REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2010-03435**

BETWEEN

READYMIX (WEST INDIES) LIMITED

Claimant

AND

SUPER INDUSTRIAL SERVICES LIMITED

Defendant

****

Before The Honourable Mr. Justice Devindra Rampersad

Appearances:

Mr. Kerwin Garcia instructed by Ms. Marcelle Ferdinand for the Claimant

Mr. Ramesh Lawrence Maharaj SC leading Kingsley Walesby and instructed by Vijaya Maharaj for the Defendant

Delivered on the 12th day of June 2012

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RULING ON EVIDENTIAL OBJECTIONS

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THE CLAIMANT'S NOTICE OF APPLICATION FILED ON 5 MARCH 2012

1. The claimant made this application under CPR part 33.5(1) for permission to rely on the witness statement of Paul Williams filed on 2 May, 2011. The claimant says that the evidence set out in the witness statement represents what Mr. Williams observed upon examination of aerial photography and a topographical survey which he prepared relying upon his knowledge and experience as a photogrammetric engineer and land surveyor. Therefore, he is a witness of fact. In so far as any of the evidence contained in that witness statement is not merely factual, the court ought to permit that statement to be adduced at trial because his evidence is necessary to the claimant's case and it is consistent with the overriding objective of the CPR to deal with cases justly and that such evidence should be allowed. The claimant's attorney at law suggested that, in the event that the court was of the view that there was any expert evidence within the statement, permission should now be granted for same to be admitted as such, with such consequential remedial and/or curative directions being made, (pursuant to CPR Part 26.8 and/or to the Court's inherent jurisdiction) as are necessary to bring his witness statement into conformity with CPR Part 33 and to preserve the trial date, and that the Defendant's Notice of Application filed on March 9, 2012 should be dismissed, with costs.

THE DEFENDANTS NOTICE OF APPLICATION FILED ON 9 MARCH 2012

2. By notice of application filed on 9 March 2012, the defendant:

   2.1. Objects to the entirety of Mr. Paul Williams' statement pursuant to parts 26.1(w), 29.5 (2) and 33.5 (1) of the CPR or, in the alternative, that paragraphs 12 to 25 of the witness statement be struck out;

   2.2. Objects to portions of the witness statements of Gordon Richards and John Cárdenas which ought to be struck out;

   2.3. Objects to the supplemental list of documents filed on 9 February 2012 and the second supplemental list of documents filed on 5 March 2012.

A BRIEF HISTORY

3. The claimant says in the claim which was filed on the ….that it had a mining license issued under the Minerals Act dated 5 May 2006. In or around the month of January 2007 the defendant entered into occupation of a portion of block to and commenced mining without having obtained any license from the state and without the claimant's permission. The hello immoderate okay our event next claimant's license was for a period of one year from 5 May 2006 to 4 May 2007 and was extended by letter dated 16th of October 2007 for the period 14th of March 2007 to the 13 March 2008 with an option to renew for a further five years. The license which is attached to the statement of case says that the licensee may be granted a license for a period not exceeding five years over the licensed area subject to the

fulfillment, three months prior to the expiration of the license, of the conditions set out therein. Part of the claim made by the claimant is for damages for the unauthorised mining and removal of material from the subject lands by the defendant.

4. The defense says that the license was only for one year and that the claimant does not have any right, title or interest to maintain these proceedings. The portion of the claimant's lands allegedly mined by the defendant comprising 7.2 ha was previously occupied and mind by Silica Sands Limited with the claimant's consent and permission. The defendant does not know about those lands. Instead, the defendant says that they have been in continuous use in occupation of 4 acres of land located on the southern boundary of block 2 and therefore it is entitled to occupy that portion of land. This 4 acre parcel of land is part of a larger parcel comprising 8.0937 ha licensed to one Ganesh Ramdeo in respect of which he later on got a lease. Further, paragraph 8 of the defence states that the claimant remained silently passive and/or delayed and/or acquiesced to the defendant's continued use and occupation of the subject lands.

CASE MANAGEMENT

5. The claim first came up for hearing on the 18th January 2011 and then again on the 13th April 2011 and, on both occasions, the first CMC was adjourned for the parties to consider their positions and to consider their pleadings as a result of certain comments and observations made by the court.

6. The first CMC was then held on 21 June 2011 when directions were given for standard disclosure by 28 July 2011, mutual inspection by 12 August 2011, and for the filing by the claimant of a joint list of agreed and unagreed documents cosigned by attorney at law for the defendant by 20 September 2011. Directions were also given for the filing by the claimant of a joint list of agreed and unagreed issues again cosigned by attorney for the defendant as 7 October 2011 and another CMC was fixed for 19 October 2011.

7. On 19 October 2011, the following directions were given:

> *“Claimant indicates that they have three witnesses and the defendant indicates that they have 3 to 4 witnesses.*
>
> *The parties to notify the court and each other in writing of the names of the witnesses they intend to call by the 15th of November 2011*
>
> *Parties to file and exchange witness statements to be used as examination in chief by the 31st of January 2012 and in default no evidence would be allowed in respect of any witness in relation to whom no witness statement has been filed;*
>
> *All pretrial applications including objections to the witness statements are to be filed by 28 February 2012 and in default no such applications or objections would be entertained*

Trial window fixed for the 22nd to 24th of May 2012 at 10 AM in POS 09

Pre-trial review fixed for 15 March 2012 at 9:30 AM in POS 09"

8. At the PTR held on the 15th March, the trial dates for the 22nd to the 24th May 2012 were vacated upon the request of the claimant's attorney, who also expressed the view that the use of the term "trial window" did not mean that the trial date was confirmed, and the following directions were given for the handling of the pre-trial applications as follows:

> *"Leave granted to the claimant to file and serve for written submissions in support of the claimants application of 5 March 2012 and in opposition to the defendants application of 9 March 2012 by the third of may 2012; soft copy to be forwarded to the court and to the other side by e-mail on that date.*
>
> *Leave granted to the defendant to file and serve for written submissions in opposition by the 11May 2012; soft copies to be forwarded to the court and the other side by e-mail on that date.*
>
> *The suggested dates for trial fixed for the 22nd 23rd and 24th of May 2012 are vacated and the trial is confirmed for the 10th 11th and 12th of July 2012 at 10 AM in POS 09.*
>
> *A further PTR is fixed for the 23rd of may 2012 at 10 AM in POS 09*"

9. The issue of any expert evidence in relation to the evidence of Paul Williams never arose until the application filed on 5 March 2012.

THE RELEVANT CPR PROVISIONS

10. Part 26.1 (w) provides as follows in relation to the court's general case management powers:

> "*Take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective*".

11. Part 26.8 (w) provides as follows:

> *"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
>
> *(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
>
> *(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*

> (4) *The court may make such an order on or without an application by a party.*

12. Part 28.13 (1) provides as follows in relation to failure to disclose documents:

> "*A party who fails to give disclosure by the date specified in the order may not rely on or produce any document not so disclosed at the trial*".

13. Part 29.5 (2) provides as follows in relation to the striking out of any witness statement:

> "*The court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement*".

14. Part 33 deals with expert evidence and assessors, the latter being irrelevant to the issue at hand.

PART 33 – THE EXPERT'S DUTY TO THE COURT AND THE WAY THAT DUTY IS TO BE CARRIED OUT

15. Parts 33.1 and 33.2 provide the foundation that the expert's duty is to the court and not to be partial or partisan in any way. The expert's assistance must be "independent by way of objective unbiased opinion in relation to matters within his expertise."[1]

16. Part 33.5 sets the restrictions which the CPR imposes in relation to expert witnesses and evidence:

> *"(1) No party may call an expert witness or put in an experts report without the court's permission.*
>
> *(2) The general rule is that the court's permission should be given at a case management conference.*
>
> *(3) The court may give permission on or without an application.*
>
> *(4) No oral or written expert'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 intends to give.*
>
> *(5) The court must direct by what date such report must be served.*
>
> *(6) The court may direct that the evidence be given by one or more experts.*

17. Part 33.6 goes on to deal with the manner in which a single expert is to be engaged pursuant to the court's permission with the court retaining the residual power to control the process even to the extent of the determination of the questions for the expert's opinion.

18. Part 33.7 provides a general rule for the parties to give instructions to a single expert and goes on to elaborate on the content and procedure for giving those instructions.

[1] Part 33.2(2)

19. Part 33.8 gives the court the power to order a party obtain and share expert evidence and part 33.9 directs the experts to address his report to the court and not to any person from whom he has received instructions.

20. Part 33.10 gives details of what the expert's report ***must*** contain, which includes the matters referred to at part 33.10 (1), and a statement by the export confirming his understanding of his duty and that he has complied with that duty along with the other matters referred to at part 33.10 (2)[2], along with the list of annexures relating to the instructions upon which the expert has acted referred to at part 33.10 (3).

21. Part 33.11 allows the court to direct a meeting of experts to discuss and to identify issues for trial upon which the experts are unable to agree.

LEGAL AUTHORITIES AND DISCUSSION ON EXPERT EVIDENCE

22. This court first addressed the concept of expert evidence in the case of ***Debbie Mohammed v Archibald Bellamy & ors*** [3]. That case was determined under the provisions of the Rules of the Supreme Court 1975 (the RSC). The authorities referred to in ***Debbie Mohammed*** were confirmed in the case of ***Stevens v Gullis*** (2000) 1 All ER 527 by no lesser person than Woolf MR whose seminal report – "Access to Justice" – paved the way for the CPR. In that case, the learned Woolf MR said:

> *"First, with regard to Mr. Isaac as an expert witness, he demonstrated by his conduct that he had no conception of the requirements placed upon an expert under the CPR.*
> *……………..*
>
> *The position was made clear in numerous authorities but, in particular, in the decision of Cresswell J in* ***National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer*** *[1993] 2 Lloyd's Rep 68. In different words Cresswell J summarised the duties of an expert. 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. It is now clear from the rules that, in addition to the duty which an expert owes to a party, he is also under a duty to the court.*
>
> *The series of orders made by the judge to which I have referred 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 orders 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. The requirements of the practice direction that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters set out in para 1 of the practice direction, <u>are intended to focus the mind of</u>*

[2] See discussion of this requirement for the statement below as discussed in the case of ***Stevens v Gullis*** (2000) 1 All ER 527

[3] HCA No. 11 of 2002; HCA 66 of 2002 (POS) at section 5, pages 18 - 22

> *the expert on his responsibilities in order that the litigation may progress in accordance with the overriding principles contained in Pt 1 of the CPR.*
>
> *Mr. Isaac had demonstrated that he had no conception of those requirements and I am quite satisfied that the judge had no alternative but to take the action which he did, notwithstanding the fact that the CPR had only recently come into force and that the consequences to the defendant of the course which was taken were draconian and could deprive him of a claim which he might otherwise have against the architect."*
>
> [Emphasis mine]

23. Clearly, the learned judge was postulating the importance of the expert recognizing his/her duty to the court by focusing on the matters referred to in the requirements to part 33. In ***Stevens***, the learned Master of the Rolls confirmed that the learned judge at first instance was correct to exclude the expert's evidence despite the fact that the parties later on consented to him giving evidence. To my mind, this highlights the fact that an expert is ultimately controlled by the court in relation to participation in court proceedings so that, notwithstanding any consensual position reached by the parties in relation to such an expert, the final decision as to his/her participation remains with the court.

24. In ***Stevens***, the expert was clearly not cooperating with the other experts and was therefore not complying with an explicit direction given by the court. That is not the situation in the case at bar but the relevance of ***Stevens***, to my mind, is really its emphasis on the need for the expert to set out the matters referred to in part 33.10 so that the court is reassured of the expert's identification and appreciation of his/her duty.

25. Judge Toulmin QC in **Anglo Group plc v Winther Brown & Co Ltd and others** [2000] All ER (D) 294 said at paragraph 105:

> *"The Woolf reforms, building largely on the approach which was developed in this Court and the Commercial Court (with the support and encouragement of the users of these Courts) sees no inherent conflict between dispute resolution by parties in the course of the procedure and dispute resolution by the court at a full hearing at the end of the procedure. Dispute resolution in the course of the procedure may be achieved with assistance outside the court procedure by way of independent mediation; but it may also be achieved by techniques of case management pioneered in this court, e.g. by "without prejudice" meetings of experts, joint statements of experts setting out the matters on which they agree or disagree, early neutral evaluation or by the appointment of a single jointly appointed expert who may effectively resolve the technical issue or issues which are preventing the parties from settling their disputes; or by a combination of constructive case management and mediation. Many of these innovations underline the importance of experts retained by the parties acting at all stages as independent experts in order to assist the parties in reaching a resolution of their disputes or in narrowing the issues in dispute thus saving time and costs at trial."*

26. To my mind, these words are quite germane to the intention of Part 33 and its function and purpose. It is precisely for this purpose, and to achieve the overriding objectives of the CPR

which include ensuring, so far as is practicable, that the parties are on an equal footing;[4] and saving expenses[5]; that experts cannot give evidence in a matter unless the party wishing to call or put in that evidence has served a report of the evidence which the expert intends to give[6]. The contents of such a report are well defined by Part 33.10. This, to my mind, introduces the elements of full disclosure and equal footing at an early stage for consideration by the court, allowing the court to afford the other side the opportunity to consider that report and to make submissions on it in the event that they are of the view that it is not appropriate for any particular reason. Quite obviously, the expert's report and the information from which it is derived must be disclosed to the other side to allow for an informed consideration of the case with a view to resolving the matter at an early stage and so save expenses. If the other side is of the view that the expert's report raises questions of expertise, credibility or independence, the other side is then free to make that observation to the court so that decisions can be made to resolve that issue through the appointment of a single expert[7] or for the meeting of experts on both sides, in the event that the other side decides to get their own report, to resolve, as far as possible, technical issues so that the parties' and the court's time is not taken up unnecessarily. If, however, the parties agree that the expert's report is determinative of the technical issue at hand, then it may very well be that additional costs are saved without having to bring the expert to court or even to proceed to trial in the event that either of the parties accepts the technical opinion of the expert.

27. In fact, in ***P v Mid Kent Healthcare NHS Trust*** [2002] 1 W.L.R. 210; [2001] EWCA Civ 1703 which concerned a claim for medical negligence, the expert evidence dealing with quantum was provided by seven joint experts: an education psychologist, an employment consultant, a nursing specialist, an occupational therapist, a physiotherapist, an architect and a speech therapist. Each produced a report. The appeal centered around whether the claimant's parents should have been allowed to hold conference with the experts without the defendant solicitor present Lord Woolf 's judgment included a clear point of principle on the single joint expert procedure at paragraph 28:

> "*The starting point is: unless there is reason for not having a single expert, there should be only a single expert. If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report. In the normal way, therefore, there should be no need for that report to be amplified or tested by cross-examination. If it needs amplification, or if it should be subject to cross-examination, the court has a discretion to allow that to happen. The court may permit that to happen either prior to the hearing or at the hearing. But the assumption should be that the single joint expert's report is the evidence. Any amplification or any cross-examination should be restricted as far as possible. Equally, where parties agree that there should be a single joint expert, and a*

[4] Part 1.1(2)(a) of the CPR
[5] Part 1.1(2)(b) of the CPR
[6] Part 33.5 (4) of the CPR
[7] Parts 33.6 & 33.7 (single experts) and Part 33.11 (meeting of experts) of the CPR.

single joint expert produces a report, it is possible for the court still to permit a party to instruct his or her own expert and for that expert to be called at the hearing. However, there must be good reason for that course to be adopted. Normally, where the issue is of the sort that is covered by non-medical evidence, as in this case, the court should be slow to allow a second expert to be instructed."

28. It seems to this court that a failure to present that report at an early stage as envisaged by the CPR deprives the court and the opposing side of the opportunity of meaningfully considering the contents of the report –including questioning the expert's independence or credibility or even conclusion by a consideration of the instructions given to the expert[8], the documents which he /she considered and the assumptions made. The early consideration of the report, therefore, provides a window for early resolution, at least in respect of the aspect of the case which is touched by the expert's opinion. And that, to me, is the underlying_rationale of the CPR! This, to my mind, is the dispute resolution referred to by Judge Toulin QC, *supra.*

THE PROPOSED EVIDENCE OF PAUL WILLIAMS

29. On 5 March 2012, a witness statement for Paul Williams was filed.

30. The first 11 paragraphs of his witness statement disclosed his training in the field of land surveying and photogrammetry and enclosed his curriculum vitae.

31. At paragraphs 12, 13 and 14, he described what he termed to be "the science of photogrammetry" which he defined as a specialized area of surveying.

32. At paragraph 15 he indicated the nature of the written instructions he received from **attorneys at law for the claimant** without exhibiting a copy. He then went on to describe the survey work that he did on the subject parcel of land and then followed it up at paragraph 18 to describe the procedure he followed to determine the volume of material allegedly mined by the defendant.

33. At paragraphs 19, 20, 21, 22 and 23, he described what he did to make that determination. He spoke about comparing aerial photographs taken before and after earthworks had taken place to determine and compute the volume of material removed. He referred to particular aerial photographs which he relied upon and also to first order stereo plotting equipment and first order material mapping equipment along with a hydrographical survey which he conducted. All of the information he gathered was compared using engineering software written by a local programmer and the computation was checked by TechMAP using well-known engineering software marketed by Terra Model of the USA. At paragraph 25, he

[8] See, for example, a helpful discussion of the value of determining the instructions given to the expert by David Dabbs in his article "***Experts or Charlatans?"*** 153 NLJ 1742

mentioned that he submitted his results to the claimant company in the form of a map – the contents of which he did not reveal.

34. It is remarkable and, to my mind contrary to the provisions of the CPR, that none of the technical information gathered and referred to above was revealed or disclosed nor was an opportunity given to the defendant to verify his results through a perusal and analysis of his results and their application in respect of the computer software referred to.

35. Even more startling was the fact that he did not attach a copy of the "map" which he referred to at paragraph 25. There is in fact a “map” exhibited as JC4 to the witness statement of John Cárdenas which is signed by Mr. Williams and dated 5 January 2010 and which concludes that an area was mined by the defendant comprising approximately 7.2 hectares and that the volume mined by the defendant amount to 423,260 m^3. Interestingly, Mr. Williams gives no foundation for his conclusion that what was mined was in fact mined by the defendant. In the list of **unagreed** documents filed by the claimant on 19 September 2011, this "map" was referred to so that the claimant would have been patently aware of the fact that the same had to be properly proven at the trial. Yet, even though the maker of the document filed a witness statement, he does not identify JC4 as his document nor does he reveal any nexus between himself and JC4. Inexplicably, the court is left to surmise that JC4 is the "map" referred to by Mr. Williams at his paragraph 25.

IS HIS EVIDENCE EXPERT EVIDENCE?

36. This court has no doubt that the opinion expressed with respect to the volume allegedly mined by the defendant which, to my mind, is one of the main intended uses of Mr. Williams’ evidence, amounts to expert evidence since it takes data which is gathered through several unexplained technical instruments and then processes it, using an unexplained engineering computer software program which was then allegedly verified by another unexplained American entity, to churn out a figure upon which the claimant seeks to rely. The process is, on the face of it, more technical than the mere crunching of numbers on a calculator to determine a usable aggregate. It seemingly involves the use of aerial photography upon which opinions and conclusions are drawn by the witness and the interpretation of results from the other methodologies referred to by him to prepare the appropriate variables for what is presumably a sophisticated mathematical interpretation to the extent that a dedicated appropriate computer software program has to be used. This is more than just factual observations and descriptions. This is more than a “mere” survey plan drawn by a surveyor using information which he observed and recorded and translated into his plan. It seems to be highly technical interpretative method used to decipher factual information in a scientific way. To my mind, this calculation involves expert evidence and goes beyond mere factual observation.

37. Bearing in mind that, inexplicably:

37.1. Mr. Williams provided no report in compliance with Part 33.10 **in its entirety**,

37.2. He failed to present the actual instructions upon which he relied or the assumptions upon which his work is premised;

37.3. He failed to disclose the aerial photographs, the hydrographical survey report(s) and any other results whatsoever upon which he relied;

37.4. He failed to properly identify at the CMC stage his reliance upon specialized computer software for the required calculations as well as the names of these programs for verification;

37.5. He failed to identify JC4 as his plan;

37.6. His failure to disclose his familiarity with the requirements of Part 33 and his duty as an expert or that he was even given a copy of Part 33;

37.7. No permission was sought for the use of expert evidence pursuant to Part 33.5 – which specifically requires a report from the expert;

37.8. Mr. William's expert evidence was only disclosed on the 5th March 2012 with the trial fixed for the 22nd May 2012 (which date was shifted to accommodate the claimant's attorney) without any prior opportunity for the engagement of the Part 33 technical dispute resolution process as described above;

This court has no alternative but to exclude the evidence of Mr. Williams as, in the opinion of this court, to allow it would be manifestly unfair to the defendant. The claimant's attorney has submitted that it would have been plain to the defendant that the claimant was relying on Mr. Williams' plan as it was annexed to the statement of case. However, this court is of the view that the defendant was entitled to expect a proper report in keeping with the provisions of Part 33 cited above and that without it, Mr. Williams' plan, which in any event was unagreed, cannot be relied upon for all the reasons given above.

38. The claimant has suggested that this court should exercise its discretion in the manner exercised by my sister Rajnauth Lee J in CV 2010-02387: ***Nirmal Bhaggan v Endeavour Holdings Limited, bearing*** in mind the comments by the Court of Appeal in Civ. App. No. 118 of 2001: ***Vanessa Garcia v NCRHA*** and in Civ. App. No. 216 of 2011: ***Rhonda Taylor v Andy Sookoo & Ors***. The claimant has submitted that if this court is of the view that the evidence is expert in nature, which the claimant's attorney insists is not, then a curative/remedial order should be made to allow the evidence at this stage.

39. This court **might** have been willing to consider such an approach had there been full disclosure at a very early stage of all the data, information and records and processes upon which Mr. Williams relied. In those circumstances, it may have been reasonable for the defendant to have inferred that, notwithstanding the fact that Mr. Williams did not prepare a report as required under part 33, he was able to reach the conclusion that he did in relation to the volume extracted from the site from the disclosed data. But, unfortunately, that is not the case and to allow a supplemental witness statement to be filed on his behalf

at this stage when the trial is imminent and fixed to commence in one month's time would, to my mind, be unfair to the defendant and contrary to the overriding objective. The claimant's suggestion that the trial date fixed for July ought to be vacated in the alternative and adjourned to provide the defendant with an opportunity to deal with Mr. Williams' evidence would, to my mind, be counterproductive to the intentions and objectives of the CPR.

40. Maintaining certainty in relation to trial dates is something that the CPR seeks to establish throughout the breadth of its provisions. The matters raised in the witness statement provided by Mr. Williams are matters which could have and should have been raised earlier but were not. Had the CPR provisions been complied with, and had there been full disclosure and proper compliance with part 33 in particular, this situation would not have occurred. There has been no explanation given for this failure to comply with the provisions of the CPR. Having found that portions of Mr. Williams' evidence include expert evidence, then part 33.5 applies requiring the court to give permission for the use of that evidence. Failure to obtain that information means that the expert evidence cannot be used.

41. Further, part 26.8 applies to those situations which are not specified by any rule, practice direction or court order. In this case, part 33 provides the consequences of failure to comply which is that no party may call an expert witness or put in an expert's report without the court's permission[9]. It also provides that no oral or written expert'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 intends to give[10]. Consequently, to my mind, part 26.8 has limited applicability in this situation.

THE USE OF COMPUTER SOFTWARE FOR ANALYSIS OF INFORMATION

42. What is also remarkable is that the software upon which he relied was not identified prior to his witness statement being filed and therefore its reliability and credibility has not been verified. From the point of view of assistance to this court, such a step should have been done so that the court would be in a position to assign the appropriate weight to the results of the software calculation. It cannot be doubted that software programs can be unreliable especially if they are not recognized in mainstream computing arenas. Generally, it would be advisable for any witness relying upon any software program to analyze information and calculate results upon which the witness seeks to rely to provide details and appropriate scholarly or accepted reviews of that software program to establish its veracity and reliability and acceptance in the particular field.

[9] Part 33.5 (1)
[10] Part 33.5 (4)

CONCLUSIONS IN RELATION TO MR. WILLIAMS' EVIDENCE

43. In the circumstances, therefore, this witness can only legitimately give evidence in respect of matters of which he has first-hand information and experience in relation to this matter. In any event, the claimant's failure to disclose the reports generated by Mr. Williams observations which provided the data for the calculation exercise is a direct non-compliance with the order for disclosure made and therefore part 28.13 is apposite.

44. Consequently, the following paragraphs of his witness statement would be struck out:

    44.1. Paragraphs 20 and 21 – all references to reliance upon photographs or maps which have not been disclosed cannot be allowed in light of the provisions of part 28.13 of the CPR bearing in mind the fact that these photographs were not disclosed despite this court's order for standard disclosure which was made.

    44.2. Paragraph 23 – this refers to the application of the data collected and analyzed and interpreted by the witness to an undisclosed engineering computer program which cannot be allowed for the reasons given above.

    44.3. Paragraph 25 – in so far as it relates to the results calculated in respect of the volume of material removed created by the process which was interpreted at paragraph 23, this evidence is struck out. For clarity, this court is of the view that the claimant is still entitled to rely upon any admissible topographical plan prepared by this witness to the exclusion of information relating to the volume of material removed.

THE OTHER EVIDENTIAL OBJECTIONS

45. This court considered the issue of hearsay in ***Mahadai Baldeosingh v Mahadeo Baldeosingh*** H.C.A No. 3652 of 1993 and will bear the law expressed therein in mind with respect to the objections raised by the defendant.

THE SUPPLEMENTAL AND THE SECOND SUPPLEMENTAL LIST OF DOCUMENTS

46. The supplemental list of documents was filed on 9 February 2012. This list refers to two copies of minutes of meetings held which involved both the claimant and the defendant. It also included a letter from the defendant to the claimant. Even though no explanation was given for the failure to provide those documents earlier, the disclosure of these documents was made prior to the prescribed time limit for the filing and service of witness statements so that the court is of the view that the defendant would not have suffered any prejudice notwithstanding the late disclosure of documents. This is because, since those documents were disclosed, it would have been possible for the defendant to have considered those

documents and to have addressed them directly in the defendant's witness statements. **This list is allowed**.

47. The second supplemental list of documents was filed on 5 March 2012 – the date by which all witness statements had to have been filed – and comprised two letters from the claimant dated 22nd of March 2010 and 21st of June 2010. Again, there was no reason given for this late disclosure of correspondence which ought clearly to have been in the possession of the claimant and which the defendant did not have an opportunity to address prior to the filing of the witness statements. However, these letters seem to have been the pre-cursors for responses for the letters from the Ministry of Energy and Energy Affairs dated the 10th May 201 and the 16th July 2010 and, in those circumstances would be of assistance to this court in understanding the context in which the responses from the Ministry were sent. Consequently, this **second supplemental list is allowed**.

GORDON RICHARDS WITNESS STATEMENT

48. Objection was raised to paragraphs 5 and 6 of Mr. Richards' witness statement. These paragraphs refer to alleged telephonic conversations between Mr. Richards and one Mr. Richard Oliver. Those conversations refer to alleged extensions granted annually by the Ministry of Energy and Energy Affairs to the claimant. They are being relied upon for the truth of the contents namely that extensions were in fact granted.

49. As a result, these hearsay statements are inadmissible without the provision of hearsay statements accounting for the non-attendance of Mr. Oliver. Without some sort of indication being proffered in relation to the reason for the failure to call Mr. Oliver, this court cannot allow this evidence for the truth of its contents. It can however consider allowing the evidence for the fact that conversations were had with Mr. Oliver but that is conditional upon Mr. Oliver attending to give evidence since, without that evidence, what Mr. Richards has to say at paragraphs 5 and 6 would be of no value whatsoever.

50. Consequently, this court will allow those paragraphs to stand for the moment and, in the event that Mr. Oliver does not attend to give evidence, they will be struck out.

JOHN CÁRDENAS WITNESS STATEMENT

51. The objections to Mr. Cárdenas' witness statements were extensive and the court would deal with them seriatim.

PARAGRAPH 8

52. This evidence refers to this witness's experience in dealings with the State and his understanding of the criteria upon which the State issues licenses. In those circumstances, this paragraph is **allowed**.

PARAGRAPH 9

53. Unless agreed, this survey plan cannot be put into evidence in this manner as it is being tendered for the truth of its contents. Consequently, it is inadmissible hearsay and no hearsay notice has been filed to give notice of it being admissible by means of any of the allowable exceptions. This document was prepared by Mr. Rajan in his capacity as a licensed land surveyor and this witness is not qualified to put in or capable of putting in Mr. Rajan's survey plan.

54. This paragraph is **struck out**.

PARAGRAPH 10 & "JC 3"

55. The document referred to at paragraph 10 as exhibit "JC 3" purports to have been signed by a designated Freedom of Information officer[11] and, to my mind, cannot be objected to subject to the provision of the original at the trial. However, this document was not disclosed by the claimant on any of its list of documents and would not be allowed pursuant to Part 28.13.

56. Consequently, this paragraph is **struck out**.

PARAGRAPH 11 & "JC 4"

57. No foundation has been laid for Mr. Cárdenas to competently give this evidence. He describes himself as a marketing manager and does not give any details of surveying expertise at all. Further, the plan referred to and exhibited as "JC 4" was prepared by Mr. Williams who has given a witness statement in these proceedings. Mr. Cárdenas is not competent to annex a copy of Mr. Williams' plan to his witness statement but there should be no objection to the plan being put into evidence through Mr. Williams himself.

58. This paragraph is **struck out**.

PARAGRAPH 12 – LINES 1 – 3

59. Once again, the foundation for these statements is not established nor is this witness's competence or expertise to make such statements established in his witness statement.

60. This paragraph is **struck out**.

PARAGRAPH 15 & "JC 6"

61. "JC 6" is a plan prepared by "Roger Rajan" and this witness is not competent to rely upon this plan for the truth of its contents as he is not the maker nor is an explanation given for the failure of Mr. Rajan to attend to give evidence.

[11] See section 22 of the Freedom of Information Act.

62. This exhibit is **struck out**.

PARAGRAPH 17

63. The final sentence is objected to. This court agrees that this sentence can possibly remain for the reasons given in ***Subramanium*** but, having regard to the fact that this survey by Mr. Rajan as a result of advice received from Mr. Oliver was not pleaded, and to my mind is a material fact, then the sentence should not remain.

64. This sentence is **struck out**.

PARAGRAPHS 27 & 28

65. Having regard to the fact that the second supplemental list of documents is not allowed for the reasons given above, paragraphs 27 and 28 cannot remain in evidence as they refer to documents which were not disclosed and are therefore in breach of part 28.13 of the CPR.

66. These paragraphs are **struck out**.

PARAGRAPH 29

67. Evidence of Mr. Williams' determination of the volume of pitrun allegedly extracted was not allowed for the reason referred to above and Mr. Cárdenas is not in any position to give the evidence set out in paragraph 29 since the calculations and results referred to in this paragraph relate to calculations made and results obtained by Mr. Williams.

68. This paragraph is **struck out**.

PARAGRAPH 30

69. Mr. Cárdenas has described himself as the marketing manager and it is reasonable to assume that he would be familiar with the prices of pitrun so that he is, to my mind, eminently qualified to give this evidence.

70. This paragraph is **allowed**.

PARAGRAPH 33

71. Mr. Cárdenas has not established any foundation for him to give evidence of what transpired in telephonic conversations between Mr. Richard Oliver and Mr. Gordon Richards other than by way of inadmissible hearsay.

72. This paragraph is **struck out**.

PARAGRAPH 34

73. This paragraph deals with this witness's understanding of the claimant's rights under the licence granted on the 5th May 2006 which prompted the issuance of the letter dated the 22nd March 2010 and the subsequent response from the Ministry dated the 10th May 2010 which is referred to at paragraph 35 of his witness statement.

74. This paragraph would be **allowed**.

THE ORDER

75. The court would therefore make the following order.

PAUL WILLIAMS WITNESS STATEMENT

76. The following paragraphs of the witness statement of Paul Williams would be struck out:

76.1. Paragraphs 20 and 21;

76.2. Paragraph 23

76.3. Paragraph 25

77. The supplemental list of documents and the second supplemental list of documents is allowed.

GORDON RICHARDS WITNESS STATEMENT

78. Paragraphs 5 and 6 of his witness statement will be allowed but, in the event that Mr. Oliver does not attend to give evidence, they will be struck out.

JOHN CÁRDENAS WITNESS STATEMENT

79. Paragraph 9 is **struck out**.

80. Paragraph 10 and the exhibit "JC3" are **struck out**.

81. Paragraph 11 and the exhibit "JC4" are **struck out**.

82. Paragraph 12, Lines 1-3 are **struck out**.

83. Paragraph 15 and the exhibit "JC6" are **struck out**.

84. The last sentence of paragraph 17 is **struck out**.

85. Paragraphs 27, 28, 29 and 33 are **struck out**.

Devindra Rampersad J
High Court Judge

ADDENDUM:

86. When dealing with paragraphs 27 and 28 of John Cárdenas affidavit, this court made the following order:

> *"PARAGRAPHS 27 & 28*
>
> *Having regard to the fact that the second supplemental list of documents is not allowed for the reasons given above, paragraphs 27 and 28 cannot remain in evidence as they refer to documents which were not disclosed and are therefore in breach of part 28.13 of the CPR.*
>
> *These paragraphs are **struck out**."*

87. Upon review of this ruling, the court acknowledges having erroneously stated that the second supplemental list of documents was not allowed. In fact, the second supplemental list of documents was allowed for the reasons given above so that these paragraphs ought **not** to have been struck out.