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[2013] JMSC Civ. 207

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009/HCV 03398

BETWEEN	**VRL OPERATIONS LIMITED**	**CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**1st DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2nd DEFENDANT**
AND	**THE NATIONAL WORKS AGENCY**	**3rd DEFENDANT**
AND	**JOSE CARTELLONE CONSTRUCTIONS S.A. CIVILES S.A.**	**4th DEFENDANT**
AND	**STANLEY CONSULTANTS INC.**	**5th DEFENDANT**
AND	**FREDERICK RODRIQUES & ASSOCIATES LIMITED**	**6th DEFENDANT**

Dr. L. Barnett Q.C. and Mr. Weiden Daley instructed by Hart, Muirhead, Fatta for the Claimant/Respondent
Mr. K. Williams and Mr. C. Alcott for 1st Defendant/Applicant
Miss C. Larmond and Mr. B. Williams instructed by Director of State Proceedings for the 2nd and 3rd Defendants/Applicants
Mrs. D. Kitson, Q.C. and Mrs. Risden-Foster instructed by Grant, Stewart Phillips for the 5th Defendant/Applicant
Messrs C. Piper and W. Piper instructed by Charles Piper & Associates for the 6th Defendant/Applicant

Heard: 11th, 12th, 13th, 15th and 21st November 2013

Civil Practice and Procedure - Application for Court Orders – Expert witness – Application to disqualify expert witness – "Misconduct" of administrative attorney-at-law – Part 32 of Civil Procedure Rules 2002, (Amended) 2006

MORRISON, J.

[1] By way of Notice of Application for Court Orders filed on November 7, 2013 the 1st Defendant asks the court to make certain orders: However, the 2nd and 3rd, 5th and 6th Defendants collectively formed forces with the 1st Defendant but in so doing preserved their singular presentations.

1. That the Court provide such directions as are necessary relative to the Claimant's communications with the Expert Witness, Mr. Barry Walton, particularly since October 16, 2013;

2. That Mr. Barry Walton be disqualified as an Expert Witness in this matter;

3. That the trial dates of November 11-23, 2013 be vacated and new and further case management directions be given for the proper conduct of this matter;

4. That costs of this Application and hearing be determined;

5. Such further and other relief and orders as this Honourable Court deems fit in the circumstances of this case

[2] The head and front of Mr. Walton's offending, indeed, the grounds on which the Applicant is seeking the orders, are stated to be that:

a) the conduct of Mr. Barry Walton discloses an absence of impartiality in that -

i) from at least October 16, 2013 the Claimant's attorneys-at-law made communication with the Expert Witness Mr. Barry Walton in relation to substantive aspects of the evidence and advised and/or directed the Expert seek directions pursuant to Part 32 of the Civil Procedure Rules

from the Case Management judge, the Honourable Mr. Justice Bryan Sykes in relation to the same, without copying or otherwise advising all Defendants of the proposed communication and without permitting all Defendants an opportunity to assess, consider and advise their respective clients on the proposed course of action;

ii) the application for Directions, though permitted to be made without notice, was not brought to the attention of all the parties in circumstances in which the Claimant having been in communication with the expert advised and/or directed the Expert Witness to seek directions from the Case Management Judge;

b) Save for the 5th Defendant's attorney-at-law, no indication was given by the Claimant's Attorneys-at-law to the other Defendant's Attorneys-at-law that he had advised the Expert Witness to seek directions from the Court;

c) On October 23, 2013 the Attorneys-at-law for all the parties met, endeavouring to agree a Bundle of Documents for the trial, and even during the same the Claimant's Attorney-at-law failed to advise all attorneys-at-law for all parties that contact had been made with the Expert Witness in relation to the content of his Expert Report and/or the Witness Statements filed by a number of the parties;

d) The Case Management Judge in consequence issued directions to the Expert Witness on October 29, 2013;

e) The Order on Case Management was, "You may have sight of the comments made about your report and respond to them as you see fit. Your responses should form part of your report. It should be headed in a manner that makes it clear that you are responding to the comments. This Addendum should be addressed to the Registrar of the Supreme Court, after the Registrar has received it then you should send it to the other parties in the matter."

f) Save that Mrs. Risden-Foster of the 5th Defendant's Attorneys-at-law was copied one of the e-mails from the Claimant's Attorneys-at-law to the Expert Witness, none of the other Attorneys-at-law for the Defendants were aware of the directions given by the Case Management Judge until October 31, 2013 after the letter of October 29, 2013 was dispatched by the Claimant's Attorneys-at-law.

g) On October 31, 2013 the Defendants' Attorneys-at-law were made aware for the first time that Witness Statements selected by the Claimant's Attorneys-at-law had been sent to the Expert Witness by the Claimant's Attorneys-at-law for his response to be made on comments made on the Expert Report by Witness for the 1st and 5th Defendants, that is to say, Mr. Carlton Green, Mr. Garwaine Johnson, Mr. Andrew Evans and Mr. Robert Jacobs while omitting to forward the other Witness Statements to the Expert Witness;

h) The Addendum to the Expert Report was sent by Mr. Barry Walton to Mr. Weiden Daley and Mrs. Risden-Foster by e-mail dated November 4, 2013. In the said e-mail the Expert Witness requested that the recipients advise of all "fall- out" in relation to the Addendum. The Expert Witness then pointed out that "Mr. Johnson's statement includes a potential spanner in the words if NWC did not restore supply for two (2) days yet the system was apparently full or partially full of water in the meantime." Mr. Johnson is a witness or the 1st Defendant;

i) By the above statements, without more, the Expert Witness demonstrates an absence of impartiality required of such a witness;

j) Further, in the Addendum, the Expert Witness fails to comply with the Order of the Case Management Judge, in that;

k) In relation to the Witness Statement of Mr. Andrew Evans, the Expert Witness did not respond to the only comments made by Mr. Evans in respect of the Expert Report. Instead, the Expert Witness adopted the

role of the adjudicator by making definitive findings and conclusions on the proposed evidence of Mr. Evans;

ii) In relation to Mr. Carlton Green's Witness Statement, the Expert Report has offered no response on the comments of Mr. Carlton Green but sought to assess the quality of the evidence of the intended witness;

iii) In relation to the Witness Statement of Mr. Garwaine Johnson, the Expert Witness responded to paragraphs 16, 20, and 30 of Mr. Johnson's witness statement. However, in none of those paragraphs did Mr. Johnson comment on the Expert Report. In fact, the Expert Witness at paragraph 15 of the Addendum sought to treat with a matter which is at the heart of the 1st Defendant's case and a matter for the adjudicator. The Expert Witness made detailed conclusions on the evidence, placing himself in the judicial capacity of preferring the Claimant's evidence over that of Mr. Johnson's. Indeed, in paragraph 14 of the Addendum the Expert Witness demonstrated his partiality by selecting the evidence of one party's case over another, which is a matter for the trial judge.

iv) With regard to the Witness Statement of Mr. Robert Jacobs, the Expert Witness again made conclusions on the evidence which are the purview of the trial judge;

v) The Expert Witness sought to respond to paragraph 22 of Mr. Jacob's proposed evidence when that paragraph contained no comment on the Expert Report;

vi) The foregoing unequivocally demonstrates the fact that the Court appointed Expert Witness is unable to help the Court impartially on the matters relevant to his expertise and has demonstrated an inability to provide "independent assistance to the Court by way of objective unbiased opinion in relation to matters," the subject of the litigation.

vii) The 1st Defendant has been severely prejudiced and hampered in the presentation of its case in circumstances in which the trial date is

and the impartiality of the sole Expert is patently impugned.

It is important that I sketch an outline of the circumstances which has brought about the discord at hand.

The Claim

[3] The Claimants action against the 1st and 2nd Defendants dated June 23, 2009 and subsequently amended to include the 3rd, 4th, 5th and 6th Defendants is for damages for negligence comprising special damages of J$135,000,000.00 or/and general damages for approximately J$409,781,562.47 and, *inter alia*, interest at the usual commercial rate or at such rate and for such period at the court deems just.

The nub of the complaint by the Claimant is that on or about 2nd March 2005 servants or agents of the Government of Jamaica acting under the auspices of the 3rd Defendant carried out works on the North Coast Highway in the vicinity of the Hedonism III Hotel, St. Ann of which the Claimant is its lessee and engaged in its management and operation.

The 1st Defendant informed the Claimant of their intention to suspend water supply to the said hotel which was in fact done on March 2, 2005. As a consequence the Claimant consumed water which was already in its tank. It is alleged by the Claimant that after the restoration of the water supply by the 1st Defendant to the Claimant via the latter's tank it was discovered by the Claimant that the water was discoloured and turbid. That fact has spawned the dispute as to which of the parties at bar is responsible for that event. It is in this context that Mr. Barry Walton was appointed the sole expert witness of the Court pursuant to separate applications by the Claimant and the 5th Defendant to appoint their own expert witness. Added to this important consideration is the fact that considerable costs have been incurred in relation to Mr. Walton being appointed the Court's expert.

The Background

[4] I am indeed grateful to all Counsel for the piercing and poignant clearness of their submissions as well as the punctilious care of their presentations. I am now brought to a consideration facts relevant to the Applications.

The Facts

[5] The facts are to be gleaned from the respective affidavits of Mr. Colin Alcott, Mrs. Susan Risden-Foster and Mr. Weiden Daley. Also, the facts comprise the Orders of the Court, the provision by the Expert of his original Expert's report, e-mail communications between of the Claimant's attorneys-at-law and the Expert Witness, the Expert Witness and the Case Management judge leading to the eventual, if not eventful, Experts addendum to the report.

[6] Mr. Colin Alcott, attorney-at-law for and on behalf of the first Defendant gave two affidavits to which were attached exhibits evidencing a copy to the Addendum to the Expert Report prepared by Mr. Barry Walton dated November 2013; copy of letter of October 29, 2013 as well as the full suite of e-mail correspondence passing between the Expert Witness and the Claimant's attorney-at-law. It is reproduced in full.

[7] In summary the complaint is that after the 16th October neither the 1st, 2nd, 3rd and/or the 6th Defendants attorneys-at-law were notified by the Claimant's attorneys-at-law that the latter had advised the Expert Witness to seek directions from the court. That, on October 23, 2013 when the attorneys-at-law for all the parties met with a view towards agreeing a Bundle of Documents for the trial, the Claimant's attorneys-at-law failed to advise all Defendants' attorneys-at-law that they had contact with the Expert Witness in relation to the contents of his Expert Report and/or the witness statements filed by a number of the parties.

[8] Also, that from the e-mail communication that was eventually disclosed to the Defendants' attorneys-at-law on October 31, 2013 the Case Management judge, The Honourable Mr. Justice Sykes, issued directions to the Expert Witness on October 29, 2013. Save that Mrs. Susanne Risden-Foster of the 5th Defendant's attorney-at-law was copied on the e-mails from the Claimant's attorneys-at-law to the Expert Witness, none of the other attorneys-at-law were aware of the directions given by the Case Management judge until October 31, 2013 after the letter of October 29, 2013 was dispatched to the Expert by the Claimant's attorneys-at-law.

Here, I pause to say that Mrs. Suzanne Risden-Foster's affidavit confirms this contention. Also, I pause to make reference to the directions issued to Expert Witness by the said Case Management judge: "You may have sight of the comments made about your report and respond to them as you see fit. Your responses should form part of your report. It should be headed in manner that makes it clear that you are responding to the comments. This Addendum should be addressed to the Registrar of the Supreme Court. After the Registrar has received it then you should send it to the other parties in the matter."

To rejoin the Affiant continues: on or about October 31, 2013 the Defendants attorneys-at-law were also made aware for the first time that "Witness Statements selected by the Claimant's attorneys-at-law had been sent to the Expert Witness by the Claimant's attorney-a-law for his response to be made on comments made on the Expert Report by witnesses for the 1st and 5thDefendants, that is to say, Mr. Carlton Green, Mr. Garwaine Johnson, Mr. Andrew Evans and Mr. Robert Jacobs, while omitting to forward the other witness statements to the Expert Witness."

[9] Further, depones Mr. Alcott, on or about November 4, 2013, the Addendum to the Expert Report was sent by Mr. Barry Walton to Mr. Weiden Daley and Mrs. Risden-Foster by e-mail. In the said e-mail the Expert Witness requested that the recipients advise of any "fall out" in relation to the addendum. In the said e-mail the Expert Witness then pointed out that, "Mr. Johnson's statement includes a potential spanner in

the works if NWC did not restore supply for two days yet the system was apparently full or partially full of water in the meantime."

[10] In relation to the Witness Statement of Mr. Andrew Evans, the Expert Witness did not respond to the only comments made by Mr. Evans in respect of the Expert Report. Instead, the Expert Witness adopted the role of the adjudicator by making definitive findings and conclusions on the proposed evidence of Mr. Evans; in relation to Mr. Carlton Green's Witness Statement, the Expert Report has offered no response to the comments of Mr. Carlton Green but sought to assess the quality of the evidence of the intended witness; in relation to the Witness Statement of Garwaine Johnson the Expert Witness commented on aspects of his statement without his doing so on the Expert Report. The Expert Witness in his Addendum made conclusions on the evidence and thus usurped or assumed the role of the judge.

In respect of the Witness Statement of Robert Jacobs the Expert witness drew conclusions on his proposed evidence and in respect of a certain paragraph sought to respond thereto though that paragraph contained no comment on the Expert Report,;the Expert Report has sought to comment on the proposed evidence of Mr. Milton Gayle in circumstances where Mr. Gayle did not comment on the Expert Report nor was the Witness Statement of Mr. Gayle sent to him by virtue of the content of the letter of 29th October, 2013.

[11] It is to the above that Mr. Weiden Daley's affidavit responded.

I do not propose to dwell at length by way of comment on the contents of his affidavit. If indeed a prefactory remark is permissible, it is this: Mr. Daley's errancy seems to have been an undersigning legal lapse. I now turn to the Civil Procedure Rules (CPR) Rule 32.10(2) provides that when an instructing party gives instructions to the Expert Witness that party, must at the same time, send a copy of the instructions to the other instructing parties, that is, the parties wishing to submit the expert evidence. Of course, the instructing parties here are the Claimant and the 5th Defendant. However, it suffices to remind that the instructing parties role vis-à-vis- the expert witness is administrative, that is to say, arrangements for the payment of the expert witness's fees and expenses

and for the inspection, examination or experiments which the expert witness wishes to carry out.

[12] It is not for the Expert Witness to go beyond that remit. The criticisms of the Defendants in this regard are well-founded. However, I have to say that by sending the 'selected' Witness Statements to the Expert Witness, and by failing to disclose his e-mail communications with the Expert Witness, Mr. Daley's blunder may well be termed, "misconduct", not in the sense of moral turpitude but as denoting irregularity. Notwithstanding that observation, the Expert Witness in respect of the Rule 32.13 has failed to abide its terms and as such is amenable to censure. Whether or not that censure should be made manifest in his disqualification will be addressed on short order.

THE SUBMISSIONS

First Defendant

[13] The gravamen of the complaint by the first Defendant is that the Court's Expert Witness, Mr. Barry Walton, and Mr. Weiden Daley, junior counsel for the Claimant, engaged in e-mail communications after the Expert Report had been tendered, which communications bears the invidious import of demonstrating an absence of impartiality on the part of the Expert Witness. As a result the 1st Defendant has been severely prejudiced and hampered in the presentation of its case. In the result the 1st Defendant asks that the said Expert Witness be disqualified. Alternatively, that the trial dates of November 11-22, 2013 be vacated so as to allow the Defendants time to take further instructions from their respective clients and to put further questions to the Expert Witness in accordance with the provisions of the Civil Procedure Rules (CPR).

[14] Counsel for the 2nd and 3rd Defendants, for the 5th Defendant and the 6th Defendant not only embraced and adopted the submissions by Counsel for the 1st Defendant, but also in their written and oral presentations elaborated on aspects of the facts and the law.

[15] Cumulatively, all Defendants' counsel relied on the following authorities:

a) **National Justice Compania Naviera S.A. v Prutential Assurance Company Limited ("The Iberian Reefer")** [1993] 2 Lloyds Report, 68;

b) **The Queen on the Application of Factortame & Others v The Secretary of State For Transport** [2002] EWCA Civ. 932, hereafter referred to as **The Queen;**

c) **Whitehouse v Jordan** [1981] 1 WLR 246, HL ("**Whitehouse**")

d) **Liverpool Roman Catholic Archdiocesan, Trustees Incorporated v David Golberg** [2002] WL 171 ("**Liverpool**")

e) **Stevens v Gillis** [2001] CPR 3 ("**Stevens**")

f) **Arpad Toth v David Jarman** [2006] EWCA, Civ. 1028 ("**Toth**")

g) **Eagle Merchant Bank of Jamaica Ltd and Another v Paul Chen-Young and Others** Claim No. CL 1988/E095 ("**Eagle Merchant Bank**")

[15] On behalf of the Claimant, Dr. Barnett with economic gracility was content to refute the applicability of the Defendants' recruited authorities while at the same time reposing on the authorities of –

i) **Whitehouse,** *supra*

ii) **Carbotech-Australia Pty and Another v Ian Yates and Others** [2008] NSWSC 540

iii) **Halsburys Laws of England, Fourth Edition, Reissue**

iv) **Civil Procedure, The Civil Procedure Rules 1999, Second Edition**

[16] As the Defendants/Applicants and the Claimant/Respondent are dissonant in their conjunctions of arguments and law, I propose to look at the issues in their incidents on the duty of an expert witness to the Court and the duty of instructing counsel to the Expert Witness and his report which constitute the proferred grounds for his disqualification as an Expert Witness.

THE LAW

[17] I wish now to turn attention to Part 32 of the CPC which frames the reference of "Experts". Here the phrase "expert witness" has ascribed to it an expert who has been instructed to prepare or give evidence for the purpose of court proceedings.

Clearly, Mr. Barry Walton, is so regarded and that fact being undisputed need not detain us.

[18] According to Rule 32.2, "Expert Witness must be restricted to that which is reasonably required to resolve the proceedings justly." Rule Rule2.3(1) and (2) speaks to the Expert' Witness's overriding duty to the court to help the court impartially on matters relevant to his or her expertise and that such duty overrides any obligations to the person by whom he or she is instructed or paid. In a significant paragraph, Rule 32.4 sets out the 'Way in which expert witness's duty to the court is to be carried out'. I repeat it in its entirety:

> "(1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or to content by the demands of the litigation;
>
> (2) An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise;
>
> (3) An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to consider material facts which could detract from his or her concluded view;
>
> (4) An expert witness must state if a particular matter falls outside his or her expertise ;
>
> (5) Where the opinion of an expert witness is not properly researched, then this must be stated with an indication that the opinion is no more than a provisional one;

(6) Where the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report;

(7) Where after service of reports and expert witness changes his or her opinion on a material matter, such change of view must be communicated to all parties."

[19] Rule 32.5 gives an Expert Witness the right to apply to the court for directions in order to assist him or her in carrying out his or her functions as an expert witness or his or her duty to the to the court. However, says Rule 32.5(2), such an expert witness "need not give notice of the application to any party." In seeking directions from the court, the court may direct that notice of the application be given to any party; or a copy of the application and any direction given be sent to any party. As the CPR makes plain, "where the court gives directions … for a single expert witness to be used, each instruction party may give instructions to the expert witness;" See Rule 32.10(1). According to R 32.10(2) "when an instructing party gives instructions to the expert witness that party must, at the same time, send a copy of the instructions to the other instructing parties." Here it is worth bearing in mind that the expression "the instructing parties" means the parties wishing to submit the expert evidence: See Rule 32.9(2).

[20] I must now go on to another important duty imposed upon an expert witness: The content of his or her report. Rule 32.13 mandates that such "an expert witness's report must –

a) give details of the expert witness's qualifications;

b) give details of any literature or other material which the expert witness has used in making the report;

c) say who carried out any test or experiment which the expert witness has used for the report;

d) gives details of the qualifications of the person who carried out any such test or experiment;

e) where there is a range of opinion on the matters dealt within the report –

i) summarise the range of opinion; and

ii) give reasons for his or her opinion, and

f) contain a summary of the conclusions reached.

(2) At the end of an expert witness's report there must be a statement that the expert witness –

a) understands his or her duty to the court as set out in Rules 32.3 and 32.4;

b) has complied with that duty;

c) has included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and

d) has given details in the report of any matters which to his or her knowledge might affect the validity of the report;

(3) There must be also attached to an expert witness's report copies of –

a) all written instructions given to the expert witness;

b) any supplemental instructions given to the expert witness since the original instructions were given; and

c) a note of any oral instructions given to the expert witness, and the expert witness must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert witness, the party's attorney-at-law or any other person acting on behalf of the party.

(4) …

(5) …"

Lastly, and importantly, an expert, says Rule 32.18, "… appointed by the court who gives oral evidence may be cross-examined by any party."

[21] It needs to be said at once that the CPR impose a very onerous duty on an Expert Witness "in keeping with the policy of open preparation for trial, with the object of avoiding trail by ambush and the promotion of early settlements": See A Practical **Approach To Civil Procedure, Stuart Sim, 13th Edition**, paragraph 31.2. Also, one does well to observe that "The Court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules," per Rule 1.2.

To that end, it bears worthwhile repeating that the overriding objective of "These Rules" is "of enabling the court to deal with cases justly". As to dealing with cases justly, it involves, inter alia, saving expense, dealings with it in ways which take into consideration, the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party; and, ensuring that it is dealt with expeditiously and fairly.

OUGHT THE EXPERT WITNESS TO BE DISQUALIFIED?

[22] All the defendants say yes. The Claimant says no. The reasons proferred by the Defendants are encapsulated or captured in the grounds of the Application for Court Orders as filed by the 1st Defendant.

In deciding the above I now engage cited case law authorities on the matter even as I make the observation that the CPR of England is similar to ours in their relevant aspects.

Long ago the duties and responsibilities of experts in relation to the court and to the parties was considered by Creswell, J in the "Ikarian Reefer", supra. The judge there helpfully set out in his judgment that –

1. Expert evidence presented to the court should be and should be seen to be, the independent product of the expert uninfluenced as to form or context by the exigencies of litigation;

2. An Expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise.

The basis of Creswell's, J formulation appears to have received guidance from the principles enunciated in the **Whitehouse** case, *supra* and the case of **Polivitte Ltd v Commercial Union Assurance Co., plc** [1987] 1 Lloyd's Report 379 and Re J [1990] FCR 193.

[23] In **Whitehouse** *supra*, the plaintiff was born with brain damage and he brought action against one Dr. Jordan and others claiming that the damage had been caused by the former's professional negligence. The principal allegations of negligence were that in the course of carrying out a trial by forceps during Dr. Jordan had pulled too long and too strongly on the plaintiff's head, thereby causing the brain damage. At the trial considerable expert evidence was called on. The first instance judge gave judgment for the plaintiff which the Court of Appeal reversed. On appeal to the House of Lords the judgment of the Court of Appeal was upheld. In the course of the speeches it was Lord Diplock who said that, "I have to say I feel some concern as to the manner in which part of the expert evidence called for the Plaintiff came to be organized … while some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should seem to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

I believe I am within the mark to say that the above remarks cannot be isolated from the context of their utterance. I consider that it amply explains a general principle as to what should inform the content of an expert witness's report in circumstances where there has been consultation between experts and legal advisers and that the report is for presentation to the court.

[24] The principles that were extracted from the "**Ikarian Reefer**" case were also applied in the **Steven's** case, *supra.* The facts in brief can be stated compendiously. The Defendant "G" in a building dispute instructed "S" to act as an expert witness in proceedings brought by the claimant builder and in third party proceedings brought by "G" against his architect. The court ordered the parties' experts to prepare a joint memoranda of matters agreed or disagreed, but despite attending a meeting with the other experts, "S" failed to respond satisfactorily to the drawing up of the memoranda. Subsequently, the court made an order requiring "S" to set out in writing that he understood his duty to the court and had complied with that duty and a statement setting out the substance of all material instructions pursuant to a practice direction to the CPR, in default of which "G" would be barred from calling S" as an expert witness in the third party proceedings unless the court ordered otherwise. "S" failed to provide the required information within the prescribed time limit, and the matter returned to the judge a month before the trial was due to start. At the hearing the judge held, despite "S's" assertion to the contrary, that "S" had not complied with the practice direction and concluded that "S" did not appear to be co-operating with the other experts. Thus, he made an order debarring "S" from acting as an expert witness in both proceedings and dismissed the third party proceedings for want of expert evidence.

[25] "G" appealed and the architect sought to uphold the order in respect of the third party proceedings. As to the main proceeding "G" and the builder invited the court to make a consent order allowing "S" to be called as an expert provided that he made good on his default. It was held in dismissing the appeal that: The requirements of the practice direction to the CPR were intended to focus the experts mind on his responsibilities so that the litigation might progress in accordance with the overriding principles of the CPR; "G's" expert had demonstrated that he had no conception of those requirements and the judge had no alternative but to bar "'G" from calling "S" as an expert witness in the third party proceedings, it would be inappropriate to allow the claim against the architect to be resurrected in view of the state of the proceedings.

[26] Further, where a judge had appropriately exercised his discretion under the CPR in relation to controlling the evidence placed before the court, it would be wholly wrong

for the parties to override that discretion merely because they were content for the matter to be dealt with otherwise. Accordingly, the judge's order in the proceedings between the builder and "G" should stand, and "G's" expert would not be allowed to give expert evidence.

[27] The above case is, in my view distinguishable on its facts from the current case at bar. As observed by Lord Wolf MR, "The CPR only came into force on 26 March 1999. But, as I have already indicated, in the order of 26 March 1999 reference had been made to the practice direction of Pt. 35 which was to come into force on 26 April 1999, the relevant part of which had specifically been drawn to the attention of the defendant about that order." Thus argues Lord Wolf, "There can be no excuse based upon the fact that the CPR only came into force on 26 April 1999, for the fact that Mr. Isaac did not understand the requirements of the courts with regard to experts. Those requirements are underlined by the CPR. Continuing, he dilated, "The series of orders made by the Judge … were designed to bring the present proceedings forward to a state where they could be conveniently tried at the proposed date in June 1999. If those order had been followed, it should have been possible to identify clearly and precisely what were the real issues between the parties. Because of the way which Mr. Isaac responded to the experts' meeting, that was not possible."

[28] In **ArpadToth**, *supra*, the defendant was called to Mr. Toth's house one morning in order to give emergency to one Wilfred who had suffered a hypoglycaemic attack and was subsequently unconscious. The defendant failed to administer an intravenous glucose injection and the judge held that he was negligent in that respect. Having heard and considered the expert evidence the judge held that he was not satisfied on the balance of probabilities that had the defendant administered intravenous glucose at the time of his arrival as he should have done it would have saved Wilfred's life in that, by that state, Wilfred had already suffered brain damage. The judge's finding on the question of causation was based principally on his preference for the evidence of the Defendant's expert witness who had failed to inform the court that he had a conflict of interest.

[29] In the judgment of the court, on appeal, on the matter of the conflict of interest, the court asked itself rhetorically: Does the presence of a conflict of interest automatically disqualify an expert? The court answered itself: "In our judgment, the answer to that question is not the key question it is whether the expert's opinion is independent. It is now well-established that the expert's expression of opinion must be independent of the parties and the pressures of litigation. However, says the court, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is a sufficient condition in itself. Ultimately, the question of what conflict of interest is a question for the court, taking into account all the circumstances of the case.

[30] In **The Queen**, supra, in a significant paragraph of the judgment, the court asked whether it is essential than an expert witness should have no interest in the outcome of the case in which he is giving evidence. Reference was then made to **Field v Leeds City Council** (unreported 8 December 1999) where a District Judge refused to entertain the evidence of an expert witness employed by the claimant in their Claim's Investigation Section on the basis that such an expert witness was not independent and, on appeal, the County Court Judge upheld his decision. On appeal to the Court of Appeal Lord Woolf MR held that the fact that the expert was employed by the Council did not automatically disqualify him from giving evidence. Let me cite Lord Woolf: "It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering the question the judge will have to weigh the alternative choices open if the expert's evidence is excluded having regard to the overriding objective of the Civil Procedure Rules" (Emphasis mine)

[31] In the case of **Carbotech-Australia Pty Ltd and Another v Ian Yates and (14) Others,** [2006] NSWSC 540**,** it fell to Brenton, J to decide on the issues of:

a) whether His Honour erred in concluding that there was a reasonable apprehension of bias on the part of the Reference arising from his communications with one Clayton Utz ("the bias issue");

b) whether His Honour erred in concluding that Eva had not waived any objection on the grounds of apprehended bias ("the waiver issue"); and

c) whether His Honour erred in concluding that the report was flawed in its contents in the respects to which His Honour referred ("the contents issue").

The background to that case can be summarized in a few words. The plaintiffs alleged that Messrs Yates, Nelson and Mellon used their confidential information to conspire with the 11th defendant, Era Polymers Pty. Limited and its holding company, the 12th defendant, Era Polymers Holdings Pty. Limited to produce a competing product similar in purpose to that of the Plaintiff's. The defendant companies denied that they received any confidential information of the plaintiffs. By way of court order the matter was referred to a Referee on a question as to the similarities and differences between both products. The Referee produced a report in which he said that the products were very similar in composition. However, the Plaintiffs filed a motion in which they moved for adoption of the report which the Era companies opposed on the basis of communications passing between the Referee and the plaintiffs' solicitors to the exclusion of Era's solicitors and that there was a reasonable apprehension of bias on the part of the Referee such as to require that the Report be rejected. The judge upheld the objections and further held that any objection on grounds of bias had not been waived by Era.

[32] The New South Wales Court on appeal concluded that though the mere fact of the communications is relevant, it is necessary to go beyond that and to view the context and content of the communications. Second, Era having articulated the view that there was a bias point to be taken if it wished, rather than doing so purported to

"reserve all rights" and engage with the Referee on the merits, to see if his conclusions could be changed. It was only after they had failed to secure the proposed change conclusions that they then objected to the Report. Accordingly, it was ruled to be a case of waiver. Third, the Referee determined the question posed, that is, on the similarities and differences of the two products. In that respect the court rules that whether it is a similarity of significance is a matter for the trial. In any event since the parties had agreed that each product contained a common chemical element, there is no prejudice from the Referee having adverted to that fact.

[33] On the bias issue, the court held that the Referee must be actually and apparently impartial and that an appearance of impartiality may be compromised if the Referee has private dealings with one of the parties. It is necessary to look beyond the mere fact of the communications to see whether the reasonably informed bystander would apprehend bias, knowing of their contents.

[34] As to the issue of waiver, that involves a decision by the party against whom bias is shown to raise no objection, that situation is one in which the law prevents a party to litigation from taking up two inconsistent positions.

Concerning the contents issue, the court observed that it will reject a Referee's report if the Referee has patently misapprehended the evidence, or exhibited perversity and/or manifest unreasonableness in finding facts that no reasonable tribunal of fact could have found.

[35] In the instant I am to say that the Defendants did not waive their rights by arguing the merits of the Experts Addendum. Rather, they stoutly impeach the ex parte communications and the use by the Expert Witness in those communications of portentous phrases of "fall out" and "spanner in the works" in ostensible reference to comments contained in witness statements that were supplied to him.

[36] In the **Eagle Merchant Bank** case, *supra*, R. Anderson, J, had to grapple with an Application in which it was sought to exclude an Expert Witness report in that "it refers to and bases conclusions on documentation not put in evidence and proved by any of the witnesses of fact whose statements have been put in evidence-in-chief, and to this

extent amounts to inadmissible hearsay; contains opinions and draws conclusion that are not within his area of expertise, and instead gives evidence on matters not within his personal knowledge; seeks to conclude the incied issues of fact and law that are before the court, for it to decide, and therefore trespass on the function of the court, and to this extent cannot be regarded as expert evidence as trial by expert is not permitted."

[37] Further, the objection says, the report fails to comply with Rule 32.3 of the CPR in that it was in breach of the duty of an expert to help the court on matters within his expertise in accordance with Rule 32.3 of the CPR. The experts report was criticized inasmuch that it was not addressed to the court in accordance with Rule 32.12of the CPR and that it did not contain a Statement of Truth.

After a review of the authorities on the matter R. Anderson, J adopted the formulation of Nelson, J in the case of **Helical Bar plc and Another v Armchair Passenger Transport Limited** [2003] EHWC 367:

1. It is always desirable that an expert should have no actual apparent interest in the outcome of the proceedings;

2. The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection;

3. where the expert has an interest of one kind or another in the outcome of the case, the question of whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether or not an expert should be permitted to give evidence;

4. The questions which have to be determined are whether –

    a) the person has relevant expertise and

b) he or she is aware of their primary duty to the court if they give evidence, and are willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.

5. The judge will have to weigh the alternative choices if the expert's evidence is excluded, having regard to the overriding objective of the CPR

6. If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his or her evidence.

[38] In the final analysis I too adopt the above formulation. However, I will venture to add that the ex parte communications between Mr. Walton and Mr. Weiden Daley and the use of the expressions in those communications of "spanner in the works" and "fall-out" by Mr. Walton, that while they might yet signal the portent of impartiality that cannot by itself be the only consideration. Such dereliction from propriety may well amount to misconduct in the sense of denoting irregularity and not any moral turpitude or anything of that sort. In applying the formulation from the **Helical Bar** case, *supra,* I am to say that I favour the alternative approach which the Application at head enfor considering.

[39] In the instant case I am of the view that I will have to weigh the alternative choice if the experts evidence is excluded having regard to the overriding objectives of the CPR.

[40] After all, the overarching and underpinning consideration is of enabling the court to deal with cases justly, a matter to which I have already adverted. I am of the view that the court's power to control and limit evidence can be brought to bear on this matter and as such deny the application that the expert be disqualified. In the final analysis I having adopted the suggested alternative I hereby order that the trial dates of November 11-23, 2013 be vacated and that new and further case management directions be given for the proper conduct of this matter.