

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS IN MANCHESTER  
TECHNOLOGY AND CONSTRUCTION COURT (QB)**

Manchester Civil Justice Centre,  
1 Bridge Street West, Manchester M60 9DJ  
Date: 25 February 2020

**Before:**

**HIS HONOUR JUDGE STEPHEN DAVIES  
SITTING AS A JUDGE OF THE HIGH COURT**

**Between:**

**Blackpool Borough Council** **Claimant**

**- and -**

**Volkerfitzpatrick Limited** **Defendant**

**and**

**Range Roofing and Cladding Limited** **Third Party**

**and**

**RPS Planning and Development Limited** **Fourth Party**

**and**

**Caunton Engineering Limited** **Fifth Party**

**Martin Bowdery QC & Robert Clay** (instructed by **Squire Patton Boggs, Birmingham**) for the **Claimant**

**Anneliese Day QC & Sanjay Patel** (instructed by **Fieldfisher, London**) for the **Defendant**

The **Third Party** was not present or represented

**Serena Cheng QC** (instructed by **Beale & Co, London**) for the **Fourth Party**

**Simon Hale** (instructed by **Clyde & Co, London**) for the **Fifth Party**

**Hearing date: 12 February 2020**

-----

**APPROVED JUDGMENT**

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

**His Honour Judge Stephen Davies**

**His Honour Judge Stephen Davies:**

1. In this case the claimant, Blackpool Borough Council, claims substantial damages of around £6 million against the defendant, Volkerfitzpatrick Ltd, for alleged breaches of contract in relation to the design and construction of a new tram depot in Blackpool. In turn the defendant has brought third party proceedings against the third party, Range Roofing and Cladding Ltd, which have very recently been compromised, together with fourth party proceedings against the fourth party, RPS Planning and Development Ltd, and fifth party proceedings against the fifth party, Caunton Engineering Ltd, both of which remain live. The case is listed for trial over 4 weeks commencing Monday, 24 February 2020. It is a case which involves expert evidence in a number of disciplines. In particular, the claimant is heavily reliant so far as liability is concerned upon the expert evidence of its expert structural engineer, Mr Matthew Davis, and of its expert in corrosion, Dr Michael Clarke.
2. On 29 January 2020 the defendant made an application for orders that: (a) the claimant should not be permitted to rely upon the expert evidence of Mr Davis or Dr Clarke upon the ground that their evidence was inadmissible because their conduct had demonstrated that it could not be relied upon as properly independent; and (b) in consequence all of the claimant's claims should be struck out on the basis that without this expert evidence the claimant could not hope to succeed in its claims (apart from some modest claims which have already been admitted). The application is supported by the fourth party and the fifth party but is opposed by the claimant.
3. The application was listed for hearing over a full day on 12 February 2020, when I had the benefit of extremely helpful written and oral submissions from all counsel, to each of whom I am grateful. I also had the benefit of witness evidence in support and in opposition to the application in an application bundle which was helpfully provided in electronic as well as in paper format. At the conclusion of the hearing I announced my decision to refuse the application and that I would give my reasons in a written judgment to follow, which I now do.
4. The grounds of the application are summarised in paragraphs 5 and 6 of the witness statement of Mr Thorne, a partner in Fieldfisher the firm of solicitors which acts for the defendant, and which substantially repeats the content of a very detailed letter to the court and to the other parties dated 27 January 2020.
5. Paragraph 5 states as follows: "In short, the application is made on the grounds that the conduct of the claimant's appointed experts Dr Clarke and Mr Davis means that their independence has been compromised irreparably. Specifically, Mr Davis and Dr Clarke have: (i) contacted Socotec, the jointly instructed testing house that carried out corrosion testing at the tram depot, privately and without copying other corrosion experts into their communications; (ii) acted on the claimant's behalf to procure testing directly relevant to these proceedings from Socotec without disclosing the existence of that testing to other corrosion experts; (iii) directed Socotec as to how its testing should be carried out in private communications; (iv) in the case of Mr Davis, directed Socotec to keep the existence of the privately procured testing secret; and (v) in the case of Dr Clarke, taken objections to Socotec testing methodology in an expert report notwithstanding that Dr Clarke directed the manner in which testing was to take place".

6. Paragraph 6 states that “as a result of their conduct, Dr Clarke and Mr Davis cannot now be called as independent experts as they have fallen far short of the standards required by CPR Part 35. The defendant therefore applies for their evidence to be ruled inadmissible”.

### **The Law**

7. In making this application, the defendant relies upon the following key legal propositions.
8. The first is that if a party seeks to rely upon expert evidence where the expert has not complied with the recognised duties of an expert witness to be independent and impartial the court may exclude the evidence as inadmissible rather than merely taking such non-compliance into account when deciding what weight should be attached to the expert evidence. That proposition is derived from the decision of the UK Supreme Court in *Kennedy v Cordia Services* [2016] 1 WLR 597 at paragraph 51. It is not disputed.
9. The second is that a challenge to the admissibility of expert evidence ought to be dealt with at an interlocutory stage rather than being left to trial if it can fairly and properly be dealt with at that earlier stage. That proposition is derived from the principles stated and applied by Mann J in *Meat Corporation of Namibia v Dawn Meats UK Ltd* [2011] EWHC 474 (Ch) at paragraphs 43 to 46. It is not disputed, although the claimant draws my attention to the fact that the principles referred to in that case include the following: (i) the decision as to whether an expert should be permitted to give evidence in a case of challenged independence is a matter of fact and degree; (ii) the judge will have to weigh the alternative choices openly if the expert’s evidence is excluded, having regard to the overriding objectives of the CPR; (iii) if the challenge to the independence is not sufficient to preclude the expert from giving evidence, it may nevertheless affect the weight of the expert’s evidence; (iv) in some circumstances it might not be possible to determine with sufficient clarity whether the circumstances justify ruling inadmissible the expert evidence at an interlocutory stage, in particular where the facts may be in dispute and may require further investigation in evidence. In such a case it might have to be decided at trial.
10. The summary given by Cresswell J as to the duties of an expert witness in *The Ikarian Reefer* [1993] 2 Lloyd’s Rep 68 (at pp 81-82) has been widely applied, remains authoritative and repays setting out in full, omitting case citations:

“The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.

**High Court Approved Judgment**

3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.”
11. Paragraphs 1 and 2 of that guidance are enshrined in CPR Part 35.3 which, as is well known, provides that it is the duty of experts to help the court on matters within their expertise and that such duty overrides any obligation to the person from whom they have received instructions or by whom they are paid.
12. Further detailed guidance is to be found in CPR Practice Direction 35. As relevant to this case, I have been referred to the following.
13. Paragraph 3.2, which requires at (3) that an expert's report must contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based, and at (5) that an expert's report must state who carried out any examination, test or similar activity which the expert has used for the report. Paragraph 5 permits experts to be cross-examined on the contents of their instructions only where permitted by the court, if satisfied that there are reasonable grounds to consider that the statement in the report is inaccurate or incomplete and it appears to be in the interests of justice to do so.
14. Yet further and more detailed guidance is given in the written Guidance for the Instruction of Experts in Civil Claims, issued by the Civil Justice Council in August 2014 (“the Guidance”). As relevant to this case I have been referred to and consider material the following.
15. Paragraph 13, which requires experts to take into account all material facts before them.

High Court Approved Judgment

16. Paragraph 23, which requires experts to inform those instructing them without delay if their instructions place them in conflict with their duties as an expert, and paragraph 27, which requires them to withdraw from the case if there is an incompatibility between their instructions and their duties.
17. Paragraph 30, which requires experts to try to ensure that the same information has been disclosed to each expert in the same discipline.
18. Paragraph 55, which contains more detail as to the obligation to set out the substance of all material instructions, stating that “the imperative is transparency”.
19. As the defendant and supporting parties submit, the TCC has consistently emphasised the principle of expert independence, so as to protect the integrity of the vital function which expert evidence regularly plays in litigation in the TCC. In particular, I have been referred to the very forceful criticism made by Coulson J in *Bank of Ireland v Watts Group plc* [2017] EWHC 1667 TCC and by Fraser J in *Imperial Chemical Industries Limited v Merritt Merrol Technology Ltd* [2018] EWHC 1577 (TCC) of experts who had failed to display proper independence in those cases. I entirely agree that where experts fail to perform their obligation of independence the TCC should be astute to take prompt and effective action.
20. It is also important that I should say something about single joint experts, since it is a fundamental plank of the defendant’s case that Socotec was in the position of a single joint expert and that Mr Davis and Dr Clarke should have approached their dealings with Socotec on the basis that Socotec was instructed jointly by all parties and that the guidance applicable to dealings with single joint experts applied equally to dealings with Socotec.
21. CPR Part 35.7(1) provides that where two or more parties wish to submit expert evidence on a particular issue the court may direct that the evidence on that issue is to be given by a single joint expert. It is well understood that a single joint expert is under the same obligations as any other expert who has been permitted under CPR Part 35 to give expert evidence in a particular case.
22. When considering whether a person or company in the position of Socotec is acting as a CPR 35 single joint expert two important distinctions must in my view be borne in mind.
23. The first is that there is a distinction to be drawn between those who are genuine experts properly so called and those who are only appointed to undertake investigations and provide factual material upon which experts properly so called may rely in reaching conclusions. I accept, as was made clear in *Kennedy v Cordia*, that expert evidence may extend beyond pure opinion evidence to encompass factual evidence, not based exclusively on personal observation, where that witness has sufficient knowledge and experience to draw on the general body of knowledge and understanding of the relevant expertise to give such evidence and that it is of sufficient utility to justify allowing the witness to give that evidence. Nonetheless, that factual evidence must still be of a sufficiently expert nature to qualify as expert evidence properly so-called.

24. The second is that a distinction should be drawn between the role played by and duties imposed upon experts instructed by parties in a wide variety of circumstances to provide expert opinion (for example, a valuation expert in a rent dispute) and experts who are instructed in litigation where the parties instructing them have sought and obtained the court's permission under CPR Part 35.4 to rely upon their expert evidence in that particular litigation. Whilst it is of course true that an expert who is not acting as a Part 35 expert will still owe professional obligations which are, in part, similar to the obligations owed by a Part 35 expert, nonetheless the full gamut of the specific obligations owed by Part 35 experts as provided for in Part 35 and its associated Practice Direction and as explained in the Guidance do not apply to such experts. This distinction appears from the Guidance at paragraph 5 and subsequently.
25. As regards single joint experts appointed under Part 35, very clear guidance was given by the Court of Appeal in the case of *Peet v Mid Kent Healthcare NHS Trust* [2002] 1 WLR 210 as regards the propriety of unilateral contact between one party and a single joint expert. Agreeing with the judgment of Lord Woolf, Simon Brown LJ said as follows.
- “32. When, if at all, should one party, without the consent of the other party, be permitted to have sole access to a single joint expert, ie an expert instructed and retained by both parties? In common with my Lord, I believe that the answer to this question must be an unequivocal “Never”...
33. ... There can be no point in a unilateral meeting or conference unless what transpires between the party enjoying sole access and the expert is, at least in part, intended to be hidden from the expert's other client. What is to be hidden will necessarily be either the information which the party enjoying access is giving the expert, ie part of expert's instructions, or the expert's view expressed in the light of that information, or more likely both.
34. ...
35. The hiding of such material seems to me necessarily inconsistent with the very concept of a jointly instructed expert, owing, as such an expert does, an equal duty of openness and confidence to both parties, besides his overriding duty to the court. That, in short, is the fundamental objection in principle ...”.
26. A similarly robust view was expressed by Coulson J in *Edwards v Bruce & Hyslop Ltd* [2009] EWHC 2970 (QB) at paragraph 25, where he said this.
- “In addition to the obligations owed to the parties, a single joint expert owes an overriding duty to the court to give advice on the issues, independent of the interests of the parties. He is in a position of considerable importance. Absent any legal issues, in a dispute like this, his opinions and conclusions might be determinative of the case as a whole. He can no more have communications with just one party about the substance of his report, in the absence of the other side, than a judge can have a conversation on the telephone with one party, and not the other, about the strengths and weaknesses of that party's case.”

27. In support of the argument that Socotec was in the position of a single joint expert I was referred to the Guidance at paragraph 35, which states that “in the early stages of a dispute, when investigations, tests, site inspections, photographs, plans or other similar preliminary expert tasks are necessary, consideration should be given to the instruction of a single joint expert, especially where such matters are not expected to be contentious. The objective should be to agree or to narrow issues.” The TCC guide contains a similar provision at paragraph 13.4.3. The defendant and supporting parties submit that this illustrates that single joint experts may be instructed to undertake work which is relatively straightforward and is very similar to the work undertaken by Socotec in this case. I accept that this is the case. However in my view that does not detract from the points already made that: (a) to be expert evidence properly so called it must fall within the category of expert evidence; and (b) for the expert to owe the full gamut of obligations under Part 35 the court must have given a direction under Part 35.7.
28. So far as communicating with single joint experts is concerned, paragraph 39 of the Guidance provides that instructions given separately by one party should be copied to the other instructing parties. Paragraph 43 confirms that single joint experts also owe an overriding duty to the court and an equal duty to all parties so that they should maintain independence, impartiality and transparency at all times. Paragraph 44 contains guidance consistent with the decision in *Peet*. Finally, paragraph 46 requires single joint experts to serve their report simultaneously on all instructing parties.
29. That concludes my review of the relevant legal principles and I now turn to the facts.

### **The Facts**

30. The starting point is the case management order made at the first case management conference in February 2019. By that order the court gave permission to all parties to rely upon expert evidence from structural engineering experts (save for the third party, who was permitted to rely upon a cladding and roofing specialist instead) and experts in corrosion/materials engineering. As regards the corrosion experts, the order required them to meet to discuss and agree appropriate inspection and/or testing procedures in respect of a number of specified relevant issues, such as the thickness and rate of loss of galvanised coating and current levels of corrosion, blistering and/or degradation of cladding panels. It required them to produce a joint statement by 15 March 2019 to specify the agreed joint inspection and testing procedure and, failing agreement, the parties were given permission to apply to the court to determine the joint inspection and testing procedure. It stated that the experts were to commence and carry out inspection and/or testing procedures in accordance with their joint statement by 12 April 2019 and to produce a further joint statement setting out the results of the joint inspections and/or testing by 6 May 2019. It stated that the structural engineering experts and cladding expert might attend these meetings, inspections and tests, but were not required to be signatories to the joint statements which were required unless they chose to be so.
31. I should emphasise that these provisions were proposed by the parties and endorsed by the court upon the entirely sensible basis that the sooner that the basic facts relevant to the nature and extent of any loss of thickness, corrosion, blistering or degradation were ascertained in a manner which ought not to prove contentious the better. I should also observe that there was no express provision for the inspections and tests to be undertaken by an independent testing company nor for any single joint expert to be appointed

to undertake such inspections and tests. Instead what was envisaged was that the experts would agree the inspection and testing procedures and would then undertake those procedures in accordance with their agreement.

32. The directions went on to provide that subsequent to disclosure the experts in like disciplines were to hold CPR Part 35.12 discussions by 30 September 2019, to produce CPR Part 35.12 statements by 18 October 2019 and to exchange reports on matters not agreed by 8 November 2019.
33. It is common ground that it took until May 2019 for the experts to agree and to produce a joint statement setting out the agreed inspection and testing procedure. It is also common ground that Mr Davis took the lead in the production of this joint statement. Although there was some complaint that this was inappropriate, since the inspection and testing was of the corrosion which was, obviously, the province of the corrosion experts, Mr Davis was clearly entitled under the terms of the directions to participate in the meetings and discussions. He says there was no objection raised to his taking the lead by any of the other experts and that for practical purposes, largely to do with the fact that he is part of a large well-resourced organisation whereas Dr Clarke is not, it was he rather than Dr Clarke who took this organisational role. He explains in his evidence that in his experience it is perfectly normal for one expert to take the lead in this way and for my part I can see no possible basis for any complaint or criticism in this regard.
34. Paragraph 16 of the joint statement recorded the agreement of the experts that “in the interests of consistency and repeatability and also to ensure that the full programme of testing can be completed in a reasonable time, it would be preferable for an independent third party to be engaged for all the sampling and testing work. The experts would be given the opportunity to witness the testing and to make their own tests provided that these do not interfere with the main inspection and test programme”.
35. It is not in dispute that Mr Davis, again without objection from any of the other experts, took the lead in obtaining quotations from a number of companies, including Socotec, and arranged for the claimant to issue an order to Socotec to carry out the work on the basis of an agreement that the cost would be shared equally between the parties. There was no suggestion that Socotec should be appointed as a single joint expert which would, of course, have required the permission of the court, nor was any further or more detailed agreement drawn up beyond the agreed method statement as to the basis upon which the inspection and testing would be undertaken.
36. It is quite clear to me that it is simply impossible to view this as either the instruction of a single joint expert or something equivalent in substance to such an instruction. Not only was that never suggested by anyone at the time but the substance of the joint statement itself makes clear, as one would expect, that Socotec was being instructed purely and simply to undertake the mechanical processes stipulated by the joint statement, which did not involve it in exercising any expert judgment or offering any opinions on the results. Whilst undertaking the inspection and testing was obviously a skilled process there is no basis in my view for any suggestion that the process as a whole could properly be regarded as being of an expert nature.

37. It is common ground that Mr Davis then liaised with Socotec in terms of making the necessary arrangements for the inspection and testing procedures to be undertaken over a period of some days in July 2019 in the presence of such of the experts as wished to be present. Mr Davis describes this as entirely normal and his liaison as either purely administrative which did not need to be copied to the other experts or, where more substantive input was required, was notified to the other experts. It appears that subsequent to the inspection and testing Mr Davis was also involved in raising certain queries with Socotec as to the draft results it produced until a final draft version of the results was provided in early September 2019.
38. Criticism is made of Mr Davis on the basis that he did not share his correspondence with Socotec with the other experts and, it is submitted, some of his correspondence went beyond the merely administrative and was such as to seek to control the process in a wholly inappropriate way. I entirely reject the suggestion that in his dealings with Socotec in relation to these joint instructions Mr Davis acted in such a way as to compromise his independence. It is sufficient to refer to some of what was identified as being the most egregious examples.
39. On 12 July 2019 Mr Davis emailed Socotec dealing with various matters relevant to the forthcoming inspection, stating that he would not be physically present but would be available by telephone, and concluding in these terms: “I will write separately to let you know which experts will be present with the broad indication of their movements. The experts are likely to take an interest in your work, but if they start trying to give you instructions, please refer this to me before changing anything”. It is said that it was wholly improper to write to Socotec in these terms, since it was not Mr Davis’ role to instruct Socotec as to how to respond to requests made by the other experts during the course of the inspections, especially since they were not copied into the email. Whilst I agree that it would have read better had Mr Davis not adopted quite such a dictatorial tone and also that he ought to have copied in the other experts to that email to ensure their agreement, nonetheless it is clear to me that his only intent in writing in those terms was to seek to ensure that the provisions of paragraph 16 of the joint statement were adhered to, so as to avoid the performance of the agreed inspection and testing works being thrown off course by individual experts making unilateral requests of Socotec during the course of the inspection process to vary the agreed works or to undertake further works not already agreed, without that being the subject of further discussion and agreement. There can be no basis in my judgment for a suggestion that this shows that he was seeking to exert improper control over the inspection and testing processes.
40. Complaint is also made that the queries raised by Mr Davis involved him interfering in the substance of the results produced by Socotec. Reference is made to emails dated 12, 14 and 29 August 2019 in which he asked certain questions of Socotec in relation to their results. However, it is clear to me that all that he was seeking to do was to ensure that the results were clearly and consistently produced and that they addressed all of the relevant matters which Socotec had been asked to deal with, rather than seeking in any way to interfere with the substance of the results. Complaint is also made about an exchange of emails in late October 2019 where, it is said, Mr Davis inappropriately sought to interfere on behalf of the claimant with a request made of Socotec by one of the corrosion experts to be provided with certain samples for further inspections. However, in my view all that this correspondence shows is that Mr Davis was seeking to reach a sensible agreement in relation to the practical issue of ensuring the physical security and integrity of the samples.

41. I cannot help but observe that in my view the readiness of the defendant and the other parties to read a sinister motive into these exchanges, which in my view reveal nothing more than Mr Davis taking steps to ensure that the inspection and testing procedure was undertaken in an efficient and an effective manner, is unattractive and reveals at best a careless and at worst a wilful misreading of these exchanges. Whilst it is apparent that the other corrosion experts and the defendant's and the other parties' solicitors were aggrieved at what they perceived as being unwarranted interference by Mr Davis in matters which they believed ought to have been dealt with solely by the corrosion experts, and whilst it is also apparent that Mr Davis may have contributed to that sense of grievance by being rather ready to seek to assert control over the procedure, there is nonetheless a very real distinction to be drawn between conduct of that kind, however aggravating it may have been perceived, and conduct seeking to secure an unfair advantage for the client in relation to this testing process, which this plainly was not.
42. I turn next to what in my view is the most significant issue raised by the defendant, which is the circumstances in which Socotec was instructed to undertake further inspection and testing on behalf of the claimant alone. There had been a joint meeting of the experts in August 2019 at which the intention was to produce the further joint statement setting out the results of the joint inspections and testing, which ought to have been produced by 6 May 2019. I am told that no agreement was reached as to the wording of the joint statement due to disagreement between Mr Davis and Dr Clarke on the one hand and the experts for the other parties on the other. I do not quite understand how it could have come to pass that agreement as to what the results were, in contrast to agreement as to what the results signified, which was not the purpose of this stage of the process, could not have been reached. I was invited to draw some adverse inference against Mr Davis and Dr Clarke for this unfortunate state of affairs. That is clearly something which I am not in a position to do, in the absence of any evidence adduced as to the reasons for the failure, let alone any basis for me to conclude either that the fault was entirely that of Mr Davis and Dr Clarke or that the fault indicated a serious lack of independence or integrity on their part.
43. I was also told that there was an unsuccessful mediation on 10 September 2019 and that the first approach to Socotec was made by Mr Davis 3 days later, on 13 September 2019. I was invited to draw the inference that there was a connection between the two events, in that the decision to instruct Socotec to undertake further investigation and testing must have been a reaction to an appreciation by the claimant and its advisers that the existing Socotec results demonstrated that the claimant's case was doomed to fail. Again, that is clearly something which I am in no position to do, in the absence of any proper evidential basis for so doing. Again, I must register my concern as to the readiness of the defendant and the other parties to seek to persuade me to draw adverse inferences of such significance against Mr Davis and Dr Clarke as the experts on such a slender and insinuating basis.
44. The email sent by Mr Davis to Socotec on 13 September 2019 asked it to provide prices for further investigatory work on the basis that more detailed instructions would be provided "if the client decides to go ahead with the further investigation". It is common ground that the reference to the client is a reference to the claimant alone. It is also common ground that this was an approach solely on behalf of the claimant and something about which the other parties and their experts and legal advisers knew nothing. However, it is also clear that Mr Davis was merely asking Socotec to undertake further investigations without any suggestion that Mr Davis was seeking either to replicate investigations

already undertaken to obtain a more favourable result or in some other way to skew the investigations so as to produce results more favourable to the claimant than the results already produced.

45. In his witness statement in response to this application Mr Grocott, an employee of the claimant who has been directly involved in the control of the case on its behalf, said at paragraph 9 that “the claimant was made aware of additional testing which was being advised from Mr Davis and Dr Clarke which was to be carried out at the claimant’s cost. Given the nature of this advice from the independent experts, I considered it to be inappropriate to in any way go against this advice”. He continued at paragraph 10 as follows: “In light of Socotec’s involvement in the earlier joint testing and in the absence of there being availability to carry out the tests by any other testing houses, it would be prudent to engage Socotec to carry out these additional tests, and for results to be made available to the other parties once they had been made available. At no point was there ever any suggestion or instruction from the claimant, or its experts, to in any way withhold these results, once produced”.
46. In his first witness statement in response to this application Mr Davis said at paragraphs 62 and 63 that he noticed an uneven distribution of the metallographic samples undertaken by Socotec and that it seemed sensible to him that further samples should be taken from the galvanised components to provide a better sample distribution. He explained that the decision for the claimant to instruct Socotec independently to undertake these additional tests was simply a pragmatic decision made in the light of the limited time available and impending deadlines for the liability experts to complete joint discussions, produce joint statements and exchange separate reports, especially given the previous and continuing delays in relation to the inspection and testing already undertaken. He concluded in these words: “The specification for the tests and the results would be made available to all parties in due course, but what was most pressing was to obtain the results in time for the other parties to consider them in advance of the relevant court deadlines. It was always the intention that the details and results of the tests would be provided to all parties. There was no intention to hide or keep secret either the tests or the results. It was simply the most expedient way of obtaining a more complete and useful set of test results, as I explain further below”.
47. In a note of a telephone call with Socotec on 11 November 2019 Mr Davis is recorded as saying “new samples also of interest to the other experts”. Mr Bowdery submits, and I agree, that this is inconsistent with a contemporaneous desire to conceal the results from the other experts.
48. In his witness statement Dr Clarke said at paragraph 25: “I had no intention or desire to keep anything from my fellow experts, nothing was further from my mind. The results of the additional testing were made available in advance of the expert meeting on 3 December 2019, with all of the information assisting the expert group in coming to reasoned conclusions based on corrosion technology”.
49. Notwithstanding those clear statements by Mr Grocott, Mr Davis and Dr Clarke, the defendant and the other parties invite me to reject that evidence and to conclude that the reason for the separate testing, particularly in the context of the secrecy with which they say it was arranged and obtained, was to enable the claimant and the experts to make use of the further results only if they supported the claimant’s case but not otherwise. Whilst I will have to consider that invitation by reference to all of the other relevant

evidence, to which I now turn, it is self-evident that it would only be possible for me to make such a clear adverse finding without the benefit of cross-examination if the other relevant evidence was such as admitted of no other credible explanation.

50. On 16 September 2019 Socotec provided a quotation and on 23 September 2019 Mr Davis wrote saying “I think that [the claimant] will wish to instruct both items under a new order so that it does not form part of the original jointly agreed work. Would this be possible?” On 3 October 2019 Mr Davis emailed Socotec, referring to an earlier conversation and attaching a draft specification for the further sampling and testing, saying that “as discussed, this work would be instructed direct by [the claimant]”. Mr Davis says that the specification was prepared by Dr Clarke. He says that “the methodology for the metallographic samples was essentially the same as that used for the joint testing. The only difference was that the test areas would include other areas of the depot to provide a more complete and therefore useful set of results. Dr Clarke’s suggestions for the cladding were intended to supplement the information obtained from the joint testing”.
51. Although it was submitted to me that the fact that the specification required Socotec to inspect areas of blistering indicated that this was an investigation designed to provide information to support the claimant’s case, it is difficult to understand why this should be so, since information about the areas of blistering would clearly be relevant both to the case of the claimant and to the cases of the defendant and the other parties. There is no evidence adduced by the defendant or the other parties from their own corrosion experts to the effect that Mr Davis’ evidence as to the nature and purpose of the further testing is inaccurate from a technical perspective nor is there any suggestion in the substantive reports produced by the other experts that the results obtained from this further inspection and testing are in some way deliberately skewed to support the claimant’s case or are otherwise manifestly unreliable in a way which ought to have been clearly appreciated by Mr Davis or Dr Clarke.
52. As regards the complaint about secrecy, the defendant and other parties refer to an email from Mr Davis to Socotec, into which the claimant’s solicitors were copied, stating that it would be necessary to make a clear distinction between the work undertaken in relation to the joint instruction and the work undertaken in relation to the new separate instruction. As regards the former, Mr Davis said that he would be sending Socotec collated comments from all of the corrosion experts and that this document was to be copied to the other experts, as was Socotec’s response, since that had been requested by one of the experts to ensure “full transparency relating to the joint instruction”. As regards the latter, and in contrast, Mr Davis stated that all correspondence was to be sent to him and not to the other experts and that the separate instruction and results “should not be referred to in any correspondence relating to the joint instruction”.
53. On 31 October 2019 the defendant’s solicitors emailed the claimant’s solicitors to state that since Socotec had been “appointed on behalf of all of the parties all correspondence with Socotec should be copied to all of the corrosion experts”. In response, Mr Davis forwarded to the other parties’ corrosion experts his correspondence with Socotec in relation to the joint instruction but did not forward his correspondence with Socotec in relation to the separate instruction. In his witness statement Mr Davis says that this was because he “took this to mean all emails relating to the joint instruction only”. I have been referred to a note of a telephone call made by Mr Davis to Socotec on 5 November 2019, where

Mr Davis specifically reminded Socotec not to refer to the new samples in other correspondence relating to the joint investigation. There was also a joint meeting of the corrosion experts held on 7 November 2019, at which Dr Clarke was present, where no mention was made by him of the ongoing separately instructed testing which, the defendant submits, could only have been a conscious decision by him in the knowledge of the instruction to keep this work secret with which he was prepared to go along.

54. As I have indicated, work was still being undertaken by Socotec as regards the joint instruction alongside the work on the separate instruction. By separate emails dated 23 November 2019 Mr Davis was chasing Socotec in relation to both. Although there was some suggestion that some inference could be drawn from the wording used in the email relating to the separate instruction, I found that suggestion entirely unconvincing since it was not materially different from the wording used in the email relating to the joint instruction. The final results were produced by Socotec and the results from the separate instruction were forwarded by Mr Davis to all of the corrosion experts by email dated 29 November 2019 without delay.
55. There was a further joint meeting of the corrosion experts on 3 December 2019 at which the other corrosion experts felt that they had had insufficient time to consider the results from the separate instruction. However, there is no indication that the production of these separately instructed further test results provoked an immediate outcry. It appears that nothing was said at all until 24 December 2019, when the solicitors for one of the other parties wrote to say that their position was reserved in relation to this material. In the event, at least one of the other corrosion experts as well as Dr Clarke made reference to the information contained in the further test results in his principal report without any suggestion either that it was deliberately skewed to favour the claimant's case or was otherwise unreliable because of the terms in which Socotec had been instructed. There was no submission made to me at the pre-trial review which took place on 10 January 2020 to the effect that this further material should be excluded on any basis. Instead, the defendant sought and obtained an order that all material communications between each of the experts and Socotec should be disclosed and, in compliance with that order, Mr Davis provided the communications between him and Socotec in relation to the separate instruction which in due course became the launchpad for the current application.
56. It is right to record that neither Mr Davis nor Dr Clarke has provided any explanation in their witness evidence as to why Mr Davis repeatedly instructed Socotec to keep all information regarding the separate instruction concealed from the other experts or as to why Dr Clarke made no reference to that separate instruction at the joint meeting in early November 2019. The defendant and the other parties also draw to my attention the lack of any explanation by Mr Grocott on this point and the absence of any witness evidence in response to the application from the claimant's solicitors to explain their involvement in this matter. They also draw to my attention the absence of provision of contemporaneous correspondence or records of telephone conversations which indicate precisely the circumstances in which the decision came to be taken to instruct this further separate work or the basis for the decision to keep the existence of this further separate work concealed.

### **The separate instruction - conclusions**

57. Having considered this evidence and the submissions made it is important in my view to give separate consideration to whether or not what happened was in accordance with good or best practice and whether or not the role which Mr Davis and Dr Clarke, considered separately both from the claimant and from the claimant's legal advisers and indeed from each other, played in what happened is such as to satisfy me that their expert evidence in its entirety should be ruled inadmissible on the basis that they have breached in a very serious manner the obligations imposed upon Part 35 experts to which I have already referred.
58. The first question is whether or not separate instructions ought not to have been given to Socotec in any circumstances.
59. As to that, as I have already said in my view an argument founded on the basis that Socotec was in the position of a single joint expert or in a position so closely analogous thereto so that the *Peet* principle applied, is misconceived, given the role which Socotec actually played.
60. However, the defendant and other parties submit that even so the terms of the order made at the first case management conference and the obvious rationale for that order should have made it clear to Mr Davis and Dr Clarke that any and all inspections and tests should be undertaken on a joint basis so that it was quite simply and obviously wrong for separate inspections and tests to be undertaken.
61. I agree that the order clearly provided for joint inspections and tests to be agreed and that if agreement could not be reached the court would decide, rather than the parties being free to undertake separate inspections and tests on a unilateral basis. One obvious purpose behind these provisions of the order was to avoid the risk of dispute arising from disagreement as to whether individual testing was appropriately specified and/or undertaken. I also agree that although the order did not expressly deal with the position so far as any further or supplemental inspections and tests were concerned it would have been expected that a similar procedure should also apply in that respect as well unless there was good reason not to do so. Indeed, it is apparent from the reasons given by Mr Grocott and Mr Davis for the decision to instruct Socotec separately that they understood that this was so. Their evidence is to the effect that there was good reason to depart from that starting point.
62. The defendant and other parties suggest that there is no credible basis for that explanation. I agree that, considered objectively, there was no sufficient basis for that unilateral decision at the time it was made. I accept that the claimant and its advisers were concerned, understandably, that time was tight and that there had already been considerable slippage. I accept that they were entitled to be concerned that it would take far longer to attempt to achieve agreement and further joint instructions than to give separate instructions. I am also prepared to accept, given my involvement in managing this case from which it is apparent that the relationship between the claimant's solicitors and the solicitors for the defendant and the other parties (and, I infer, the relationship between the respective corrosion and structural engineering experts) has not always been harmonious, that the claimant would have had a justifiable concern that the defendant and other parties might well have attempted to create obstacles for purely tactical reasons.

63. Nonetheless, it seems to me that the claimant ought at least to have made some attempt to do so before proceeding unilaterally. In my view the proper course would have been to notify the other parties that the claimant wished to have these further tests undertaken, explaining why, and that it would prefer to do so on a continued joint basis if agreement could be reached within a specified short but reasonable timeframe, failing which it would apply to the court on an urgent basis for permission to instruct Socotec unilaterally. I appreciate that parties are, sometimes for good reason, concerned that they cannot always have urgent applications put before and decided by a judge as soon as they would wish. However, it is the practice of the TCC to deal with genuinely urgent matters on an expedited basis and there is no reason to think that this would not have happened here.
64. However, it is also clear in my judgment that the decision to instruct Socotec unilaterally was not a deliberate breach of a clearly expressed term of that order. It cannot be said in my view that it must have been or ought to have been obvious to the claimant and its legal advisers that unilateral instruction of Socotec was so plainly contrary to the express terms of that order that it could not have been justified in any circumstances. To state the obvious, a deliberate decision to breach a court order in such circumstances would have been a very high risk strategy, since a likely consequence would have been that the court would simply accede to an application by the defendant to debar the claimant from relying on the further results.
65. Still less can it be said in my view that it must have been or ought to have been apparent to Mr Davis or Dr Clarke as expert witnesses that it was plainly contrary to their duties as Part 35 experts to be involved in any way in that decision. Despite their experience as Part 35 experts it would not be right to treat Mr Davis or Dr Clarke as if they had the detailed knowledge of civil procedure to be expected from litigation lawyers. As Mr Bowdery forensically submitted, in his witness statement Mr Callow, the defendant's corrosion expert, responding to a criticism of his decision to take his own tests during the course of the July 2019 Socotec testing, said that he did not believe that it was inappropriate for him as an expert to carry out his own separate testing, because in his view "it is standard industry practice for each expert to take their own measurements, if they wish to do so". Whilst that is of course a response to a criticism of a different type of action, it does rather tend to indicate that Mr Callow saw nothing wrong in principle with experts carrying out their own inspection and measurements notwithstanding the joint instruction of Socotec.
66. However, the defendant and the other parties submit that this decision cannot be considered in isolation from the associated decision to keep the instruction concealed from the other experts and the other parties. In my view it is important to consider this point in a structured fashion.
67. The first point to be made is that in my view there can be no general obligation upon a party such as the claimant to notify the other parties to litigation that it is instructing a testing house such as Socotec to undertake inspections and tests on its own property, with a view to putting the results of that work to its expert for consideration once available. Whilst, as I have said, in the particular circumstances of this case the proper course would have been for the claimant to have sought agreement for a further joint instruction before seeking the court's permission to instruct Socotec direct, that does not also carry with it a separate or associated obligation to notify the other parties if it decided, mistakenly but in good faith, to instruct Socotec directly without first taking those prior steps.

68. I accept that it would have been better for the claimant, having made the decision (albeit mistakenly in my view, as I have said) to instruct Socotec direct, to have notified the defendant and the other parties that it had decided to issue separate instructions to Socotec to carry out these further inspections and tests and to explain why. That would have given the defendant and the other parties the opportunity if so advised to take that matter further, possibly by making an application to the court to seek to restrain the claimant from so doing. Or the defendant and the other parties might have adopted a reasonable approach, which the court might well have endorsed if required, of agreeing to a joint instruction or, perhaps, of giving the other experts the opportunity to comment on the proposed inspection and testing procedures and/or the opportunity to be present during the further inspections. However these are all observations about what in my view good practice would have required rather than my accepting a submission that the claimant and its legal advisers and its experts all had specific obligations to notify their counterparts of their intention to instruct Socotec.
69. The second point to be made is that in my view there is nothing in the principles established by case law or the CPR or the Guidance which suggests that a Part 35 expert is under an obligation to notify his or her fellow experts that he or she has recommended or been instructed to or has instructed a testing house to undertake inspections and tests to be used to assist the expert in reaching opinions in relation to the issues upon which his or her opinion is sought. To the contrary, what the principles make clear is that the expert must identify in his or her report the relevant material upon which he or she has relied in reaching his or her opinions. That would include an obligation to refer to such further results if material to his or her opinion, favourable or unfavourable to the client, and to take steps to ensure that such information is made available to his or her counterparts. But there is no obligation, as Mr Bowdery put it, for the expert to give his or her fellow experts a “running commentary” on the investigations which he or she is conducting or having conducted to get to that point. In my judgment the obligation of transparency does not extend that far and no authority has been cited to me to suggest that it does.
70. It follows, in my view, that no criticism can properly be made of Mr Davis or Dr Clarke for not disclosing the fact of these separate instructions to their fellow experts either in correspondence or at the joint meeting. What is clear is that the results of those further inspections and tests were disclosed to the other experts as soon as they were made available. That of course was entirely appropriate and in accordance with good practice and their obligations as Part 35 experts. Nothing more was strictly required of them before that date.
71. Nonetheless, I would venture to suggest that it would have been sensible for the experts to have suggested to the claimant or its legal advisers that for good practical reasons the other experts should be notified of what was being done and given the opportunity either to offer comments or to attend the further inspections. However I am quite unable to accept that the experts were under an obligation to do so unilaterally, which would of course not have been their right, nor that they would have been obliged to resign as experts had the claimant refused to permit them to notify the other experts at this point.
72. The defendant and the other parties also submit that the response of Mr Davis and Dr Clarke to this application, whereby they strongly deny any wrongdoing, is in itself concerning. However, since I agree that they have not, in fact, been guilty of any wrongdoing, I am unable to accept that submission either.

Indeed, I would observe that their defensive response is not an altogether surprising response to the aggressive tenor of the application. I am however troubled by their failure to explain the basis for Mr Davis' conduct in instructing Socotec not to disclose the separate instruction from the other experts and for Dr Clarke's conduct in not raising the fact of these further investigations at the joint meeting. As has been submitted, the claimant and its legal advisers have not shed any light on this issue either. If it was necessary for me to reach a conclusion on this point I would conclude on the basis of the (albeit limited) material before me that it was the claimant and/or its legal advisers who instructed Mr Davis to give these instructions to Socotec and who had instructed Mr Davis and Dr Clarke not to disclose the instructions to their fellow experts. I would conclude that this was on the basis that the claimant and its legal advisers did not want to give the solicitors for the defendant and the other parties the opportunity to seek to put a spoke in the wheels of obtaining this further information in good time to be able to deploy the results at the joint meeting. Whilst, as I have said, I do not consider that to have been a proper basis for making such a decision, it does not in my view support a conclusion that the role played by Mr Davis and Dr Clarke in this is such as to demonstrate such a serious lack of independence as would justify rendering the entirety of their evidence inadmissible. It must not be forgotten that experts do not have conduct of the case and to view them as having some form of roving or supervisory role over matters which are outside their strict remit would be quite wrong and positively unhelpful.

73. In the circumstances I am quite satisfied that there is no basis for acceding to the application on this basis. However I should also consider a wider question, which is what would have been the proper and proportionate response to the events which have occurred even if I had reached the conclusion that one or other or both of the experts ought not to have allowed themselves to have been involved in these unilateral and concealed instructions. I would have needed to consider whether that conduct was such as to demonstrate that they could not be relied upon to give independent expert evidence in these proceedings, so that their evidence should be declared inadmissible at trial. In my view in the absence of any evidence, and as I have said there is none, that this conduct was intended to procure skewed or unreliable results to support the claimant's case or to obtain some other unfair advantage in the litigation for the claimant, I would not have been satisfied that this conduct was such as to lead to such a conclusion with such wide-ranging consequences. I would have had to consider other more proportionate responses, for example ruling that neither the claimant nor its experts should be entitled to rely upon the results of these further inspections and tests or, for example, deciding that such conduct should go to the overall weight to be attached to the evidence of those experts rather than rendering their evidence as a whole inadmissible. I would also have needed to consider separately the position of Mr Davis and Dr Clarke. Whilst it is clear that Dr Clarke cannot disassociate himself completely from these events it is nonetheless apparent that his involvement in the instructions and in keeping them secret was far less than that of Mr Davis and in my view it would have been wholly disproportionate to exclude his evidence in its entirety even if that had been an appropriate decision as regards Mr Davis.

**A separate complaint**

74. The final complaint made is against Dr Clarke on the basis that he wrongfully took objection to Socotec's testing methodology in an expert report notwithstanding that Dr Clarke directed the manner in which testing was to take place.

75. Dr Clarke responded to this criticism in his witness statement at paragraphs 26 to 28 in the following terms.

“26. I have explained that I have not objected to any of Socotec's tests results. All of their results have been analysed carefully by me, and my conclusions fully disclosed in my report (which consists of 214 pages in total). In respect of the use of Socotec's magnetic thickness testing to attempt to demonstrate there has been negligible corrosion of the zinc coatings, I have argued in my report that the methodology of magnetic thickness measurements is inappropriate for assessing metal loss by pitting corrosion. I understand that the other experts desired that these measurements be made, and it was not for me to object to these, not knowing at the time what purpose they had for these tests. I have analysed all of the Socotec data in my report, and presented my conclusions thereon.

27. I have no concerns as to the Socotec's methodology for any of their tests, or indeed of the reliability of their data. Instead, I disagree completely with the interpretation of the magnetic thickness data made by my fellow experts, the reasons for which I put forward comprehensively in my report. This is indeed the role of an expert under CPR Part 35. I have set forward the scientific reasons for my conclusions. I have worked on the basis that Socotec, as a large and well-resourced independent testing house, were fully competent in the way in which they carried out the testing. Wherever it appears that there were inconsistencies or anomalies in their data, this was corrected by myself and all of the experts. Indeed there were several drafts of the Socotec report which needed to be produced.

28. The concerns which I raised in respect of whether or not Socotec has measured both sides of cold-formed galvanised components were based on the fact that the geometry certainly of some components meant that one side was enclosed, and therefore inaccessible.”

76. That evidence, if genuine, is clearly a complete answer to this complaint. It cannot seriously be suggested that this court could reject that evidence at this interlocutory hearing and, in case there is any doubt, I am quite unable to do so.

### **Conclusion**

77. For completeness, I should say that even considering all of the separate allegations in the round I do not consider that they come anywhere near justifying the draconian order sought by the defendant and supported by the other parties.

78. These are the reasons why I have not acceded to the defendant's application.