

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV2010-02387

BETWEEN

NIRMAL BHAGGAN

Claimant

AND

ENDEAVOUR HOLDINGS LIMITED

Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Ms. Nalini Sharma instructed by Ms. Andrea Goddard for the Claimant.
Mr. Colin Kangaloo instructed by Ms. Candice Jones for the Defendant.

Dated: 14th May, 2012.

JUDGMENT

THE APPLICATION

1. Before the Court is the Defendant's Amended Notice of Application filed on the 8th May, 2012 seeking under paragraph F an order pursuant to Part 29.5(2) of the Civil Proceedings Rules, 1998 (as amended) ["the CPR"] that the entire witness statement and documents referred to in the witness statement of Mr. Paul Williams ["Mr. Williams"] filed on the 31st May, 2011 be struck out on the following grounds:

- (i) The Claimant did not make an application pursuant to Part 33.5(1) of the CPR to call on Mr. Williams as an expert or put in an expert report; and
- (ii) The Claimant did not give the Defendant notice of the name and address of the expert and the nature of the instructions given to him as required pursuant to Part 33.7(3) of the CPR, and
- (iii) The Witness Statement does not comply with Part 33.10 of the CPR.

THE RULES

2. Part 33 of the CPR governs the use of expert evidence before the court. Part 33.1 provides that it is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.¹ This duty overrides any obligations to the person from whom he has received instructions.² Part 33.2 also requires inter alia that expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.³ An expert witness must provide independent

¹ Sub-rule (1)

² Sub-rule (2)

³ Sub-rule (1)

assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.⁴ An expert witness must state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded view.⁵ Part 33.5 provides that a party cannot call an expert witness or put in an expert's report without the permission of the court.

3. Part 33.7 provides as follows:

- (1) The general rule is that parties must give instructions to a single expert.
- (2) Where, however, experts are instructed by two or more parties such experts must seek to carry out any examination jointly.
- (3) A party instructing an expert must provide him with a copy of this Part and give every other party notice of –
 - (a) the name and address of the expert; or
 - (b) the names and addresses of a number of experts one of whom the party intends to instruct; and
 - (c) the nature of the instructions to be given to him.
- (4) 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 names in the notice; or
 - (c) to instruct another expert to prepare a report jointly with that expert.

⁴ Sub-rule (2)

⁵ Sub-rule (3)

4. In accordance with Part 33.9 an expert must address his report to the court and not to any person from whom he has received instructions.
5. Part 33.10(1) sets out the contents which an expert's report should contain:
 - (a) details of the expert's qualifications;
 - (b) details of any literature or other material which the expert has used in making his report;
 - (c) who carried out any test or experiment which the expert has used for the report;
 - (d) details of the qualifications of the person who carried out any such test or experiment; and
 - (e) where there is a range of opinion on the matters dealt with in the report-
 - (i) summarise the range of opinion; and
 - (ii) give reasons for his opinion.
6. Pursuant to Part 33.10(2), at the end of an expert's report there must be a statement that-
 - (a) the expert understands his duty to the court as set out in rules 33.1 and 33.2;
 - (b) he has complied with that duty;
 - (c) his report includes all matters within his knowledge and area of expertise relevant to the issue on which his expert evidence is given; and
 - (d) he has given details in his report of any matters which to his knowledge might affect the validity of his report.
7. Part 33.10(3) provides that there must be also attached to an expert's report copies of-
 - (a) all written instructions given to the expert;

- (b) any supplemental instructions given to the expert since the original instructions were given; and
- (c) a note of any oral instructions given to the expert,

and the expert must certify that no other instructions than those disclosed have been received by him from the party instructing him, his attorney-at-law or any person acting on behalf of the party.

8. Mr. Kangaloo argued on behalf of the Defendant that the witness statement of Mr. Williams had failed to comply with Part 33.2, Part 33.7, especially sub-rules (3)(a)(b) and (c), Part 33.9 and Part 33.10.

WHETHER MR. WILLIAMS' EVIDENCE IS EXPERT EVIDENCE OR NON-EXPERT OPINION EVIDENCE

9. Mr. Kangaloo also argued that Mr. Williams presented himself as an expert in photogrammetry⁶; that this area required expert evidence and that the Court should ask the question whether it could understand the science of photogrammetry without Mr. Williams' evidence. Both Attorneys cited the judgment of Rampersad J. in the unreported case of **Debbie Mohammed v Archibald Bellamy, the Attorney General and another** [H.C.A. No. 66 of 2002] where the learned Judge outlined the test to determine whether a witness is competent to give evidence as an expert [as set out in the Australian case of *R v Bonython*].⁷ At pages 18-19 of the judgment, Rampersad J. cited the case of ***R (on the application of Doughty) v Ely Magistrates' Court, Crown Prosecution Service (Interested Party)*** [2008] EWHC 522 (Admin) where it was discussed as follows:

⁶ See paras. 1-5 of his witness statement

⁷ See below

The relevant legal principles are not in dispute and can be taken from a judgment of the South Australia Supreme Court in R. v. Bonython [1984] 38 SASR 45, a judgment which has often been quoted in this jurisdiction. The relevant passage is conveniently set out in paras. 1065 of the 2008 edition of Archbold. It is for the Judge to determine whether a witness is competent to give evidence as an expert and for that purpose that are two questions for the Judge to decide:

“The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This ... may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge to the subject to render his opinion of value in resolving the issues before the court.

An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions ... Where the witness possesses the relevant formal qualifications to express an opinion on the subject, an investigation on the voir dire of his methods will rarely be permissible on the issue of his qualifications. There may be greater scope for such examination where the alleged qualifications depended upon experience or informal studies ... Generally speaking, once the qualifications are established, the methodology will be relevant to the weight of the evidence and not to the competence of the witness to express an opinion...”

Whether someone is competent to give expert evidence has to be determined not on a generalized basis but as a focussed question by the court in which the evidence is sought to be given, by reference to the specific issues to which the evidence relates and on the basis of the specific information available to the court as to the witness' knowledge and

expertise. The magistrates in this case had before them, we are told, a document containing details of the claimant's experience and qualifications.

10. Rampersad J. also observed at page 21:

It is therefore more than just desirable for an expert to furnish the court with his/her relevant qualifications, experience and all matters in relation to his/her expertise for the court to decide whether he/she is in fact an expert as professed. In matters in which witness statements are ordered, it should be standard practice for the expert to attach a curriculum vitae [CV] to the statement detailing his/her relevant qualifications, experience and all matters in relation to his/her expertise along with any affiliations and details of any papers or writings or articles or contributions to scientific journal or periodicals made, done or written by that particular expert in that particular area of expertise.

11. On the other hand, Ms. Sharma on behalf of the Claimant argued that Mr. Williams was giving non-expert opinion evidence which concept was discussed by Jones J. in the reported case of **Seereeram Brothers Limited v The Central Tenders Board and Trinidad Contractors Limited** (1992) 2 TTLR 465. At page 475, Jones J considered an objection to a statement contained in an affidavit of the plaintiff's witness that Trinidad Contractors Limited was not experienced in the field of road building as the applicant and had to subcontract out most of its works and also submitted a higher tender. Jones J. made the point that opinion evidence of persons other than experts in the particular field was generally inadmissible on the general principle that witnesses must speak only to that which was directly observed by them. He noted however that there were few exceptions and that opinion evidence by persons other than experts was admitted in order to prove age, speed, weather, handwriting, identity and things of that nature.

12. Jones J. further observed that non-expert opinion evidence was, however, receivable as evidence of the facts intended to be conveyed by that expression of opinion, but such evidence must be approached with the strictest caution. Such statements could only be admissible if the opinion was founded on facts within the actual knowledge of the witness. The witness in such circumstances would therefore be expressing what he actually perceived as a fact and would though given in the form of an expression of opinion not be departing from the rule that he must express facts which he was able of his own knowledge to prove. On that basis, the objection was overruled and the evidence was admitted.

13. The Court has also considered the judgment of Myers J. in the unreported cases of **Chaitlal v Attorney General of Trinidad and Tobago and Mohammed v Attorney General of Trinidad and Tobago** [HCA 2472 of 2003 and HCA 2476 of 2003]. In that judgment, Myers J. considered the issue of non-expert opinion evidence.⁸ He referred to section 3(2) of the Civil Evidence Act, 1972 [U.K.] which allowed to be admitted into evidence a statement of opinion on any relevant matter on which a witness was not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him. Such evidence was admitted as evidence of what the witness personally perceived. Myers J. opined that there was very little difference between that statutory provision in United Kingdom and the common law position in Trinidad and Tobago.

14. In my view, however, the case of **Seereeram Brothers** must be distinguished and Miss Sharma's arguments cannot be sustained. The witness statement of Mr. Williams cannot be described as non-expert opinion evidence. One could really not argue that Mr. Williams was expressing or conveying only what he actually and personally perceived as facts or that his opinion was founded on facts within his own actual knowledge. He is in fact considering certain plans, aerial photographs and such documents [not being the maker of all these documents] as an expert in photogrammetry and bringing his expertise to bear in order to arrive at the conclusions which he set out at paragraph 24 of his witness statement.

⁸ See page 22 and onward

15. At paragraph 24, Mr. Williams concluded that having examined the plans referred to in paragraph 11 of his witness statement and having examined the aerial photographs for the years 1979, 1980, 1986, 1998 and 2003 stereoscopically (in three dimensions) and having examined the Aerial Mosaic of 1966 and the Orthophoto and Digital Mapping of 1994:

- a) The disputed trace existed in the same position on the eastern boundary of the lands of Endeavour Estates Limited since 1901.
- b) That a fence existed on the western edge of the trace as shown on the plans prepared by Land Surveyor Mr. Gill Thomson (now deceased) in 1972 and by me in July 1987. The fence separated the lands of Endeavour Estates from the trace.
- c) That the trace extended from the Endeavour Road on the south to Biljah Road on the north.

16. In my judgment, Mr. Williams' evidence falls squarely within the class of subjects upon which expert testimony is permissible.⁹ In my view, the subject matter of Mr. Williams' witness statement is such that a person without instruction or experience in that area of knowledge would not be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in that area.

WHETHER IT IS TOO LATE FOR THE COURT TO GIVE PERMISSION

17. It is undisputed that no permission was given by the Court for the filing of Mr. Williams' witness statement in accordance with Part 33.5 of the CPR. It is also not disputed that important aspects of Parts 33.7, 33.9 and 33.10 have not been complied with. Nevertheless, Mr. Williams at paragraph 6 of his witness statement made it clear that his involvement in the matter as he understood it was to assist the Court by obtaining and explaining existing aerial photography that

⁹ See the test in *R. v Bonython*

might show the existence of a disputed trace, sometimes referred to as an existing road, or a road reserve by different land surveyors over a number of years. Mr. Williams has also set out in brief at paragraphs 1-4 of his witness statement his qualifications as a chartered surveyor and in photogrammetry. Further, paragraphs 8-23 set out in detail how Mr. Williams carried out this exercise.

18. Several authorities were cited to the Court and these all supported the propositions that permission must be granted to the Court for the filing of expert evidence.¹⁰ In addition, Mr. Kangaloo cited to the Court the dictum of Dean-Armorer J. who said that failure to provide information required by Part 33.10 was fatal and would result in the Court's rejection of the expert report.¹¹

19. The Court has considered the submissions made in this matter and the special circumstances of this case. The witness statement of Mr. Williams was filed and exchanged on the 31st May, 2011 and the original notice of application to strike it out was filed on the 24th June, 2011. The parties had filed other applications seeking to strike out the witness statements of Mr. Hakeeb Nandlal [land surveyor, filed on behalf of the Claimant] and Mr. Fitzherbert Reyes [land surveyor, filed on behalf of the Defendant]. On the 1st November, 2011, Attorneys for the Claimant and the Defendant agreed before the Court that the witness statements of Mr. Nandlal and Mr. Reyes were to be treated as expert witness statements pursuant to Part 33 of the CPR and Attorneys agreed to take no objection to them [although no applications had been made pursuant to Part 33]. As to the witness statement of Mr. Paul Williams, Mr. Kangaloo agreed to investigate whether there was another expert in that field and to report to the Court on the adjourned date. On the adjourned date of the 9th March, 2011, the application was adjourned pending discussions to the 23rd April, 2012. On that date, the Court was informed that Mr. Kangaloo's instructions were that the Defendant could not locate someone to answer Mr.

¹⁰ See in particular the transcript of the Court of Appeal in the procedural appeal of *Vanessa Garcia v The North Central Regional Health Authority* Civ App. 118 of 2011.

¹¹ *Revenales v Charles* CV 2006/03842 para 14

Williams' evidence. Mr. Kangaloo therefore indicated that he was pursuing his application to strike out Mr. Williams' witness statement.

20. The Court has also considered the transcript cited to the Court in the procedural appeal of **Rhonda Taylor v Andy Sookhoo and others** [Civ. App. 216 of 2011]. Although that matter as a whole was eventually settled before the Court of Appeal and there was no determination of the appeal before the Court of Appeal, in my view, there are very helpful and persuasive dicta relevant to the issue of expert evidence. This appeal arose out of the decision of Master Mohammed where she was of the view that although the court could grant permission at any time to allow an expert report, she opined that it was too late to make an application since the court would be deprived of its supervisory function to ensure that several of the requirements with which an expert had to comply were followed. In addition, she found that to allow the offending paragraphs to stand as expert evidence would prejudice the defendants and put the court at a serious disadvantage in assessing the evidence.¹²

21. In **Rhonda Taylor**, during the discourse between the members of the Court of Appeal and Attorneys representing the appellant and the respondents, Kangaloo JA opined that because the relevant rule says that the application could be made at any time, the Master could have made him an expert at that stage, rather than strike out the witness statement.¹³ Kangaloo JA made it clear that it was up to Attorney for the respondents to convince them otherwise.

22. I regard the dicta of Kangaloo JA as highly persuasive. In my view, it is not too late to give permission to the Claimant to treat the witness statement of Mr. Williams as expert evidence and I propose to do so. In my further view, there is nothing unfair, unjust or prejudicial in such a determination since Mr. Williams has in essence set out his qualifications and has made it clear that he understood his duty was to assist the Court (although he does not use the word *duty*). He

¹² Para. 24 of Master Mohammed's judgment [CV 2009-00226]

¹³ See pages 5-6 of the transcript

has also clearly indicated that his instructions were to obtain and explain aerial photography that might show the existence of a disputed trace.¹⁴ Thereafter, Mr. Williams details how he arrived at his conclusions. What he has not done is to exhibit his *curriculum vitae* and he has also failed to attach all written and supplemental instructions given to him. It is my view that in these circumstances I should allow the Claimant to file a supplemental witness statement setting out these matters. These are matters which can be dealt with also by amplification when Mr. Williams is giving oral evidence at the trial, but I am of the view that it would be fairer for the Defendant to have that evidence in advance of the trial. I am of the further view that any issues which still arise as to the evidence of Mr. Williams can be fairly dealt with by cross-examination and closing submissions as to the weight to be placed on his evidence..

23. Accordingly, I will make the appropriate order. In addition, I am of the view that the appropriate order as to costs in these circumstances should be costs in the cause assessed in the sum of \$12,000.00 having regard to the complexity of the matter and other related factors.

ORDER

IT IS HEREBY ORDERED as follows:

(a) Permission is granted to the Claimant to treat the witness statement of Mr. Paul Williams filed on the 31st May, 2011, as expert evidence and to call Mr. Paul Williams as an expert witness pursuant to Part 33.5.

(b) Permission is granted to the Claimant to file and serve the supplemental witness statement of Mr. Paul Williams:

¹⁴ Para. 6 of his witness statement

- (i) exhibiting his *curriculum vitae* and referring to any other matters set out in Part 33.10(1) of the CPR.

- (ii) attaching all written instructions giving to him, any supplemental instructions given to him since the original instructions were given, and a note of any oral instructions given to him.

- (iii) setting out whether he has complied with his duty pursuant to Part 33.10(2) of the CPR.

(c) The costs of this application shall be the Defendant's costs in the cause assessed in the sum of \$12,000.00.

.....

MAUREEN RAJNAUTH-LEE
JUDGE