experts, including during the period when the experts were conducting their joint discussions and before the signing of their joint statement.
10. It also became apparent that there had not been full disclosure of all information relating to site visits by the Defendant's experts to the Defendant's factories, of which the Claimant had not been notified. During those visits there had been "unfettered and unsupervised access" by the experts to the Defendant's personnel and no proper record of the information supplied during those visits had been disclosed.
11. The Claimant therefore applied for an order debarring the Defendant's experts from giving evidence on three grounds, namely (i) breach of the requirement of the PTR Order to provide details of all information and instructions provided to the experts (ii) breach of CPR Part 35 and the relevant guidance on the instruction of experts and (iii) that the court could have no confidence that all information and instructions from the Defendant to the experts had been disclosed, not least because of the lack of proper documentary records evidencing oral communications.
12. The Claimant succeeded on each ground.
13. In particular, the Court held, at [36], that the Defendant's failure to comply with the requirement to provide a list of all materials provided to each expert was *"not just a technical or unimportant breach. 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.”

14. Joanna Smith J concluded:

“[93] 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.

[94] 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. I agree with Mr Webb’s submission that 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.”

15. **Analysis:**

As a result of the Claimant’s persistent applications, the Defendant was required, during trial, to reveal the nature and extent of its communications with the three experts it had instructed. The Court was satisfied that the Defendant had passed information about its processes and procedures directly to its litigation experts and there had been a failure to provide proper oversight and control over the instruction of its experts. In light of the numerous breaches of CPR 35, the Court agreed with the Claimant’s

submission that the only appropriate sanction was to debar the Defendant's experts from giving evidence.

16. Whilst one would hope that the facts of this case are highly unusual, it comes as a powerful reminder that severe sanctions will be imposed on litigants who breach the requirements of CPR Part 35 and that transgressions of the rules may not simply be an issue as to the weight which might be attached to such evidence.
17. As the Judge observed, this is because compliance goes directly to the fair administration of justice. The Court must obviously hold those who breach the rules governing the instruction of experts to account; to do otherwise would not only risk injustice in the individual case, but would also encourage other litigants to believe that they can flout those rules with impunity. This judgment sends a very clear message: such behaviour will not be tolerated.
18. The Claimant was represented by Geraint Webb QC and Harrison Denner, instructed by Crowell & Moring LLP.
19. The full judgment is available [here](#).

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