[2012] JMSC Civ. 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 02426

BETWEEN	**ROWAN MULLINGS**	**CLAIMANT**
AND	**JOAN ALLEN**	**1ST DEFENDANT**
AND	**LOUISE THOMPSON**	**2ND DEFENDANT**

Ms. Gillian Mullings for the Claimant.

Mr. Gayle Nelson and Ms. Analisa Chapman, instructed by Gayle Nelson & Co. for the Defendants.

IN OPEN COURT

HEARD: 3RD FEBRUARY 2012, 4TH OCTOBER 2012 & 18TH OCTOBER 2012

Expert Evidence – Part 32 of the Civil Procedure Rules (CPR) – Oral Application and Written Application – Oral Evidence by expert – Need for Expert Report to be prepared – Section 31E of Evidence Act – Relationship between Part 32 of the Civil Procedure Rules and Part 31 of the Civil Procedure Rules – Proposed appointment of expert witness during trial – Jointly instructed expert witness – Whether another expert witness should be appointed by the Court.

ANDERSON, J.

[1] In this claim, which is presently underway in terms of the trial thereof, applications have been made before me both orally and in writing, the latter by means of Notice of Application for Court Orders, which was by permission of the Court, permitted to be argued as per the subsequently filed, Amended Notice of Application for Court Orders which was filed on July 20, 2012. Prior to that, the Notice of Application

for Court Orders was filed on July 19, 2012. These Applications have all been made are all being strongly pursued by the Defendants.

[2] The Defendant's Amended Application for Court Orders seeks three reliefs and the third of those three reliefs, as numbered '3' is essentially the same as the Defendant's oral application which was argued before this Court during trial, in proceedings which were held on February 3, 2012. The Defendant's written application had come up for hearing before more than one Justice of Supreme Court, in Chambers. When however, it came before me in chambers as had been directed by the other judge who had earlier dealt with the matter when it came before him in chambers, I then ordered that the Application be dealt with in open Court, since the trial of this Claim had already begun and is part-heard. As such I was then and still am now of the view that any Application for Court Orders being made during the course of an ongoing trial should, whenever that trial is being held in open Court, also be heard in open Court.

[3] The Defendant's Applications are supported by affidavit evidence which has been deposed to by one of the attorneys on record for them, as instructed by Gayle Nelson and Company, this being Miss Annalisa Chapman. In response, the Claimant has filed an affidavit which he has deposed to.

[4] The Defendants have filed two notices of intention to tender hearsay statements made in documents. The first of these was filed on December 16, 2011 and the second was filed on January 27, 2012. Those respective notices of intention to tender documents each pertain to document prepared by one Isa Angulu, Commissioned Land Surveyor of Angulu and Associates – Commissioned and Chartered Land Surveyors. One of those documents is a surveyor's report dated January 10, 2012, whilst yet another is a surveyor's report dated October 23, 2009.

[5] Those respective notices of intention to tender documents as hearsay evidence were respectively served on the Claimant's counsel, on December 16, 2011 and January 27, 2012. The Claimant's Counsel has not responded to either of those notices

by filing the typical notice of objection to the tendering into evidence of the proposed hearsay evidence. Thus, as at this stage, when no determination has, as yet been made as to the admissibility of the proposed evidence and the trial of this claim is next scheduled to resume on October 19, 2012, which would thus be the earliest date upon which the relevant documentary evidence, if permitted by the court, could be properly tendered into evidence that proposed evidence could be adduced as hearsay evidence during the course of the defence's presentation of its case at trial, which is already underway, as the evidence of the First Defendant is now ongoing, insofar as her evidence-in-chief is concerned.

[6] This is so because, the Defendants, having given notice of intention to tender those documents, in accordance with the requirements of section 31E (2) of the Evidence Act, thereby made it such that if the Claimant had wished for the Defendants to call upon Mr. Angulu to give viva voce testimony, he could only have done so by notifying the Defendant's counsel and the Court, that he requires that Mr. Angulu be called as a witness. If this had been done, then the only way in which the Defendants could have led into evidence, documents purportedly under the hand of and/or prepared by Mr. Angulu, without calling upon Mr. Angulu to provide oral testimony before the trial Court, is if one or the other prerequisite conditionalities for the permitting of such hearsay evidence, in a situation wherein an opposing litigant is requiring that the relevant person be called upon to personally provide his or her oral testimony before the court, was or were met. Amongst those conditionalities are for example, that the proposed witness is dead or too ill to attend Court, or cannot be found after reasonable steps have been taken to find him or her. This however, cannot and does not arise in a situation wherein no notice has been given by the opposing litigant, to the effect that such person is required to be called upon to personally testify as a witness in the proceedings before the Court.

[7] Whilst though, this means that all of the proposed evidence can be admitted as hearsay evidence through any of the defence's witnesses, that is not to be taken as being either the end of the Court's adjudication of the Applications, nor that simply

because evidence may meet all of the technical requirements of the Evidence Act, for the purpose of its admissibility as hearsay evidence, this means that regardless of any other issue that may arise in terms of admissibility, such as its relevance, its probative value as against its prejudicial effect and also, in civil cases, where it is sought to rely on hearsay evidence as expert evidence ,whether the requirements of the rules of Court as regards expert evidence, have been met, insofar as the proposed evidence is concerned, such is automatically admissible. That is not so and can never be so, for if that were so, then it would mean that all hearsay evidence is admissible, in all contexts whatsoever. Thankfully though, the defence counsel has made no such contention in the matter now at hand.

[8] The defence counsel has, in the first instance, contended that Mr. Angulu can properly be permitted by this Court to give that which senior counsel, Mr. Nelson, has on the Defendant's behalf, described as 'first-hand evidence' of what he saw when he visited the scene of the dispute between the parties, which pertains to the alleged encroachment by the Defendants on the Claimant's property and vice versa. The parties' properties are each adjoining the other and are located on East Mountain Pride Avenue located in Long Mountain Country Club, Beverly Hills, St. Andrew. As set out in the text – **A practical approach to Civil Procedure, authored by Stuart Sime (12th edition) (2009), at paragraph 31.04 – 'Experts, like other witnesses, may give evidence of primary facts within their own knowledge.' Further on, at paragraph 31.07 in the same text, the learned author states – 'It is also possible that an expert may be called to give factual evidence about facts known to the expert. In such a case the individual is called as a factual witness, not an expert.' (Kirkman v Euro Exide Corporation (CMP Batteries Ltd.) (2007) ALL E.R. (D) 209).**

[9] What is clear to this Court, is that survey drawings cannot be taken as constituting evidence of facts. A survey drawing is, of necessity, a drawing based on the expert opinion of a surveyor as derived from years of academic training and practical experience in the field of land surveying and the preparation of survey drawings. Thus, to this Court's mind, the proposed evidence of surveyor's reports

prepared by Mr. Isa Angulu, cannot be admitted as evidence of fact, or as perhaps more properly termed, evidence of primary facts.

[10] The letter under the hand of Mr. Angulu and dated January 24, 2012 is also, insofar as the most important portion thereof is concerned, that being what has been set out in the second paragraph of that two paragraph letter, evidence of opinion. Solely for the benefit of those who may hereafter read this judgment and wonder as to exactly what is the wording of that short letter, the same is reproduced here- 'On the 19th of January, 2012, I carried out a survey of the premises in caption from which the attached plan was prepared. The survey was done in accordance with the Land Surveyor's Act and Regulations.' (1st paragraph) 'To the rear of the townhouse on the lot, there is a concrete wall separating the subject of my survey and adjoining premises number 117 East Mountain Pride Avenue. The said concrete wall is within number 115 East Mountain Pride Avenue, a few inches from the registered boundary line'.

[11] It is abundantly clear that what is purportedly set out by Mr. Angulu in the second paragraph of that letter, is a matter of opinion in respect of an issue which is at least one of the central issues in the case at and is not an opinion in respect of a matter which would, at all, be within a lay person's expected knowledge. To the contrary, it is an opinion on a matter in respect of which expertise in the field of land surveying is required. Thus, this Court is not at all persuaded to decide on the Defendant's oral application, in the Defendant's favour, on that ground as posthulated, this being that what Mr. Angulu is referring to in the various documents which it is sought to have be tendered as hearsay evidence from him, is proposed evidence of primary facts, or in any event, that the same would in any useful or important respect, be anything other than opinion evidence, in which event, it is a well-hallowed rule of common law, insofar as the law of evidence is concerned, that opinion evidence can only properly be permitted by a Court to be given in proceedings before that Court, if such is expert evidence.

[12] The first paragraph of the letter purportedly under the land of Mr. Angulu, clearly would be of no relevance to the matter at hand, if Mr. Angulu's expressed opinion in the second paragraph of that same letter is not permitted to be adduced as evidence. In other words, whether or not Mr. Angulu conducted a survey in relation to a concrete wall at the rear of the premises between 117 and 115 East Mountain Pride Avenue on January 10, 2012, in accordance with the Surveyor's Act and Regulations, is, in and of itself, irrelevant to the matter at hand. It would and could only be relevant if Mr. Angulu's expressed opinion arising from his conduct of that survey, were to be permitted to be adduced as evidence before the Court in this Claim. Thus, the overall fate of that letter, just as of the surveyor's reports from Mr. Angulu, insofar as their admissibility or inadmissibility as evidence is concerned, will depend on the outcome of the respective arguments advanced by the parties in that regard.

[13] There was also argued before me in open Court in the midst of the trial, by means of oral Application of the Defendants, that the proposed evidence sought to be relied on as hearsay evidence, should be permitted by this Court to be adduced as expert evidence, bearing in mind that there exists no dispute between the parties that Mr. Isa Angulu is a Chartered and Commissioned Land Surveyor and Mr. Easton Douglas, who testified as the jointly instructed expert of the parties, has given sworn evidence already, during the course of the trial of this Claim, in that regard. It is contended by defence counsel that Mr. Angulu's expert evidence can assist this Court in resolving at least one very important issue in the trial, this being as to whether or not there is any encroachment upon Lot 115 East Mountain Pride Avenue, of any portion of the building which was built on Lot 117 East Mountain Pride Avenue.

[14] Lead counsel for the Defendants – Mr. Nelson, upon his clients' oral Application to have the proposed documentary evidence be accepted both as hearsay and expert evidence, also argued that the Court could even and should in fact call upon Mr. Angulu to give testimony as an expert witness, at the behest of the Court. For reasons which will become apparent shortly hereafter in this Judgment, that aspect of defence counsels' submissions will be addressed further on in this Judgment.

[15] Insofar as the Application for the said documents to be accepted by this Court as hearsay expert evidence is concerned, which is sought to be adduced into evidence through one of the Defendants as a defence witness, the provisions of Rule 31.1 of the Civil Procedure Rules are particularly apposite. In that context, it is worthwhile quoting from those rules. **(1). – 'A party who intends to rely at a trial on evidence which – (a) is not to be given orally, and (b) is not contained in a witness statement, affidavit or expert report, must disclose his intention to the other parties in accordance with this rule. (2) – 'Where a party fails to disclose the intention to rely on the evidence referred to in paragraph (1), the evidence may not be given.'(3) – 'Subject to paragraphs (4) and (5), a party who intends to use the evidence referred to in paragraph (1) to prove any fact must disclose such intention not later than the latest date for serving witness statements.'** (4) – **'Where – (a) there is no order for service of witness statements; or (b) a party intends to put in the evidence referred to in paragraph (1) solely in order to disprove an allegation made in a witness statement, that party must disclose the evidence at least 21 days before the hearing at which it is proposed to put in the evidence.'(5) – 'Where the evidence referred to in paragraph (1) forms part of expert evidence, the intention to put in the evidence must be disclosed when the expert's report is served on the other party.' (b) – 'Where a party has disclosed the intention to put in the evidence referred to in paragraph (1) that party must give every other party an opportunity to inspect the evidence and agree to its admission without proof.'**

[16] The provisions of R**ule 31.1 of the Civil Procedure Rules** are expressed in mandatory terms. As such they must be complied with and in the event of non-compliance therewith, such non-compliance cannot be waived, pursuant to the general rule of Court as regards waiver in the Court's discretion, which is to be found at **Rule 26.9 of the Civil Procedure Rules**. In this regard, see: **Supreme Court Civil Appeal No. 101/2009 – Dorothy Vendryes and Dr. Richard Keane & Karene Keane**. There is no dispute that the Defendants have, in all respects, failed to comply with Rule 31.1

insofar as their proposal that this Court should admit into evidence, certain documents which are not contained in any expert report, witness statement or affidavit and which are not to be given orally, but instead, as hearsay evidence, is concerned.

[17] The reason for the Defendants' failure to so comply, is quite obvious. There exists even at this time, no expert report prepared by Mr. Angulu. Thus, even if the Defendants had wished to do so, the requisite notification to the Claimant of their intention to so rely on that documentation from Mr. Angulu, whether such be in the form of surveyor's reports or a letter, or all of the above, would have been of absolutely no legal value, bearing in mind that the Defendants are still not, even at this time, able to serve an expert report from Mr. Angulu, on the Claimant. The Defendants are not able to serve such, because none such exists. It is only if the Defendants' written Application for Court Orders were to be successful, insofar as that Application seeks, inter alia, to have this Court Order that an expert report be prepared by Mr. Angulu for the purposes of this Claim, that the requirements of **Rule 31.1** can be complied with by the Defendants. It is worthy of reiteration, that **Rule 31.1** is mandatory and cannot be waived either by an opposing party, or by this Court. Thus, unless this Court now Orders that an expert report is permitted to be prepared by Mr. Angulu, then under no circumstances, can either of the respective documents be adduced into evidence, unless Mr. Angulu is permitted to provide viva voce evidence to the Court and thereafter, does in fact so provide.

[18] This then now bring into sharp focus, the Defendants' written amended Application for Court Orders, which seeks not only to have Mr. Angulu be permitted to provide expert evidence to this Court during the trial of this Claim, but also permit an expert report to be prepared by Mr. Angulu, this as regards whether the concrete wall at the rear of the premises between 117 and 115 East Mountain Pride Avenue is away from the registered boundary line between the two premises and/or situated within the boundary of the Defendants' premises.

[19] This Court, it should be noted, is not of the view that it can properly be deemed that either the letter dated January 24, 2012, or the Surveyor's Report dated January 10, 2012, are expert evidence, unless such are included as part and parcel of an expert report. This is because, there is also expressed in mandatory terms, in Rule 32.6 (4), that – **'No oral or written expert witness's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give**.' Thus, expert witness evidence, even if permitted by the Court to be given to the Court orally, as distinct from solely by means of the provision to the Court of an expert report – as is permitted by **Rule 32.7 (1) of the Civil Procedure Rules**, nonetheless necessitates that an expert report be served as regards the expert evidence which it is proposed to have that expert witness give.

[20] As such, the Defendants' oral Application to have certain documentation purportedly prepared by Mr. Angulu, but which does not presently form and parcel of any expert report, could not, under any circumstance, be accepted by this Court as expert evidence. This is simply because, Jamaica's Rules of Court, just as does England's Rules of Court, requires that expert evidence which is proposed to either be called or put in, must be contained in an expert report and that report must be served on the opposing party to the dispute that is before the Court.

[21] The next question now to be answered therefore is – Should this Court permit Mr. Angulu to be determined as being as expert and should this Court also permit an expert report to be prepared by him for the purposes of this Claim? The answer to that question has by no means, been an easy one for this Court to render.

[22] An expert witness is expected whenever acting in that capacity, to have sufficient specialized knowledge, whether derived from academic training or practical experience or both, such as would enable him or her to provide useful assistance not just to the respective litigants in a particular Claim, but also, to the Court. The expert is expected to be objective and not influenced by the wishes or desires of the particular litigant who

may be paying for his or her services as an expert. An expert witness is expected to understand his or her duty to the Court and is to act as an expert, completely in a manner which is consistent with that duty. This is an important and also, an onerous responsibility and it is not a task which should be undertaken by anyone, simply because he or she has specialized knowledge in a particular field.

[23] It is generally expected that even where opposing litigants each hire an expert, that those experts will co-operate with one another as far as possible, so as to limit the ambit of any disagreement between the respective experts hired by the opposing litigants. On this point, see: **Harris [2006] 1 Cr. App. R. 55 and National Justice Comparia Naviera SA v Prudential Assurance Co. Ltd. – [1993] Lloyd's Rep. 68, at p. 81, per Creswell J**. It is with this in mind that **Jamaica's Rules of Court provides, just as does England's Rules of Court, that expert evidence should, as a general rule, be provided to the Court in the form of an expert report – Rule 32.7(1).** It is expected that parties who have questions to put to an expert as regards his or her findings conclusions will do so, by posing those questions in writing, as Rule 32.8. of the Civil Procedure Rules permits. Whilst parties do have the right to cross examine an expert who gives oral evidence **(See Rule 32.18 of the Civil Procedure Rules)**, it is generally to be expected that there should rarely be a need for an expert to give oral evidence at all. This is why expert reports are expected to fulfil a number of important requirements, all of which are clearly specified in **Rule 32.13 of the Civil Procedure Rules** and also why an expert can be questioned by a litigating party, prior to trial. This is also why it is to be expected that the expert will be objective and not slant his or her opinion to suit the needs or wishes of the party that has hired him or her.

[24] Insofar as an expert's role therefore, goes above and beyond merely providing to a Court, the benefit of his or her technical knowledge and/or opinion arising out of that technical knowledge, a Court should not appoint a person as an expert who has not expressed a willingness to act in that capacity. Of course, this is because Court Orders must be complied with, unless and until set aside by a higher Court and thus, a Court should, in my considered opinion, be very loathe about imposing on anyone, such a

demanding role as to require that such person be an expert witness in a case. This is not, in Jamaica, even done with respect to a lay witness who possibly could provide useful evidence to a Court, unless that lay witness has previously provided a statement to the Court (in a civil case), or to the police (in a criminal case). In either such circumstance, a subpoena could be obtained, which is a Court Order requiring that such person testify in Court, but no subpoena could properly be obtained from any Court in Jamaica, to require a person to give a witness statement and also to testify. Such power to Order though, does exist in other jurisdictions, by means of statute, with respect to persons who are designated as, "Material Witnesses."

[25] In the present Claim, Mr. Isa Angulu has provided certain documentation to his client – Ms. Joan Allen (the1st Defendant) and she, in turn, has provided this documentation for this Court to view, for, the purposes of Defendants' Application for such documentation to ultimately be admitted as expert evidence at trial. The provision of that documentation by Mr. Angulu to his client is however, a completely different thing from the provision of such to the Court, so that the same can be made part and parcel of an expert report and so that Mr. Angulu can be accepted as an expert witness with respect to at least one of the important issues in dispute between the parties. If Mr. Angulu were to hereafter be accepted as an expert witness, his role with respect to this Claim would totally change character. In reality, he has had no direct role with respect to this Claim, up until now. This is because, he has only, up until now, performed a role wherein, as must be typical for him, he has acted as a surveyor for the sole benefit of the client who hired his services. That is certainly not the role of an expert who is not expected, in that capacity, to be acting for one of the parties, but instead, is expected to be acting for the Court and thus, for the Court's benefit - this even where he may have to give evidence which is favourable to one or the other of the parties to a dispute. His role as a Court expert does not change, dependent on either who hires him, or who considers the contents of his report as being more favourable to their case.

[26] I am of the view, in the circumstances, that particularly where there is dispute between the opposing parties in a particular Claim, as to whether or not a particular

person should be appointed as an expert, it is all the more imperative that this Court should be satisfied that any person which the Court may be asked by a party to the Claim, to appoint as an expert, should be both willing and able to perform that challenging responsibility; Insofar as the Defendants' Application now at hand is concerned, I am, for my part, not even satisfied that Mr. Angulu would be willing to act as an expert witness in respect of this Claim, as no evidence has been placed before me, as would properly serve to remotely so suggest. Even though if he were willing, this does not mean that it should then be taken as being a sine qua non, that he is able to act in that capacity.

[27] **A person to be appointed as an expert must be someone whom the Court believes, can assist in resolving the Claim justly. See Rule 32.2 of the Civil Procedure Rules, in this regard. No one can call upon a person to act as an expert witness in a case, such as either to enable that person to testify in that capacity or to have an expert report from that person, be put into evidence, without the Court's permission – Rule 36 (1) of the Civil Procedure Rules.** It is for this reason that I have stated above, that even if a person is willing to act as an expert witness that does not automatically mean that such person is qualified to act as such. A person would not properly, in law, be qualified to act as an expert witness, or to prepare an expert report, unless this Court so permits, in Supreme Court civil cases. This Court should not so permit, unless the proposed expert evidence is reasonably required to resolve the proceedings justly.

[28] In assessing what is reasonably required to resolve the proceedings justly, there are a number of factors that ought to be considered, particularly in a circumstance such as exists in this case, wherein there has already been appointed, by consent of the parties, a single expert witness, who was jointly instructed by the respective parties. All of these factors must always be considered in the context of the provisions of Rules 1.1, 1.2 and 1.3 of the Civil Procedure Rules which set out the duty of this Court to give effect to the over-riding objective of dealing justly with cases, when exercising any power under the Rules. It is also the duty of the parties to help the Court further the

over-riding objective. The particular factors specified by the Rules to be considered in order to be "dealing justly with a case," are set out in Rule 1.1 (2). The factors to be considered, were briefly set out in a Times Law Report case, this being:- **Cosgrove and Another v Pattison and Another (2001) Times, 13th February, 2001**. Those factors are as follows:- The nature of the dispute; the number of disputes on which the expert evidence was relevant the reasons for needing another expert report; the amount of money at stake; the effect of allowing a further expert witness on the conduct of the trial; the delay that calling a further expert witness would cause; any other special features and the overall justice to the parties in the context of the litigation. See also: **Daniels v Walker (2000) 1 W.L.R. 1382.**

[29] That list of factors is, it should be noted, as stated in the **Cosgrove v Pattison** case itself, a non-exhaustive list. Of course, this must be so, since at the very least, any other factor specified in **Part 1 of Jamaica's Civil Procedure Rules**, must, in Jamaica, just as in England, with the English Rules equivalent, be carefully taken into account.

[30] One of the factors to be considered, which has not been set out in the non-exhaustive list given above, no doubt since it is such an obvious factor in each and every case wherein expert evidence is sought to be adduced, is whether or not the person who a party to the proceedings seeks to have declared as an expert witness, is in fact qualified by way of academic training and/or practical experience to act in that capacity in a manner which can enable this Court to resolve one or the other, or perhaps, all of the issues in dispute between the parties. In that regard the defence counsel – Ms. Annalisa Chapman's affidavit evidence filed in support of her client's written application for Court Orders, provided that which she has deposed as being a curriculum vitae of Mr. Isa Angulu. Ms. Chapman has not however, in any Affidavit evidence, of which there exists none other than hers, for this Court to rely upon, set out the source of her information as to that curriculum vitae. Thus, the requirements of Rules 30.3 (1) and 30.3 (2) of the Civil Procedure Rules as regards that affidavit evidence, have not been met and in that context such evidence from Ms. Chapman, cannot properly now be relied upon by this Court.

[31] Fortunately for the Defendants however, there does exist other evidence in the present Claim, which this Court on rely upon for the required purpose and that came from the jointly instructed, Court appointed expert – Mr. Easton Douglas. Mr. Douglas had earlier testified during the presently ongoing trial of this Claim. To summarize, Mr. Douglas had testified that Mr. Angulu is both a Commissioned Land Surveyor and also a Chartered Surveyor. He went on to explain the distinction between those two categories of Surveyors and the nature of the academic study and training which one would have to undergo, in order to become either a Chartered Surveyor or a Commissioned Land Surveyor. Mr. Douglas also testified that he has never had any reason to doubt Mr. Angulu's competence as a Commissioned Land Surveyor.

[32] In my view, that evidence from Mr. Douglas more than suffices to establish Mr. Angulu's competence and qualification, albeit solely from a training perspective, to act in the capacity of an expert, for the purposes of this Claim.

[33] The answer to the question as to whether Mr. Angulu should be permitted to testify as an expert in respect of this Claim, however, will require the consideration of several other factors, than just whether Mr. Angulu has sufficient academic training and/or practical experience in the relevant field of technical endeavour.

[34] This Claim was scheduled for trial over two days and is a Claim which has been pending before this Court, since 2009. The trial of this Claim began on November 21, 2011 and the second day of that trial was held on November 22, 2011. Other days for continuation of the trial, have subsequently been scheduled and on some of those days, the trial has continued, whilst on others, for varying reasons, it has not. We are now at the stage in the trial of this Claim, wherein the Claimant has closed his case and the 1st Defendant has given her evidence in-chief in the form of her witness statement and is about to commence her evidence under cross-examination. The jointly instructed Court appointed expert witness – Mr. Easton Douglas, has already testified and two expert reports from him, have been admitted into evidence, this notwithstanding the objection

in relation to such admission into evidence as was made by defence counsel during the trial Mr. Douglas was extensively cross-examined by the respective parties to the Claim this with the Court's permission, which was given, bearing in mind the clear provisions of **Rule 32.18 of the Civil Procedure Rules**. The trial of this Claim is next scheduled to continue on October 19, 2012 and this Judgment is being delivered on October 18, 2012. This Court has made it clear to all of the parties, that it will not permit the trial of this Claim, at least insofar as the evidentiary aspect thereof is concerned, to continue for longer than two more days. October 5 and 19 2012, were scheduled to be the last two days of trial, but as the Court's file could not be found when this Claim last come before this Court for continuation of trial on October 5, 2012, this Court then utilized that date for the hearing of the Defendant's Application for Court Orders. Thus, one extra day after October 19, 2012, will undoubtedly have to be scheduled by this Court, for continuation and ultimately completion of the evidentiary aspects of the trial of this Claim.

[35] The Claimant filed his Claim and Particulars of Claim against the Defendants on May 6, 2009 and in response the Defendants filed a Defence and Counterclaim on February 19, 2010. In their counterclaim, the Defendants have asserted, inter alia, that it is the Claimant who is trespassing on their land at no. 115 East Mountain Pride Avenue, by means of a concrete wall which is undisputedly situated at the rear of the Claimants' premises at No. 117 East Mountain Pride Avenue. That wall is a retaining wall which is, in turn, attached to a staircase leading to the rear of the Claimants premises. As this was an allegation that was made from as long ago as February 2010, it would or ought to have been clear to the Defendants from as long ago as February 2010, that they bore the burden of proof with respect to that assertion.

[36] As things have turned out, the jointly instructed expert of the parties, Mr. Easton Douglas, is a Chartered Surveyor, as distinct from a Commissioned Land Surveyor. It is certainly the case that neither the parties' counsel, nor even the Judge from this Court who ordered that expert evidence be given by Mr. Douglas, were aware that there is an important distinction between someone who has been trained as a Chartered Surveyor,

encroaching on their property. Mr. Douglas also categorically stated in that report, that - "Any encroachment on the Defendant's property requires a precise survey under the Land Surveyors Act." Thus, from a careful review of Mr. Douglas' expert report and its attachments – particularly in terms of instructions given to him by the respective parties, and queries posed to him by the respective parties, arising from the contents of his first Surveyor's report and Mr. Douglas' answers to each of those questions, it is clear, that Mr. Douglas would have been entirely unable, insofar as the precise nature of his expertise and training is concerned, to assist this Court one way or the other, in determining whether or not the Claimant's retaining wall is encroaching on the Defendants' property. The Defendants, through their counsel, just as the Claimant, through his counsel, should have known this, once they had had sufficient opportunity to carefully consider the contents of Mr. Douglas' expert report dated January 10, 2011. Certainly, from long before the trial of this Claim and Counter-Claim began on November 21, 2011, the respective parties should each have been so aware.

In that context, it is difficult to understand why the Defendants' written Application for Court Orders seeking to have Mr. Isa Angulu be appointed as an expert, and prepare an expert report, was not filed until July 19, 2012 – this of course, having been after the Claimant had already closed his case at trial. This Court finds itself, in the circumstances, entirely unable to accept the defence Counsel's contention, as borne out in her affidavit evidence which was filed in support of her clients' Application, that it was not until Mr. Douglas testified at trial, while under cross-examination, that he could not determine whether the retaining wall encroached on the Defendants' property and that such a determination would have to be made by a Commissioned Land Surveyor and by means of a land survey conducted under the Land Surveyors Act, that the Defendants then became aware for the first time, that evidence from a Commissioned Land Surveyor such as Mr. Angulu was necessary for the purposes of this case.

If indeed this assertion is even true, then this is not a lack of knowledge which can properly be attributed to anything other than a failure by the Defendants' counsel to conduct their legal work pertaining to this case in a manner which would assist in furthering this Court's over-riding objective to deal with cases justly, in particular, by saving expense by ensuring that this case is dealt with both expeditiously and fairly and

in accordance with the Land Surveyors Act. This is no doubt entirely correct, since by his own account as given in response to counsel - Mr. Nelson's queries, as posed to him, a Chartered Surveyor cannot prepare a Survey under the Land Surveyors Act. Only either a Chartered Land Surveyor, or a Commissioned Land Surveyor can do that.

[40] Interestingly enough, it was not until his letter dated November 30, 2010, which was sent to Mr. Douglas, along with instructions for the purpose of preparing his expert report in this case, that Mr. Douglas was requested to ascertain anything whatsoever, with respect to whether or not the retaining wall at the rear of the Claimant's premises (117 East Mountain Pride Avenue) is encroaching on the Defendant's premises (115 East Mountain Pride Avenue). This is so, even though from as of the date when the Defendant's Counter-Claim was filed which it will be recalled, was February 19, 2010, it would have been clear to the Defendant that they would be required at trial to prove this assertion. This would have become all the more apparent to the Defendants when the Claimant filed and served his Defence to Counterclaim. The same was filed on March 30, 2010 and was served on a date which is unknown to this Court at this time. Undoubtedly however, that Defence to Counter-Claim was served on the Defendants in advance of the commencement of trial, as I can recall having seen and considered the same when the trial of this Claim and Counter-Claim began before me in Court, on November 21, 2011.

[41] All of this history is mentioned in some detail and is of importance, because of the nature of the Defendants' assertion, through their counsel, as to why it was, that their Application seeking to have Mr. Isa Angulu be appointed as an expert witness and be required to prepare an expert report, was made during trial and indeed, when the trial has already gone beyond the close of the Claimant's case.

[42] In his second Survey Report, which is dated January 10, 2011, Mr. Douglas made it clear that the staircase in the Claimant's premises would need alternative structures for its support in the absence of the wall to which it is anchored – this of course being the said retaining wall which the Defendants are contending, is

as against someone who is trained and has experience as a Commissioned Land Surveyor, nor were they or either of them aware, that Mr. Douglas was not a Commissioned Land Surveyor, when he was first appointed as an expert in this, in this case, on November 2, 2009.

[37] Mr. Douglas, upon enquiry from lead counsel for the Defendants, in a letter which was addressed to him by that counsel and dated November 30, 2010 and even in a further letter dated December 30, 2010 from that same counsel, did respond to enquiry on each of those occasions made, as to the distinction between a Chartered Surveyor and a Commissioned Land Surveyor.

[38] The distinction is of some importance, both for the purposes of this, Claim and Counter–Claim, but also for the purposes of the Defendants' present written Application for Court Orders. It is as follows and in this regard, I quote from a portion of Mr. Douglas's further survey report :- 'A Chartered Surveyor is a person that qualifies by study and examination under the curricular of The Royal Institution of Chartered Surveyors, London. A person who is trained in estate management or land administration qualifies after successful examination as a Chartered Surveyor General-Practice... A Chartered Survey–General Practice, practices property services, appraisals, sites, leases, rental, auctioneering, building surveying, planning and development, property management et cetera.... A Commissioned Land Surveyor qualifies by training at the University of Technology for three years, examination and test of professional competence after which a Commission is awarded by the responsible Minister of Government to enable practice under the Land Surveyors Act. A Commissioned Land Surveyor or Chartered Land Surveyor practices boundary, hydrographic, topographical, trigonometrically surveyors et cetera, under the Land Surveyors Act.'

[39] Mr. Douglas' resume, as attached to his expert report, states that since 1971, he has been a Fellow, Royal Institution of Chartered Surveyors. Also in that report, he expressly stated, under the heading- "LIMITATIONS," that his report was not prepared

by enabling the allotment to this case, of an appropriate share of the court's resources, while taking into account the need to allot resources to other cases and also, by ensuring that the parties are on an equal footing.

[43] It is important to note at this juncture, that the Claimant has nothing to prove in respect of the Defendants' assertion that his retaining wall is trespassing on the Defendant's property and as such, even if aware that the expert report of Mr. Douglas could not properly assist in enabling the proof or the disproof of the Defendants' allegations in that regard, no onus was thereby cast upon him to assist the Defendants in possibly obtaining such proof. That is why the written Application for Court Orders now before this Court is one which has been filed by the Defendants. It is nonetheless, as a matter of law though, the responsibility of all counsel involved in litigating this dispute, to assist this Court in furthering the over-riding objective. This must, of necessity, even be so where on one view, assisting this Court in furthering the over-riding objective may be deemed as likely to result in an outcome which is unfavourable to one's client. In a civil case, unlike a criminal case, an attorney/advocate's primary duty is owed to the Court and not the client. This is unlike in a criminal case, where an attorney/advocate's primary duty is owed to his client. Thus, to my mind, the Claimant's counsel is equally at fault in not assisting this Court in enabling a proper resolution of this, important and disputed issue, by means of seeking to have an independent and unbiased expert be appointed by this Court with that objective in mind – this even before the trial of this Claim and Counter-Claim began. Alas however, this was not to be. The difficulty for the Defendants' however, is that this Application is of far more importance to their case, in particular, their Counter-Claim, than it is to the Claimant's case, as the Claimant does not have a legal burden of proof in respect of his Defence to that Counter-Claim, whereas on the other hand, with respect thereto, the Defendants have both a legal and an evidentiary burden. That evidential burden, is what the Defendants are seeking to discharge, by means of having this Court appoint Mr. Angulu as an expert and require him to prepare an expert report solely for the purpose of addressing that important issue as to whether the Claimant's retaining wall is encroaching on the Defendants' property.

[44] This Court though, is of the considered opinion that having filed their Application for Court Orders in that regard, as late as they have, based on that which does not appear to this Court, to be any good or valid reason, must of necessity, weigh heavily against the prospects of success of the Defendant's Application, which has come before the Court at this time, for adjudication.

[45] If this Court were to grant the Defendants' written Application at this time, this would inevitably result in the completion of the trial of this matter being even more significantly prolonged then it has already been, in a context wherein, there is no good or valid reason for such to happen, since, if the Application had been made by the Defendants as timely as it should have been, whilst the commencement of the trial may have had to have been delayed somewhat, that to my mind, would have been a much better situation than one in which the trial is already underway and the Claimant has already closed its case and then and only then, do the Defendants recognize the wisdom of pursuing the Application which they are currently pursuing. If Mr. Isa Angulu is permitted to provide a report for the first time, at this stage, undoubtedly, the Claimant would have to be permitted to re-open his case in order to respond to the findings of that expert report of Mr. Angulu, since undoubtedly, the findings of that report, would not likely be in the Claimant's favour, insofar as the alleged encroachment of his retaining wall on the Defendants' property, is concerned. Considered in that context, particularly bearing in mind that Mr. Angulu provided a particular opinion on that issue to one of the Defendants – this being the First Defendant, who was then his client, this may justifiably, in any event, leave even the Court feeling skeptical about Mr. Angulu's independence and/or unbiased approach if he were hereafter to be appointed to act as an expert for the purposes of this case. This Judgment addresses that aspect in a bit more detail below, but suffice it to state for now, that at the very least, the appointment of Mr. Angulu as an expert herein, may very well cause the Claimant to seek to have another person also be appointed as an expert, that not only being a Commissioned Land Surveyor, but also being someone whom, unlike Mr. Angulu, would not commence his work as an expert witness appointed by this Court as a person who has previously

been directly employed by either one of the parties hereto and thus, starts off, as it were, with a clean sheet, insofar as his objectivity is concerned. Even if Mr. Angulu could, upon a careful consideration by this Court, be viewed as not likely to be influenced in his findings, by his having created those findings whilst working at the Defendant's behest insofar as the relevant issue is concerned, nonetheless, Mr. Angulu certainly cannot, under any circumstances, start off with, as it were, 'a clean sheet,' insofar as his objectivity is concerned. This is simply because, the Court should not presume objectivity based merely on a person's professional expertise and/or training as to do so, would be impractical. Objectivity on the part of an expert is always to be hoped for and indeed is what the Rules of Court expects, but may simply in the particular context of a particular case and with a particular expert operating in that context, simply be unattainable. This is because, as recognized in various Court Judgments, both emanating from within and without the Caribbean region, bias can be conscious, as well as unconscious.

[46] All of these considerations and also bearing in mind the opportunity that must be afforded to counsel to pose questions to an expert witness – typically, quite some time before trial commences and certainly outside of the viva voce evidence at trial context, must mean that if this Court were to grant the Defendants' Application, the end result would be nearly tantamount to the trial entirely re-commencing. The Claimant would be put through extra cost, through fault which is by no means wholly attributable to him, but rather, is also attributable in very large measure to the fault of the Defendants. Added to that, a trial which was scheduled, by agreement between the parties and the Court, to last for two days, would probably result in at least thrice that number of days, just for an evidentiary closure thereof, to be attained.

[47] Taking all of these things into account, there can hardly be any doubt that this written Application of the Defendant, primarily for the reason that it has been filed as late in those proceedings as it has, which will inevitably result in greater cost to the parties and far more time being attributed to this case by the Court than even the parties themselves had initially desired and/or anticipated (this insofar as the trial of this matter

had been schedules to last for two (2) days) all being in a context wherein there exists no good or valid reason for this to have arisen, must be fatal to the Defendant's Application.

[48] There are a few other issues to be addressed however and one of these pertains to addressing in more detail the matter of the required objectivity of a person to be appointed as an expert by the Court. There can be no doubt that in order for a person to be properly able to carry out his/her functions as an expert witness, it is essential that such person be possessed of the requisite objectivity and thus, not tailor his or her opinion(s) as expressed in his or her expert report, to suit the wishes of one party or another.

[49] Like it or not, everyone will not be possessed of that requisite objectivity in each and every matter in respect of which his or her expertise is being sought. This can be for varying reasons, many of which are quite readily understandable. It could be because of personal closeness to one of the litigating parties which in and of itself, may create an unconscious bias which the proposed expert is himself or herself, unaware of. It could also be because of several other reasons, not the least amongst which being that prior to one having been sought as an expert, one had been engaged in a commercial relationship, particularly in one such concerning the very same matter which is now is dispute between the litigating parties. Even if one can actually be objective as an expert in such a circumstance, nonetheless, the appearance of objectivity in that type of circumstance, would be far less than apparent. This is why the maxim – 'Justice must not only be done, but manifestly and undoubtedly be seen to be done,' is of such importance, in a context such as the one now at hand. The litigating parties should be able to have confidence in the decision of this Court to appoint someone as an expert, who is possessed, not only of the requisite skills and/or academic training but also, of the requisite objectivity. Such confidence though, cannot properly be expected to exist in a circumstance wherein a party whose assistance as an expert is being sought in a particular case, had previously performed services of the same nature which it is later sought to have him perform as an expert, for one of the parties to the relevant dispute

under litigation. I entirely reject the submission of the defendants' counsel Ms. Chapman, that since any person to be appointed as an expert must certify that he/she understands his duty to the Court and that he or she understands, amongst other things, that his duty to the Court and his duty to remain objective in performing his functions as an expert witness, regardless of the demands of the litigation, then the Court can essentially therefore be confident that such requirements, amongst others, of any person in order to enable that person to properly perform his/her functions as an expert witness, have all been duly complied with. This Court is of the considered opinion that the mere signing of a document being an expert report, with a stipulation that the expert witness understands his or her duty to the Court as set out in Rules 32.3 and 32.4 of the Civil Procedure Rules and has complied with that duty, should by no means, be taken as being conclusive, even that such expert first of all, actually does know what the requirements of Rules 32.3 and 32.4 of the Civil Procedure Rules are, much less, that he or she has actually complied with those Rules as required. If the Court could and should accept that as being, at least, nearly conclusive, if not in fact, fully conclusive in that regard, then why would this Court be called upon to make any Judgment upon whether a person sought to be appointed as an expert, is in fact possessed of the requisite objectivity? This Court is not expected to act as a mere rubber stamp in that regard. In any event, how could such an assertion be a sound one, especially when one considers that persons both can and often do have biases without themselves knowing it (unconscious bias)? That assertion of Ms. Chapman is, in the circumstances, not at all, one which this Court is even remotely inclined to accept.

[50] The further assertion made by defence counsel – Ms. Chapman, on the point of there perhaps being considered by the Court as being any lack of objectivity on the part of Mr. Isa Angulu with respect to the matter at hand, was that even if such were perceived by the opposing litigant as existing, or perhaps even by the Court as potentially existing, nonetheless, this should not prevent a person from being permitted to give evidence to the Court as an expert witness, since any such issue can be resolved by means of cross-examination. The major problem with this particular contention, is that it seemingly overlooks the fact that it is for this Court to determine,

before an expert is even permitted to provide an expert report to this Court, much less is permitted to be cross-examined, whether or not such person is possessed of the requisite skills, experience and objectivity, to properly enable him or her to carry out his duties as an expert – See Rule 32.6 of the Civil Procedure Rules. This Court cannot properly be expected to carry out its duties in that regard, based on a hope that cross-examination will reveal any actual lack of objectivity on the part of a person already appointed as an expert, that there may be, and in any event, that would not at that stage, in any event, be very helpful, since it would then mean that such expert's evidence would have been entirely useless for the purpose that it was intended for. This would therefore mean that the parties and the Court's time and money would thereby have entirely been wasted, in having permitted such person and thereby had such person testify as an expert witness. This Court must bear in mind, in deciding on who should be appointed as an expert witness, that, as is required by **Rule 32.2 of the Civil Procedure Rules that – 'Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.'**

[51] In support of the Defendants' oral application for this Court to permit Mr. Angulu's prepared documentation, those being a surveyor's report and a letter to be accepted as hearsay evidence, it was urged upon the Court by senior defence counsel – Mr. Nelson, that this Court should, at the very least, itself call upon Mr. Isa Angulu to provide expert testimony to the Court and not merely leave it to one or the other of the litigating parties to call him, if this Court permits, as an expert witness. Whilst this Court accepts that in appropriate circumstances, it can and should call upon a person whom neither party has called as a witness, to testify as such, this would not, to this Court's mind, for all of the reasons set out in detail above, as are of necessity, pertinent thereto, be appropriate in the particular circumstances which now exist in relation to this particular case, insofar as Mr. Isa Angulu is concerned.

[52] In the Defendants' written Application, one of the Orders being sought, is that, "The letter dated the 24th January, 2012 and the Surveyor's Report dated the 10th January, 2012, prepared by Isa Angulu on behalf of Angulu and Associates,

commissioned and Chartered Land Surveyors be deemed expert evidence." Once again, for all of the reasons adumbrated above, as would be pertinent thereto, this Court rejects the Application for such an Order. In any event though, the Court could not, under any circumstances, grant such an Order. As earlier mentioned the requirement of Rule 32.6 (4) makes it clear that in Order for expert evidence to be given to this Court, an expert report must not only be prepared as regards that proposed evidence, but must also be served. An expert witness' report must, in all circumstances, comply with the requirements of **Rule 32.12 and 32.13 of the Civil Procedure Rules.** These are mandatory requirements, which cannot be waived by this Court. Considered in that context, **Rule 32.7 (1) of the Civil Procedure Rule, which provides that – "Expert evidence is to be given in a written report unless the Court directs otherwise," can readily be understood. Rule 32.7 (1) does not permit this Court to permit a person to provide expert evidence to the Court without first having prepared an expert report regarding the evidence which he or she intends to give and without that report having been served**. To the contrary, in Order for expert evidence to be given, an expert report must always be prepared and served. Once that has been done however, so as to save time and costs, it is specifically provided for in Rule 32.7 (1), that expert evidence is to be given in a written report unless the Court directs otherwise. Thus, it really should be the exception rather than the rule, that an expert should be expected to provide via voce testimony to the Court. If though, viva voce testimony is provided to the Court, by an expert witness so appointed by the Court, then in such event, such an expert may be cross-examined by any party (op. cit.) It is Rule32.18 read along with Rule 32.7 of the Civil Procedure Rules, which makes it all the more apparent that permitting cross-examination of an expert is not to be taken as being the rule. To the contrary, it is to be the exception, as in general, the expert witness' evidence should be provided to the Court by means of an expert report. This though is subject to the law vis-à-vis hearsay evidence (See Rule 32.7(2)) and thus, clearly was implemented as a Rule of Court without recognizing the inherent inconsistency between the provisions of Part 32 of the Civil Procedure Rules which seeks to make the giving of oral evidence by an expert witness, the exception rather than the rule and Section 31 E of the Evidence Act which makes it very easy for a party to likely, with success, prevent

a party from putting into evidence, an expert report, as hearsay evidence, in that once such a party files a notice of objection to the same, then unless the requirements of **Section 31 E (4) of the Evidence Act** are met, that witness, notwithstanding that he or she is an expert witness, will nonetheless, have to be called upon to provide viva voce testimony to the Court, if that expert's report or any other testimony, is to be relied upon in Court. In my view, there should have been a special exception provided for in **Section 31 E of the Evidence Act** so as not to make the provisions thereof, applicable in respect of a party who wishes to rely upon an expert report in a civil case. Of course, the hearsay rules in civil cases, have been altogether abolished, by statute in England. In any event though, the statutory provisions in Jamaica as to hearsay would not have been an obstacle to the calling of expert evidence by Mr. Isa Angulu, provided he had either much earlier, with this Court's permission, prepared an expert report, or provided that such were to hereafter be permitted by this Court, to be prepared. This will however, not be an Order that this Court will make in this case.

[53] In the circumstances, this Court refuses all of the Applications of the Defendants as made in respect of proposed evidence from Mr. Isa Angulu. Costs of the written Application are awarded to the Claimant and in respect thereof, costs will be awarded for the respective chambers hearings thereof, as well as the open Court hearing thereof. In respect of the oral Application of the Defendants, no costs will be awarded, since that oral Application was made during the midst of the then ongoing trial.

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Honourable Kirk Anderson, J.

N.B: Application for leave to appeal was sought in respect of this ruling, on October 18, 2012, but said application was then denied, as leave cannot properly be granted in respect of a ruling made on the admissibility of evidence/inadmissibility of evidence, or for that matter, on any ruling made **during a trial**. Such would not constitute a proper basis for a procedural appeal, under Rules 1.1(8) read along with 2.4 of the Court of Appeal Rules.