



Russell  
McVeagh

# Breaking Ground

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# Industry spotlight

## Expert witnesses and construction disputes

Expert evidence is frequently relied on in construction disputes, whether in court, adjudication, or other dispute resolution processes.

In this issue of Breaking Ground we focus on three recent cases where expert evidence proved crucial to the success or failure of the claim, and summarise the practical guidance which can be taken from those decisions.

### New Zealand

#### *Cridge v Studorp* [2021] NZHC 2077

##### Background

James Hardie is a manufacturer and supplier of cladding products for houses. It produced a fibre-cement sheet cladding called Harditex, intended to form part of a weatherproofing system. A group of homeowners with houses clad in Harditex brought legal proceedings against James Hardie alleging that Harditex was not “fit for purpose”, due to not being sufficiently weathertight.

##### Outcome

In the High Court, Simon France J dismissed the claims.

Crucial to the Judge’s conclusions was his assessment of the expert evidence. The Judge preferred, by a significant margin, the expert evidence provided by James Hardie, and considered that the plaintiffs had not shown that Harditex was a flawed product unable to deliver a watertight house. Expert witnesses of international standing had established for the defendant that the product was not conceptually flawed, and could work.

##### Key lessons

The decision contains a large amount of useful commentary on what will make an expert’s evidence persuasive. In particular:

- The choice of expert witness is crucial. A good expert witness will have demonstrable expertise in the relevant area, be capable of providing information to the court and answering questions clearly and fairly, and will remain objective throughout.
- It is vital that an expert witness clearly understands their role, which is to assist

the court, not to win the case for the side instructing them (see Schedule 4 of the High Court Rules).

- Expert evidence should be backed up with clear, reasoned analysis, and, where possible, supported by published literature. To the extent published literature opposes the expert’s views, the expert should confront those differences directly, to explain why their own opinion or analysis remains valid.
- All experts (from all sides) should have access to the same information. The court is likely to take into account any disadvantage faced by one party by being denied or prevented access to information. It may also limit the conclusions the court considers it can safely draw from the evidence, as it is not able to compare “like for like”.
- Care should be taken where external materials are relied on. In *Cridge*, one witness was criticised for citing literature in support of his position, when in fact it stood for the opposite. Another was found to have cited articles in support of his position, despite not having read them. At best, these anomalies caused the Judge to doubt the value that could be placed on those experts’ evidence. At worst, the references were seen as misleading.

### England and Wales

#### *Blackpool Borough Council v Volkerfitzpatrick Limited* [2020] EWHC 387 (TCC)

##### Background

Blackpool Borough Council contracted with Volkerfitzpatrick for the design and construction of a new tram depot by the Irish Sea. Several years later, severe structural issues were discovered.



The Council considered that Volkerfitzpatrick had breached its obligations in respect of both design and construction of the Depot and brought court proceedings. Due to the proximity of the Depot to the sea, the construction contract contained a "design life" clause, being the expected operational life of a structure located in a geographically challenging environment. Assessing the design life was a technical issue for which the Council relied heavily on expert evidence from both a structural engineer and a corrosion expert.

Prior to the hearing, the parties agreed to engage an independent third party (Socotec) to conduct testing at the Depot. In a joint statement, the parties agreed on the appropriate inspection and testing procedures that Socotec would use to assess, amongst other things, the level of corrosion and degradation of the cladding panels.

Following that engagement, the Council's own corrosion expert communicated independently with Socotec, seeking clarification of how it would produce and present its results, and instructing it to undertake further investigation of the Council's property.

Volkerfitzpatrick applied to the court to have the Council's expert evidence ruled inadmissible, on the basis that the expert had improperly engaged with Socotec for the purpose of skewing the results, and to gain an unfair advantage in the investigation.

## Outcome

- The court confirmed that it would always be inappropriate for one party to have unilateral access to an expert who had been appointed by the court to produce a report on behalf of both parties and who would be responsible for forming an expert opinion on the circumstances relating to any results.
- However, in this case, Socotec had simply been engaged to speed up the expert process by undertaking certain sampling and testing. It was not expected to form or provide an expert opinion in relation to the results, and there was accordingly no issue with one party's expert making separate contact.

## England and Wales

### *Dana UK Axle v Freudenberg FST GMBH [2021] EWHC 1413 (TCC)*

## Background

Dana had contracted with Freudenberg to supply "pinion seals", car parts that were eventually sold on to a car manufacturer for use in its vehicles. The seals began to fail, and the manufacturer sought damages against Dana. Dana then sought to recover those costs from Freudenberg.

Freudenberg engaged three separate experts to produce reports on its behalf, including experts in the testing of machine components. Dana sought

to exclude the evidence of those experts, on the basis they had failed to comply with their duties under the English Civil Procedure Rules.

The alleged failures included:

- Failing to identify the exact documents on which the experts had relied. There was some evidence to indicate that Freudenberg had provided its experts with a number of documents without also making them available to Dana.
- Undertaking site visits to factories operated by Freudenberg without putting Dana on notice or affording Dana's own experts a similar opportunity to inspect those factories. The experts provided no photographs or notes of the visits, and no notes of interviews which had been undertaken with staff members while on site.
- Failing to include cross-references in their reports to the documents or sources of data relied on in reaching their conclusions. This caused prejudice to Dana's legal team, who struggled to read and understand them.

Dana had been granted a pre-trial order which identified these deficiencies and required Freudenberg to remedy them, but it had not been followed.

## Outcome

The court held that:

- The conduct of all three of Freudenberg's experts had called into question the independence of their reports and the extent to which they had provided objective and unbiased opinions.
- Freudenberg had interposed itself in the experts' reports to such a degree that they could not confidently be said to be the result of the experts' independent analysis.
- As a result, all three experts were found to have fallen well short of their duties under the Civil Procedure Rules, and their evidence was excluded.

## The Rules

The Civil Procedure Rules of England and Wales (CPR) are comparable to New Zealand's High Court Rules (HCR), but not identical. There is no ability under the HCR for the court to appoint a "joint expert" for the benefit of multiple parties, but there is the ability to appoint a "court expert", who is able to inquire into and report upon any question of fact or opinion not involving questions of law.<sup>1</sup> A court expert under the HCR will perform similar tasks to a joint expert appointed under the CPR, but will be more remote from the parties themselves. For example, under the HCR the instructions for the "court expert" must be agreed between the parties or settled by the court, while under the CPR, either party may instruct the "joint expert", provided all parties are informed of those communications.

In relation to the individual experts which may be appointed by each party, the requirements of the CPR and the HCR are very similar. In each case, the expert's overriding duty will be to the court, not to the party who has engaged them, and they will need to be careful to remain impartial and exercise their independent, professional judgment.

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### Footnotes

1 HCR 9.36.

## Practical Guidance

An expert's evidence will often be crucial to the success or failure of your case in a construction dispute. It is therefore critical that it be prepared in full compliance with the relevant Rules, to remove any risk that it may be rendered inadmissible, and to maximise its credibility.

As noted in relation to the *Cridge* decision above, while many expert witnesses will be very familiar with their obligations, it should never be taken for granted. In each case, the expert must be reminded of the scope of their role, and explicitly referred to the code of conduct for expert witnesses included within the High Court Rules. This code of conduct should be used for expert evidence in any dispute resolution forum, not just litigation.

While an expert witness will need to work with the client's legal advisers to ensure any brief of evidence covers the appropriate areas and can be readily understood, the brief should remain in the expert's own words as much as possible. This was highlighted in another recent High Court decision, *Dempsey Wood Civil Limited v Gapes*, where Fitzgerald J noted concern that "significant and important parts" of the two key expert witnesses' briefs had been written in identical terms, even including the same typos.<sup>1</sup> Her Honour noted it was clear that the briefs had been written by the plaintiff's lawyers, and "the process by which this evidence evidently came to be in written form undermines its credibility."<sup>2</sup> An expert's brief of evidence which is plainly written in the witness's own words will ultimately be far more persuasive to the court than one which has obviously been written substantially, if not wholly, by a lawyer.<sup>3</sup>

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### Footnotes

- 1 *Dempsey Wood Civil Limited v Gapes* [2021] NZHC 2362.
- 2 At [144].
- 3 At [144].

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*Breaking Ground* is produced quarterly by Russell McVeagh. It is intended to provide summaries of the subjects covered, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this publication, please contact one of our experts.

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