

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

**Claim No. CV 2009-00551
HCA No. 1798 of 2005**

BETWEEN

**MORA OIL VENTURES LIMITED
MORA VEN HOLDINGS LIMITED**

CLAIMANTS

AND

SCOTIABANK TRINIDAD & TOBAGO LIMITED

DEFENDANT

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Andrew Mitchell, Q.C.
Mr. Keith Scotland
Instructed by Mr. Lionel M. Luckhoo for the Claimants

Mrs. Deborah Peake, S.C.
Mr. Colin Kangaloo
Instructed by Ms. Nadia Kangaloo for the Defendant

REASONS

1. On the 27th April 2012, the Defendant filed an application for an Order that (i) certain paragraphs or portion of paragraphs of, or documents exhibited to the witness statement of George Michael Nicholas III filed on the 14th April 2010 be struck out; and (ii) the Claimant's Expert Report of Mr. Mario Young filed on the 23rd February 2012 be struck out and excluded from evidence.

2. On the 30th April 2012, the Claimants filed an application for an Order that the entire expert witness report from Mr. Victor Bertrand Mouttel filed on the 24th October 2011 on behalf of the Defendant be struck out.
3. In compliance with directions given by me on the 2nd April 2012, both parties filed submissions in support of and in opposition to the respective applications on the 1st June 2012.
4. On the 28th June 2012, I heard oral submissions from Senior Counsel for the Defendant, Mrs. Peake and Queen's Counsel for the Claimants, Mr. Mitchell in respect of the Defendant's application to strike out the Expert Report of Mr. Mario Young at the conclusion of which I ruled, inter alia, that Mr. Young's Expert Report be struck out, with costs to be paid by the Claimants to the Defendant to be assessed in default of agreement. The Claimants have since appealed against that decision. I set out hereunder my reasons for making that Order.

Historical Facts

5. In the Claimant's submissions filed on the 1st June 2012, a useful chronology of events was set out which, when checked against and compared with the Court's records, revealed the following salient facts:
 - (i) On the 26th January 2010, both parties disclosed to Master Sobion that they wished to make applications to call expert witnesses and the Master directed that applications be filed on or before the 23rd April 2010;
 - (ii) On the 14th April 2010, the Defendant filed an application for permission to call an expert witness and on the 23rd April 2010 the Claimants also filed an application to rely on an expert report;
 - (iii) At the case management conference held on the 28th April 2010, the Master directed the Defendant to file written submissions on or before the 21st May 2010 and granted permission to the Claimants to file submissions in response on or before the 18th June 2010. Both parties filed their submissions in compliance with these deadlines;

- (iv) At a case management conference on the 28th July 2010 the Master indicated to the parties that she required their assistance of the parties in formulating questions to be asked of the expert witnesses since “the expert was to have a defined role in which specific questions were to be formulated. In that context, therefore, the Master directed the parties to file and serve, on or before the 14th September 2010 joint or individual draft instructions/questions/issues for the expert witness and the matter was adjourned to the 21st September 2010;
- (v) Neither party complied with this direction and on the 15th September 2010 a joint application for relief from sanctions and for an extension of time was filed;
- (vi) At the case management conference held on the 21st September 2010, the Master extended the time for the parties to file their respective and/or the agreed draft instructions/questions/issues for the expert witness to the 4th October 2010. The case management conference was then adjourned to the 5th October 2010;
- (vii) On the 4th October 2010, both sides filed their Un-agreed list of instructions/issues/questions.
- (viii) At the case management conference held on the 5th October 2010, both parties indicated that they had certain objections to the respective lists of instructions/questions/issues and wished to reduce their objections into writing. Accordingly, the Master directed the parties to file their respective objections on or before the 26th October 2010 and their responses to each other’s objections on or before the 15th November 2010. The case management conference was then adjourned to the 15th December 2010;
- (ix) On the 26th October 2010, both the Claimants and the Defendant filed their submissions/objections to each other’s instructions/issues/questions to the banking experts. On the 15th November 2010, the Claimants filed their response to the Defendant’s submissions and on the 16th November 2010, the Defendant filed its response to the Claimants’ submissions.
- (x) At the case management conference held on the 15th December 2010, the Master was not ready to give her decision but “*pressed the parties to see whether could be agreement as to a single expert and Counsel for the Defendant*

undertook to provide the Claimants with the name of its proposed expert.” The Master then adjourned the case management conference to the 26th January 2011;

- (xi) According to the Claimants’ summary, at the case management conference held on the 26th January 2011, the Master was *“due to indicate which of the questions proposed by the parties were permissible, and which were not.... The Master indicated that she would issuing an order annexing a document giving guidance in this regard. ”*
- (xii) On the 2nd February 2011, the Master’s Order was issued in the following terms:

“IT IS ORDERED that

- 1. For the avoidance of doubt, each party is permitted to instruct one expert.*
- 2. Insofar as the parties may decide to instruct a single expert, the instructions to be given to the said expert as decided by the court pursuant to the Civil Proceedings Rule 33.6 (3) shall be as set out in the Schedule hereto with the relevant annexures to be included....”*

A copy of the Master’s Order is hereto annexed for ease of reference.

Reasons

6. Part 33 of the CPR 1998 makes it abundantly clear that the Court is authorised to exercise control over evidence to be given by experts. Firstly, the Rule sets out expressly that an expert witness owes a duty to the Court to help the Court impartially and that this duty overrides any obligations to the person from whom the expert has received instructions. His opinion must be objective and unbiased and he must provide independent assistance to the Court. A party cannot call an expert or put in an expert’s report without the court’s permission. Further, expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. The expert may seek further directions from the court to assist him in carrying out his functions and in the discharge of his duty to the court. When he prepares a report, it must be addressed to the court and not to any person from whom he has received instructions.

7. Further, Rule 33.7 (3) contemplates that a party who wishes to instruct an expert must give to every other party notice of the nature of the instructions to be given to the expert. The notice under paragraph (3) must be such as will give the other party enough time and information (a) to instruct the same expert; (b) to instruct another expert to carry out an examination with the expert named in the notice; or (c) to instruct another expert to prepare a report jointly with that expert: Rule 33.7 (4).
8. Accordingly, in my opinion, when the parties filed their unagreed list of instructions/ issues/questions on the 4th October 2010, they were ostensibly complying with the requirement of Rule 33.7 (3) to notify every other party of the instructions they intended to provide to the expert. Since there was no agreement on these matters, each party made submission to the Master in support of their formulation of the instructions and in opposition to the other party's formulation so that the Master could review same and decide what were the relevant instructions to be provided to the expert for his/her consideration and expression of opinion for the assistance of the Court. In other words, when the parties made their respective submissions to the Master, they accepted that, in the exercise of the Court's power under Part 33.4, the Master would determine what evidence would be reasonably required from the expert to resolve the proceedings justly.
9. Accordingly, when I consider the terms of the Order made by the Master, I was of the view that the only reasonable interpretation thereof was as follows:
 - (i) The Master had taken into account the draft unagreed instructions/questions/ issues and the submissions made by both sides in support of and in opposition thereto;
 - (ii) Since, despite her encouragement, the parties had not agreed upon the appointment of a single expert, she expressly granted permission to each side to instruct one expert;
 - (iii) The Schedule annexed to her Order set out what she considered to be the relevant Issues, Agreed Facts and Documents and the Hypothetical Situations on which expert evidence would be permitted;

- (iv) She was exercising her power under Rule 33.4 to restrict the expert evidence to what she considered to be reasonably required to resolve the proceedings justly.
10. The logical consequence of that interpretation is, therefore, that although the parties were given the liberty to instruct separate experts, the Master had formulated for the consideration of the expert or experts the issues and the agreed facts and documents and hypothetical situations. If either party considered that the terms of the Schedule were unacceptable or erroneous for whatever reason, they were entitled to challenge her decision by way of a procedural appeal. However, neither party lodged an appeal against this Order of the Master.
11. In the circumstances, since the decision of the Master was binding upon the parties and had not been overturned on appeal, I came to the conclusion that the Claimants were not entitled to revert to the unagreed instructions/issues/questions filed on the 4th October 2010 and to show same to Mr. Young as the basis of his expert report. They ought to have shown to Mr. Young the Schedule to the Master's Order and since his Report was not prepared on the basis of those instructions, I made an Order that his Report be struck out.
12. Since the Defendant succeeded on its application to strike out, I directed the Claimants to pay to the Defendant the costs of the application to be assessed in default of agreement.

Dated this 25th day of July, 2012

**André des Vignes
Judge**