Neutral Citation Number: [2022] EWHC 479 (QB)

Case No: QB-2017-006145

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
IN THE CHIRK NUISANCE GROUP LITIGATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2022

Before :

SENIOR MASTER FONTAINE

- -

Between :

Patricia Andrews and ors	**Claimant**
- and -	
Kronospan Limited	**Defendant**

- -
- -

David Hart QC (instructed by **Hugh James**) for the **Claimants**
Michael Kent QC and Michael Jones (instructed by **Clyde & Co Claims LLP**) for the **Defendant**

Hearing dates: 19 February 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of the Defendant's application dated 28 January 2022 to revoke the Claimants' permission to rely upon the expert evidence of Dr Nigel Gibson. The application is supported by the seventh witness statement of Hugh Mullins dated 28 January 2022 (Mullins 7) and responded to by the twelfth witness statement of Stephanie Eedy dated 11 February 2022 (Eedy 12). Documents referred to in this judgment will be referred to by refence to the pagination in the hearing bundles as follows; [Vol number/page number].

Procedural background and chronology

2. This group litigation commenced on 18 July 2017, and a Group Litigation order was considered by the court on 22 June 2017, and made on 4 August 2017 (following approval of the order by the President of the Queen's Bench Division as required by CPR 19BPD.7 para. 3.4) [1/151]. Under that order I was appointed as the Managing Judge. The 159 Claimants are all residents of Chirk, Wrexham, who claim that the Defendant is liable to them in public or private nuisance by reason of dust, noise or odour emissions as a result of the management or operation of the site of the Defendant's wood processing and wood product manufacturing plant in Chirk, Wrexham.

3. The following case management orders have been made:

    i) The first CMC was held on 15 May 2018, where permission was given for each party to rely upon the evidence of an expert in dust dispersion modelling ("dust modelling"), with consideration of other potential areas for expert evidence adjourned [1/168].

    ii) Further directions were made in relation to dust modelling expert evidence in the order of 3 July 2018 [1/173].

    iii) The order dated 7 December 2018 gave permission for each party to have expert evidence in a further discipline, dust analysis and monitoring ("dust analysis") [1/177-178]. Dr Nigel Gibson was the Claimant's expert in both disciplines, Dr Hugh Datson was the Defendant's expert in dust analysis and Dr Carruthers its expert in dust modelling.

    iv) The order of 25 March 2019 gave detailed directions in both areas of expertise in relation to joint discussions [1/180-181].

    v) The order of 22 July 2019 provided detailed directions with regard to data collection and monitoring, and permitted both parties to jointly instruct an expert laboratory to provide the initial chemical and scanning electro microscopy ("SEM") analysis of the data collected and specified the samples for analysis [1/187, 189].

    vi) In the order of 23 April 2020 the Claimants were given permission to rely on a written report on the characterisation of dust from that analysis from Dr Laura Aguilano, to deal with certain aspects of the joint expert report that Dr Gibson said did not fall within his area of expertise [1/208].

vii) Further directions for exchange of reports, joint discussions and joint statements were given in the order of 21 October 2020 [1/212].

viii) The dates for these steps were then extended by a consent order of 4 March 2021 [1/219].

ix) By order of 19 October 2021 permission was given to Dr Gibson to rely on an addendum report dated 5 July 2021, arising out of an issue following receipt of Dr Datson's report [1/227]. The order also reflects that there was disagreement between the parties as to how that part of the expert evidence to be dealt with by Dr Aguilano for the Claimants was to be carried out, and I resolved that issue by providing that Dr Aguilano and Dr Datson should sign a separate joint statement in respect of the area of expertise where Dr Gibson deferred to Dr Aguilano, by 16 November 2021. The joint statement of Dr Aguilano and Dr Datson was produced on time on that date: Mullins 7 para. 5 [1/8]. The date for production of the joint statements of Dr Gibson and Dr Datson was put back again to 30 November 2021 [1/227].

Issues arising in the expert evidence during the period since 2018

4. The issue of expert evidence in dust analysis has been one that has caused considerable difficulties from the beginning, and, as is apparent, it has been considered at numerous hearings. There has been very little agreement or any common approach on any issue. For example, there was no agreement on the methodology to be adopted or the manner and monitoring of data collection. There was no agreement on the identity of the joint expert responsible for the laboratory analysis, or the letter of instruction to be sent to that joint expert.

5. The order of 25 March 2019 provides an example of the type of problems experienced. Paragraph 2 [1/180] states:

> "In order to ensure that the parties experts are reporting on the same basis, the experts are to continue discussions to agree between them, and identify areas where they have not agreed, their approach, and they are to prepare and file with the court a document in respect of each report as set out below."

6. Paragraph 4 provided that the experts should prepare a joint agenda, setting out areas of agreement and disagreement following that discussion. A list of areas that they should specifically consider is included [1/181]. Similarly, the order of 22 July 2019 provides specific directions as to the areas and time periods for baseline monitoring and orders that the experts must agree the sites from which control samples are to be taken and specifies the number of samples from each site [1/185-187]. Paragraph 3 makes provision for what should be included in the joint letter of instruction to the joint expert who was to provide the chemical and SEM analysis [1/189].

7. It would not usually be the case that the court would have to descend to such levels of detail in the directions for expert witnesses. This continuing lack of agreement has caused particular difficulties because the area of expertise is very technical. At one of the case management conferences I required Dr Gibson and Dr Datson to attend so that I could address them directly to explain what the trial judge would require in order to

understand the expert evidence and to appropriately assess the weight of each expert's opinion on contested issues, in an attempt to ensure that the experts focused less on their disagreements about process, and addressed themselves to the objective of their reports and joint statement, namely to assist the court.

8. Thus the dates for both exchange of reports and for a joint statement to be signed has been put back on numerous occasions. The order of 4 March 2021 had set a date for production of a joint statement by 25 June 2021 [1/219], a longer period than would be usual, recognising that in the light of the past history it would be unlikely that the process would be without difficulties. Unfortunately, that has proved to be the case. The dust analysis reports were eventually exchanged in April 2021, and joint discussions commenced in May 2021: Mullins 7 para. 7 [1/8].

The background to the application

9. On 18 November 2021 a chain of correspondence began between the parties' solicitors which has led to the Defendant's application, and there has thus been no joint statement from Dr Gibson and Dr Datson, although I am told that the draft is in an advanced form. That situation has also delayed the production of the joint statement from Dr Gibson and Dr Carruthers on dust modelling, which is timetabled for 14 days after the dust analysis joint statements.

10. Exhibits HKM 1-22 provide copies of that correspondence, commencing with the Claimants' solicitors letter to the Defendant's solicitors dated 17 November 2021[1/24], to 7 January 2022 [1/21-53]. In summary, as a result of that initial letter and subsequent correspondence between the parties, it became apparent to the Defendant that there had been contact between Dr Gibson and the Claimants' solicitors during the period of the joint statement discussions from early May 2021 to 18 November 2021, although there was a break during the period from about late June to October 2021 when the process of joint discussions between Dr Gibson and Dr Datson stalled, but Dr Aguilano and Dr Datson were able to continue their joint discussions and agree a joint statement, and there was a further case management conference on 19 October 2021.

11. Those communications consisted of Dr Gibson providing the Claimants' solicitors with various iterations of the working draft of the joint statement, comments being made on those drafts by the Claimants' solicitors which were sent to Dr Gibson. Some of the comments by the Claimants' solicitors on the various draft statements were in relation to typographical errors, or queries where there was a lack of clarity, but many others (16 are accepted by the Claimants) commented or made suggestions on issues of substance. There were also email and telephone exchanges in which the progress, and to some extent, the content of the joint discussions, were shared with the Claimants' solicitors. Both Dr Datson and the Defendant's solicitors were entirely unaware of this, and the full extent of the communications (as far as the Defendant is aware, as communications for which privilege is claimed have not been disclosed) was not made clear until the Claimants' solicitors' letter of 24 December 2021 [1/50].

12. The Claimants have now acknowledged, by Ms Eedy's witness statement and through Leading Counsel, that:

i) it was inappropriate for the Claimants' solicitors to have provided comment solely to Dr Gibson, and that Dr Gibson should not have responded to those comments;

ii) it is wrong for an expert to solicit input from their instructing solicitors during the process of drawing up a joint statement, just as it is wrong for those solicitors to provide that input;

iii) there was a serious transgression of the rules by the Claimants, by reference to the terminology in the case of *BDW Trading Ltd v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915(TCC);

iv) the court has power to revoke permission to rely on an expert.

13. In the light of those concessions it has not been necessary for me to refer in this judgment to any of the comments on the various drafts of the joint statement sent by Dr Gibson to the Claimants' solicitors with comments made by the Claimants' solicitors in Bundle 2, but I have read all those comments.

The issue between the parties on the application

14. The parties disagree as to the consequences that would be appropriate by reason of the acknowledged breaches of Rule 35 and 35PD.9. The Defendant submits that, although it recognises that such an order would be drastic, the only possible sanction is to revoke the Claimants' permission to rely on Dr Gibson as their expert, in circumstances where Dr Gibson has, it is submitted, acted in such a way as to demonstrate that he is not truly independent but rather has been acting as advocate for the Claimants. It is submitted that both his conduct and that of the Claimants' solicitors amounts to a failure to comply with the terms upon which the Claimants were given permission to adduce the evidence of Dr Gibson.

15. The Claimants submit, relying on the decision in *BDW*, that it would be entirely disproportionate to revoke the permission of the Claimants to rely on Dr Gibson and potentially disastrous for the 159 households who bring this claim. The proceedings have been on foot since 2017, Dr Gibson has been involved for over 3 years and revocation of Dr Gibson's right to give evidence will cause significant additional costs for the Claimants or those who advise them and significant delay whilst the Claimants identify a replacement expert who can advise them on the dust analysis issues and potentially also on the dust dispersion modelling issues.

Discussion

16. CPR 35.3 provides:

> "(1) it is the duty of experts to help the Court on matters within their expertise.
>
> (2) this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. "

CPR 35.12 (1) to (3) gives the court power to direct a discussion between experts and to direct a statement following that discussion, and rule 35.12 (4) states:

> "The content of the discussion between the experts shall not be referred to at the trial unless the parties agree."

CPR 35PD.9 governs discussions between experts.

> Paragraph 9.4:
>
> "Unless ordered by the court or agreed by all parties, and the experts, neither the parties nor their legal representatives may attend experts' discussions." And
>
> Paragraph 9.7;
>
> "Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement."

The Civil Justice Council Guidance for the Instructions of Experts in Civil Claims 2014, ("the CJC Guidance") at paragraph 91 reminds solicitors and experts of the court's powers to impose sanctions under CPR 35.4(4) and 44: White Book Vol 1 35EG.23. One of the possible penalties is stated at paragraph 91b to be that "an expert's report/evidence be inadmissible".

17. The Claimants having accepted that there have been "*serious transgressions*" of the relevant rules and practice directions, the issue for me to determine in this case is the sanction, if any, to be imposed, in accordance with guidance given in the authorities. I draw on the authorities for some assistance.

18. The most recent decisions are those in *BDW* (see Paragraph 12 above) and *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC). In *BDW* the defendant's expert in geotechnical engineering revealed in cross examination at trial that he had sent a first draft of the joint statement to the defendant's solicitors and having received feedback, had made some changes to that draft as a result. The judge concluded (at [18]), that this was "*a serious transgression*" of CPR 35PD paragraph 9. The judge upheld the complaint that it was quite inappropriate for independent experts to seek input from their client's solicitors into the substantive content of their joint statement or, for that matter, for the solicitors either to ask an expert to do so or to provide input if asked, save in the limited circumstances referred to in paragraph 13.6.3 of the TCC Guide. However he concluded that the expert was genuinely unaware that his conduct in this respect was inappropriate, and that there was no basis for considering that he had modified in any significant way the substance of his opinion as discussed with the other party's expert. Accordingly no sanction was imposed on the expert.

19. The judge stated at [18]:

> "… it is important that all experts and all legal advisers should understand what is and what is not permissible as regards the preparation of joint statements. To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12 (5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to reopen the discussion by this means."

20. Paragraph 13.6.3 of the TCC Guide states:

> "Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concern should be raised with all experts involved in the joint statement."

21. See also the commentary in the White Book Vol I at 35.12.2, which refers to *BDW* and other decisions and concludes:

> "While this guidance concerned the application of the approach set out in the Technology and Construction Court Guide, it is of general utility and applicability."

22. *Dana* concerned very serious breach of the rules by the defendant's three technical experts, which was not revealed in full until part way through the trial. This case involved the most serious behaviour by those experts, some of which had previously been the subject of an order granting relief from sanction subject to certain conditions. Not only did the judge find that the experts had not complied with those conditions, so

that the defendant no longer had the court's permission to rely on those experts, but she considered that the experts' breaches of Part 35, 35PD and the CJC Guidance were so serious that they would be sufficient in themselves, without the breach of the conditions imposed by the previous order, to justify the refusal of the court to allow the defendant to rely on its technical experts (at [87]).

23. Mrs Justice Joanna Smith referred in her judgment to two previous authorities at [66]-[68]:

> "66.… I should reiterate what was said by Fraser J in *Imperial Chemical Industries Ltd v Merit Merrill Technology Ltd* [2018] EWHC 1577 at [237];
>
> > "The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explain to them by their instructing solicitors. This applies regardless of the amounts in stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR part 35, practice direction 35. Every expert should read it."
>
> 67. Fraser J went on to set out some examples of the application of the well known principles in *The Ikarian Reefer* [1993] 2 Lloyds LR 68…. For present purposes, I note the first duty of an expert witness in a civil case as identified by Creswell J (at page 81) in *The Ikarian Reefer:*
>
> > *"*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 (*Whitehouse v Jordan* [1981] 1 WLR 246 at 256, per Lord Wilberforce) ""

24. In my judgment the breaches of Rule 35, Practice Direction 35 and the CJC Guidance by both the Claimants' solicitors and Dr Gibson in respect of appropriate conduct relating to the period of joint discussions preparatory to a joint statement being produced by experts, were more serious than in *BDW*, where there was only a single communication between the expert and the solicitors. Here there has been continuous contact, soliciting and provision of comments on the various progressive drafts of the joint statement, and provision of information on the joint discussions.

25. The facts in *Dana* concerned a particularly egregious example of the most flagrant breaches by the experts concerned, where technical input was sought and provided to the experts by the party by whom they were instructed at every stage of the process, without the knowledge of the other party. The judge would clearly have had no other option but to refuse the defendant permission to rely on those experts. The facts in this case are not comparable to those in *Dana*, but the principles applied are equally relevant.

26. In this case there were continuing discussions either by telephone or email or by written commentary on the draft joint statement in its various progressions from 26 May 2021 to June 2021 and recommencing in November 2021. Although the majority of the total of 68 comments noted on the draft joint statements relate to typographical and formatting issues, it is accepted by the Claimants there were at least 16 comments relating to "*advice and suggestions as to content*" in respect of the joint discussions/draft joint statement: Eedy 12 para. 21 [1/244].

27. I set out some examples below of input by the Claimants' solicitors in telephone and email correspondence:

    i) The attendance note of the telephone conversation on 26 May 2021 discusses the substance of the report and Dr Gibson relays Dr Datson's views on particular issues, and the conversation ends with "*SE said she will check the document he sent through and she and RA will return with any comments/aspects ready for him to send back to HD.*" [1/54]

    ii) An email of the same date from Dr Gibson to Dr Datson, enclosing "*an outline of what we discussed*" was apparently blind copied to the Claimants' solicitors. Ms Eedy's reply on 1 June 2021 says:

> "*Following our discussions, we have reviewed the draft note you sent through as I understand you wanted to ensure that it captures the points relevant for cross examination. I attach your note onto which we have inserted comments.*
>
> *Your draft seems to cover most things but some further observations are set out below:*
>
> 1. *Complaints: we recall that you are intending to make the points regarding HD's reference to "event"/"non-events"*
>
> 2. *Complaints: to substantiate your point on the complaint numbers it is possibly worth making references to residents reasons for not complaining? – e.g. review of the lead claimants' witness statements illustrate some of these reasons: residents don't always know who to complain to [e.g. names of 4 claimants] They give up/don't consider any improvement will result [e.g. names of 6 claimants] and that they don't complain every time/have no time [e.g. names of 4 claimants].*
>
> 3. *Provide comment/evidence to tackle HD's comments on 0.1% particles being linked to K – unpick the 5 points HD summarises in reaching this conclusion?* " [1/55-56].

    iii) On 3 June 2021 Dr Gibson sent an email to the Claimants' solicitors apparently attaching a further draft of the joint statement which stated "*This came through from HD the other day. There are some comments on the way that Lorna has done her assessment. Could she have a look at what HD has said so I can respond.*" The reference to "*Lorna*" is to Dr Aguilano, so it appears that Dr

Gibson is seeking Dr Aguilano's assistance in relation to his part of the joint discussions. Ms Andrews from the Claimant's solicitors responded confirming should that she "*will forward to Lorna for her comments on HD comments pages 12 and 13.*" She then states:

"*Presumably this document will be updated again following your discussion today, so I haven't considered HD's comments at length save to note the following:*

1. *Need to address his statement that there is no direct correspondence between location of complaint and of claimant*

2. *Dust criteria/thresholds section, is this missing the point that the vallack and shilto* [sic: Vallack and Shillito] *data is also out of date, air quality has improved since then….*

3. *Need to respond to what he says in the dust monitoring section*" [1/57]

iv) On 4 June 2021 Dr Gibson sent an email to the Claimant's solicitors, headed 'draft joint statement note' which states: "*HD sent me an amended format for the report along with additional commentary. I have been now been through the headings and have drafted my response. Perhaps you would like to comment draft before I send it back to HD.*" Ms Andrews of the Claimant's solicitors sent a note back with her comments and comments from "Brian Anderson" (which was intended to refer to Brian Donovan from Ricardo Consulting, Dr Gibson's colleague) [1/59-60].

28. This exchange continued until 25 June 2021. The disclosed documents show the correspondence restarting on 18 November 2021 when Dr Gibson sent through a copy of his amended draft statement before it was sent to Dr Datson where he states "*I have taken our evidence note and put that at the front of the statement and then put the discussion points table and amendments as an appendix*." [1/66] This is responded to on the same date by telephone call from Miss Eedy to Dr Gibson where she asked him to take out the "*evidence point summary*" from the document, so that is not ever seen by Dr Datson [1/67]. This is a reference to a note ("the evidence note") that Dr Gibson prepared for a conference with Counsel in November 2021 [2/13-19].

29. The Claimants' solicitors have confirmed that discussions continued with Dr Gibson during the period prior to the joint discussions resuming in November 2021, including conferences with Counsel in October and November, but that such communications were "*on matters outside of the joint statement and such communications are privileged.*": Eedy 12 para. 26.1 [1/246].

30. Although it was submitted on behalf of the Claimants that Dr Gibson has changed his position as a result of the communications with the Claimants' solicitors in only one respect, relating to whether the number of Claimants correspond with the number of complaints made: Eedy 12 para. 23 [1/244], the Defendant correctly points out that they have no means of knowing whether that is the case. In any event, that is not the test of whether to refuse permission to a party to rely on expert evidence where there has been a breach of the Rule/PD, but just one of the factors for consideration. But it is apparent from the examples of the communications cited above, and the fact that there is no

evidence from Dr Gibson, that I am unable to reach any view as to whether or not Dr Gibson's views have changed as a result of discussions with the Claimants' solicitors

31. In my judgment the primary concern, having seen the communications between the Claimants' solicitors and Dr Gibson, is that Dr Gibson's approach strongly suggest that he regards himself as an advocate for the Claimants, rather than as an independent expert whose primary obligation is to the court. This is demonstrated by the following:

    i) Dr Gibson having sent the first draft of the joint statement to the Claimants' solicitors unsolicited, which could only be because he sought their views. He sent further drafts to them where he sought their input.

    ii) Dr Gibson's view that it was appropriate to attempt to include in the joint statement the evidence note that he had prepared for a conference with Counsel: Eedy 12 paras. 17, 26.2, 27 [1/ 242, 246, 247]; HKM17 [1/13-19] when this was clearly inappropriate and further had not been discussed with Dr Datson.

    iii) Dr Gibson providing information to the Claimants' solicitors about the joint discussions without at any time informing Dr Datson of this. Even if he was unaware of his duties in this regard (and he has not informed the court whether this was the case) it is not a transparent approach and contrary to the overriding objective.

    iv) Dr Gibson's comments to the Claimants' solicitors referred to in the examples above, which make it clear that he was looking for ways in which he could support the Claimants' case.

32. The other factors which I consider should be taken into account in determining what the sanction should be are as follows:

    i) The Claimants' solicitors failure in November 2021 to reveal the full extent of their communications with Dr Gibson, the correspondence suggesting that the first contact had been on 17 November 2021, and their reluctance to do so until the persistence of the Defendant's solicitors made it apparent that they would not let the issue go.

    ii) The Claimants' solicitors informed the Defendant's solicitors that the only reason for that contact by Dr Gibson on 17 November was "*to notify us that Dr Gibson/Dr Datson's communications regarding their joint statement were being resumed*" which was clearly only part of the picture. It is apparent, having seen Dr Gibson's email of 18 November 2021 sending the next version of the draft joint statement [1/66] and the telephone attendance notes of 17 and 18 November 2021 [1/65, 67], that Dr Gibson was intending to resume his previous conduct in providing information about the joint discussions and soliciting assistance from the Claimant's solicitors. I therefore do not consider that Ms Eedy's explanation as to why there was no disclosure of the previous discussions with Dr Gibson in May and June 2021 is satisfactory: Eedy 12 para. 14 [1/242].

    iii) Dr Gibson has not informed the court of the reason for his conduct, i.e. whether he was unaware of his obligations as an expert, and if so, why, or whether he

was aware, in which case his reasons why he thought it appropriate to transgress those obligations.

iv) Dr Gibson produced his addendum report in July 2021 at a time when Dr Datson was unaware of his prior discussions with the Claimants' solicitors.

33. The factors in favour of permitting the Claimants to retain Dr Gibson as their expert are as follows:

i) Dr Gibson has been involved for over 3 years, and I am informed that some £255,000 have been spent on his fees.

ii) If permission to rely on Dr Gibson is revoked that would be a severe blow to the Claimants, a total of 159 households, all likely to be of modest means, who will be adversely affected by a decision to revoke permission.

iii) Even if the Claimants are permitted to rely on alternative expert evidence it will involve them in considerable additional costs and cause further delay to an already long running case.

iv) The Defendant is now aware of the extent of the discussions with Dr Gibson, so that the Defendant can cross examine Dr Gibson at trial in relation to whether he has changed his opinion as a result of those communications.

Conclusion

34. Taking all the above factors into account, and applying the overriding objective, I have concluded that the serious transgressions by the Claimants' solicitors and Dr Gibson are such that the court has no confidence in Dr Gibson's ability to act in accordance with his obligations as an expert witness. The basis upon which the Claimants received permission to rely upon Dr Gibson as an expert witness, namely his duties under CPR 35.3, 35PD paras. 2.1 and 2.2, has been undermined. Accordingly I consider that it is appropriate, and not disproportionate, to revoke the Claimants' permission to rely on his evidence. I consider that it must follow that permission to rely on Dr Gibson as a dust modelling expert is also revoked. The fact that this is group litigation does not dissuade me from that course. It is important that the integrity of the expert discussion process is preserved so that the court, and the public, can have confidence that the court's decisions are made on the basis of objective expert evidence. This is particularly important where, as here, the expert evidence is of a very technical nature so that the court is heavily reliant on the expert evidence being untainted by subjective considerations.

35. I have to consider whether to permit the Claimant to rely on an alternative expert, although this will undoubtedly cause additional costs and delay to the proceedings. Of course if this conduct had been uncovered only during cross examination at trial, the Claimants would not have been able to rely on any expert evidence. Although this claim is by no means at an early stage in the proceedings no trial date has been set, and a further case management conference is to be listed, having been adjourned in order to list the Defendant's application. The instruction of further experts will cause additional delay and costs, but that is the inevitable result of the conduct the subject of the application. The data has already been collected and analysed by an independent

laboratory, so a newly instructed expert in dust analysis will not be involved to the same extent as Dr Gibson has been. It may be appropriate, given past events, to provide conditions and/or directions, in relation to the instruction of new experts, and in relation to the joint discussion process. That can be considered at the case management conference. However, I do consider that it is possible at this stage in the litigation to allow the Claimants to rely on newly appointed experts. I also take into account that this is a claim in nuisance, where the Claimants would, if successful, seek an injunction or declaration as well as damages, so that they would not be fully compensated by a claim against their solicitors. Accordingly I consider that it would be appropriate to allow that option to the Claimants.

36. If that is the course the Claimants decide to take, when the time comes for joint discussions between experts, having had the opportunity to see the draft joint statement in relation to dust analysis, I strongly urge the solicitors and experts for both parties to take heed of the guidance provided by the authorities, summarised in the commentary in the White Book Vol I at 35.12.2

> "Joint statements should aid the understanding of the key issues and each expert's position on those issues. It should set out the issues on which they agree, and on which they disagree….They should be concise and both parties and experts should ensure that they do not take on the quality of a "long and repetitive pleading"….
>
> An effective joint statement is best achieved by parties agreeing a single agenda for the experts' discussion, see *Saunders v Central Manchester University Hospitals NHS Foundation Trust* [2018] EWHC 343 (QB);"

37. Finally, Ms Eedy makes complaints about comments made by Dr Datson about Dr Gibson's approach to the joint statement process: Eedy 12 para. 29 [1/248] and lack of disclosure by the Defendant/Dr Datson of relevant documents required for the experts: Eedy 12 para. 32 [1/249]. The first issue is not one which I can comment on. The second issue should have been dealt with by an application for specific disclosure, and if the alleged lack of disclosure is a hindrance to the process of concluding the expert evidence in dust analysis I suggest that an application is made so that the issue can be addressed at the next case management conference.