

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2010-01619

PARKS INTERNATIONAL LTD

CLAIMANT

AND

JULIANA WEBSTER

DEFENDANT

\*\*\*\*\*

Before the Honourable Madam Justice C. Pemberton

Appearances

For the Claimant: Mr. K. Scotland

For the Defendant: Mr. H. Ramnath

**DECISION**

- [1] The Claimant Parks International Limited (PIL) and the Defendant Julianna Webster (JW) entered into an agreement providing for PIL to do construction works for JW. Suffice it to say the relationship soured.
- [2] PIL is now claiming the sum of One Hundred and Seventy-Three Thousand Seven Hundred and Seventy-Eight dollars and Thirty-Five cents (\$173,778.35) being monies due and owing for construction services supplied and delivered by PIL to JW. JW defended the claim by stating that she did not owe this money and denies any liability for the outstanding sums. This matter came before the court and she used its best endeavours to urge the parties to settle. The court even went so far as to do a cost benefit analysis for JW at that first outing as she was not represented in court at that hearing. On diverse occasions thereafter the parties indicated that they were prepared to discuss. These discussions broke down.
- [3] As a step along the litigation path, the parties entered into a consent order that the matter be referred to an expert in the form of a Quantity Surveyor. They agreed that the firm "Welch Morris and Associates be appointed to conduct the survey and report its findings to the court." They further agreed that the parties would share the costs of the report equally, and "to be bound by the report and findings".

- [4] In keeping with this order, the firm of Welch Morris and Associates was appointed. On 28<sup>th</sup> April 2007, the Claimant filed what purported to be the Expert Report. However, that Report was not in a proper form, and having recognised that on February 23<sup>rd</sup>, 2012 another Report in the proper form was filed.
- [5] On June 15<sup>th</sup> 2011, JW took grave issue with the Report on the ground that the Report was tainted on the grounds of a likely-hood of bias. This allegation was hotly refuted by Mr Peter Parks, Director of PIL Limited. I therefore asked the parties by Order of the 27<sup>th</sup> July 2012 to submit to me in writing on the issue, should the court set aside the consent order arrived at by the parties for the appointment of the Quantity Surveyor, as the expert in this matter. I received submissions from PIL but to date I have had no written submissions or an application for an extension of time, or relief from sanctions to submit same from JW.
- [6] I shall proceed to give my decision.
- [7] I commend Mr Scotland for taking the time and effort to comply with the Court's Order in diligent and comprehensive manner. Counsel referred the Court to a most instructive authority. I now wish to associate myself with the approach and sentiments taken by Nelson J in **ARMCHAIR PASSENGER TRANSPORT LTD v HELICAL BAR plc AND PAUL GRAY**<sup>1</sup>. I shall confirm that the dicta expressed in that case provides a succinct and effective guide to determine matters such as these and it is for that reason that I set out certain passages in full:

29. *The following principles emerge from these authorities: -*

- i) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.*
- ii) 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.*
- iii) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.*
- iv) The decision as to 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 witness should be permitted to give evidence.***

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<sup>1</sup> [2003] EWHC 367 (QB)

- v) ***The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.***
  - vi) ***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.***
  - vii) ***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 evidence.***
30. *The Civil Procedure Rules 1998 give the Court broad powers to control and limit evidence, including expert evidence. CPR 32.1(2) enables the Court to exclude evidence that would otherwise be admissible, provided that power is exercised in accordance with the overriding objective of dealing with cases justly. CPR 35.4 provides that no expert evidence is admissible without the Court's permission whether in writing or oral. The expert's duty to the Court overrides any obligation to the person from whom he has received instructions or by whom he is paid (CPR 35.3). The instruction of joint experts is strongly encouraged under the CPR (28 PD 3.9(4)).*  
**(Emphasis mine).**

[8] The learned Judge concluded:

- 47. ***The decision of the Court of Appeal in Factortame makes it clear that the test of apparent bias applicable to a court or tribunal is not the correct test in deciding whether the evidence of an expert witness should be excluded. ...***
- 48. ***It is not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determines whether an expert witness should be precluded from giving evidence Hence, once such an interest or connection is ascertained a decision must be made promptly as a matter of case management as to whether the expert's evidence is precluded or not.***  
 ....
- 53. ***I am satisfied that Judge Ryland decided to exclude Mr McLean's evidence not upon the nature and extent of his connection and whether that rendered him insufficiently independent to be able to comply with the expert's duty to the court, but upon the basis that the fact of his connection with Swift alone meant that justice could not be seen to be done if his expert's report was submitted in evidence in the case.***
- 54. ***On the basis of the decisions in Factortame and Field this is the wrong***

*test. The Judge's approach suggests that he would have excluded an employee from giving expert evidence on behalf of an employer for the same reasons, namely that justice could not be seen to be done if he were permitted to give such evidence. This approach is specifically disapproved in Factortame and Field.*

**55. I conclude therefore that the Judge did apply the wrong test in this case and that his decision cannot stand.**

**(Emphasis mine).**

[9] I am guided by the steps and learning set out above and propose to adopt a similar course in the case at bar. When this issue is decided, then would I be in a position to determine whether to set aside the Consent Order on the approved bases of the following:

1. Mistake of Law;
2. Misrepresentation; or
3. Fraud.

[10] In the premises, I now give directions for a formal hearing of the issue.

#### **ORDER**

- 1. That there be a formal hearing of the issue:**  
*Has the Defendant made a case for setting aside the Consent Order appointing Messrs. Welch Morris and Associates as Experts in the matter to Report to the Court and the Report submitted by the said Morris and Associates on the basis of "a likelihood of bias"?*
- 2. Affidavits filed by the Parties do stand as Witness Statements and be deemed evidence in chief.**
- 3. Affidavits filed by the Parties be served on the Expert Ms Candice Welch within fourteen (14) days of the date of this Order. No extension of time applications to serve the Affidavits made by the Parties to this action to serve Ms Candace Welch shall be entertained favourably.**
- 4. That the Expert Ms Candice Welch upon service of the Affidavits provided for in paragraph 3, be permitted to file and serve on the parties, an Affidavit in response on or before 22<sup>nd</sup> March, 2013.**

5. **ALL DEPONENTS to be present in court including The Expert Ms Candice Welch to be cross-examined.**
6. **Cross-examination to take place in this Order and for the stated periods:**
  - a. **Ms Juliana Webster – Defendant**
    - i. **Mr Scotland – 30 minutes**
    - ii. **Ms Welch’s Attorney-at-Law – 30 minutes**
  - b. **Mr Peter Parks – Claimant’s Representative**
    - i. **Mr Ramnath – 30 minutes**
    - ii. **Ms Welch’s Attorney-at-Law – 30 minutes**
  - c. **Ms Candice Welch – The Expert**
    - i. **Mr Ramnath – 30 minutes**
    - ii. **Mr Scotland – 30 minutes**
7. **No other issues shall be permitted save the issue identified at paragraph 1 herein.**
8. **Hearing to take place on 25<sup>th</sup> July 2013 at 10:30 a.m. TGO 02.**
9. **No variations to this timetable to be considered save those which may be requested by the Expert.**
10. **Should any of the Parties to this action fail to comply with the terms of this Order, the Court reserves its right to exercise any of the powers and discretions contained in Part 26 CPR including the power to enter final judgment against any party in default of this Order forthwith.**

Dated the 31<sup>st</sup> day of January, 2013.

/s/ CHARMAINE PEMBERTON

HIGH COURT JUDGE