

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2011/0124

BETWEEN:

LINDE ANTIGUA LIMITED

Claimant

and

**[1] TOM MATHEWS
[2] TERESIA MATTHEWS**

Defendants

Appearances:

Ms E. Ann Henry Q.C. and with her Mrs. Stacy Ann Saunders-Osborne for the claimant

Mr. Charlesworth Browne for the defendants

2013: September 05

DECISION

[1] **HENRY, J.:** This is an application by the defendants for an order:

1. Permitting them to call (4) four witnesses as experts in their respective areas of specialization;
2. That the defendants be at liberty to rely on the respective reports of the named experts included in the agreed bundle of documents filed herein;
3. That the reports be deemed to have been properly served;
4. That the defendants be at liberty to rely on the respective witness statements of the said experts;

5. That the respective witness statements of the said experts be deemed to have been properly filed;
6. That the defendants be relieved from sanctions for not obtaining the court's permission at the Case Management Conference to call the said experts;
7. That the experts be permitted to issue fresh reports in such format as the court may require pursuant to rule 32, Civil Procedure Rules 2000 (CPR) and that the same be admitted as evidence at the trial;
8. Giving such other or further directions in relation to the said witnesses, their reports and witness statements as the court sees fit.

[2] The application is supported by an affidavit of Emerald Brown. In her affidavit she deposes that in order to properly advance the defence and counterclaim of the defendants they have relied on the four experts in their various areas of specialization, namely:

- (a) Dave Martin: construction and repairs of building roofs, identification of roofing defects;
- (b) Tim Carter: Framing and construction of building roofs, the installation of roofing materials: remodeling of building roofs, identification of building defects;
- (c) E. Alicia Kirton-Garraway: Civil and Structural Engineering, Quantity Surveying
- (d) David Watt: Accounting

[3] The affidavit further states that the defendants are seeking the court's permission to put in the reports of the above experts and have the experts give evidence at the trial. The omission of the defendants to apply for permission at the case management conference, they assert, was not intentional but was due to inadvertence at the material time.

[4] Further, the affidavit asserts that the evidence of the experts and the admission of their reports are necessary for the just and expeditious determination of the case. Copies of the reports have, it is asserted, been served on the claimant and were listed in the bundle of Agreed Documents filed on 28th January 2013. Therefore, according to the defendants, granting permission as requested will not prejudice the claimant's case.

[5] By a supplemental affidavit filed 18th April 2013, the Resume of E. Alicia Kirton-Garraway along with a Certificate of recognition of Caribbean Community Skills

qualification was submitted. Also submitted were the Curriculum Vitae of each of the other proposed experts.

- [6] The claimant objects to Dave Martin, Tim Carter and E. Alicia Kirton Garraway being appointed experts. The claimant has no object to David Watt being called an expert in the field of Accounting.
- [7] An affidavit of W. Addison Workman, Principal of Addison Workman Engineers, Civil & Structural Engineering Consultants was filed in opposition to the application. Mr. Workman asserts that while all three proposed experts have scholastic exposure in their relevant fields with varied levels of achievement and have gained experience working in the construction industry, none of the three have any exposure to the responsibilities of structural design. He is of the view that in order to make cogent assessments in this matter, the expert witness must be well versed in structural design. He opines that based on their respective Curricula vitae, they are not suitably qualified to give evidence as experts in this matter.
- [8] It is the claimant's contention that by looking at the Curricula vitae of the proposed expert witnesses, the court ought to be satisfied as to qualification and experience. With regard to David Martin, claimant's position is that his Curriculum Vitae gives the court no assistance. The information supplied therein, it is submitted, only indicates that he has a company that designs and manufactures roofing products. It does not indicate what role he has played in the actual installations. Claimant is insistent that the Mr. Martin cannot be considered to provide expertise on the issues before the court.
- [9] With regard to Mr. Tim Carter, claimant's submission is that his Curriculum Vitae tells the court nothing.
- [10] Mrs. Kirton-Garraway it is submitted is a Quantity Surveyor, which has to do with pricing.
- [11] The claimant also points out that both Mr. Martin and Mr. Carter have had connection with the defendants, the kind and extent of which ought to disqualify them from being expert witnesses in this matter.
- [12] Additionally, the claimant submits that it is offensive to the Rules of the court for parties to agree to the inclusion of expert reports. The tenure of Part 32 of the Rules is that it is the court who determines what expert evidence is to be lead.

Therefore, the claimant asks that the court rejects item 2 of the defendants' application.

[13] Further, the claimant is of the view that, because of the provisions of CPR 32, it is not open to the court to make the orders prayed in items 4 and 5.

[14] In answer to the affidavit of Mr. Workman, the defendants filed affidavits by Eustace I. S. Roberts and Henderson Simon Civil & Structural Engineers. Having inspected the works and having read the Curricula Vitae of the three proposed expert witnesses. They express their considered opinion that the three are suitably qualified, experienced and competent to give evidence as experts in their respective fields of endeavor. They are of the further view that there is absolutely no need for them to be well versed in structural design in order to make pronouncements on defective works.

The Applicable Law

[15] Part 32 of the CPR deals with the provision of expert evidence to assist the court. Expert evidence is restricted to that which is reasonably required to resolve the proceedings justly. The duty of the expert is to help the court impartially on matters relevant to his or her expertise. CPR 32.4 sets out the ways in which the expert's duty to the court is to be carried out. They include:

- 1) 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 demands of the litigation
- 2) An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in the relation to matters within the witness' expertise.

Rule 32.6 provides in part:

- 1) A party may not call an expert witness or put it in the report of an expert witness without the court's permission.
- 2) The general rule is that the court's permission is to be given at a case management conference.
- 3) When a party applies for permission under this rule –
 - a) That party must name the expert witness and identify the nature of his or her expertise; and
 - b) Any permission granted shall be in relation to that expert witness only.

- 4) The oral or written expert witness' evidence may not 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 witness intends to give.

[16] On the issue of competency, the text **Phillips on Evidence, 15th Edition, section 37- 46**, provides the following guidance:

"The competency of the expert is a preliminary question for the judge . . . Though the expert must be "skilled", by special study or experience; the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility. . . Equally, one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training. Police officers habitually give evidence relating to matters about which they have acquired in depth knowledge in the course of their duties . . ."

[17] The court was referred to several cases by the claimant, including **National Justice Compania Naviera SA v Prudential Assurance Company Ltd¹**; **Helicar Bar plc and another v Armchair Passenger Transport Limited²** and **Stewart v The Attorney General³**

[18] In the **National Justice** case, Mr. Justice Cresswell set out the duties and responsibilities of expert witnesses in civil cases. They are consistent with the provisions of part 32 of the CPR.

[19] In the **Helicar Bar** case Nelson J., set out the proper test to be applied in deciding whether the evidence of an expert witness should be excluded on the basis of an alleged connection. He stated:

"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."

¹ (1993) Times, 5 March

² [2003] EWHC 367 (QB)

³ Court of Appeal HCVP 2008/006 issued 16th April 2009

[20] It is therefore for the court to examine the Curricula Vitae of the proposed expert witnesses, determine whether they possess expertise in an area which is reasonably required to resolve the proceedings justly and whether, given all the circumstances, including any connection with the defendants, they understand and are able to help the court impartially on the matters relevant to his expertise.

MR DAVE MARTIN

Qualification

The defendants seek to call Mr. Martin as an expert in "construction and repairs of building roofs, identification of roofing defects".

Mr. Martin's Curriculum Vitae is rather brief. It is set out in full below.

"David G Martin

Cobbs Cross

St. Paul's

Antigua

D.O.B 7th November 1955

1975 I first worked in the construction industry in 1975 for Robert Mc Alpine & Sons as an assistant to a group of civil engineers. While there I was offered a full University scholarship to study civil Engineering.

I elected to continue my studies in Biology attaining a degree in Applied Biology.

1976 – 1979 I continued to work in the construction industry while a student.

1979 After graduating I trained as a plumber.

It should be noted that at that time plumbers did a significant amount of work on roofs including all lead flashings, valley coverings and guttering.

1979 – 1985 I continued full time in construction with my own firm for another 6 years. Projects varied from simple house remodeling to new house builds.

1985 – 1992 I changed full time careers in the 1980's, returned once again and entered the data processing industry eventually becoming a consultants.

1992 – 2001 I came to Antigua in the 1990's initially in the dive industry, I am a professional dive instructor of over 20 years standing.

2001 – 2003 I taught I.T. at Island Academy.

2003 – Present Re entered construction industry full time, initially as a plumber.

I saw a niche in Antigua for a company specializing in roof construction and in 2007, following training in the UK with J.M. Parry and Associates, formed a company designing and manufacturing roofing products.

After a slow start we now work with several architects and installed over 35,000 square feet of roofs in Antigua with a further 17,000 sq ft presently on order.

We are very particular, and taken the time and trouble to look up the various standards and statements of best practice applicable to roofing in the tropics. We have also spent considerable time researching what products are and are not approved for use in the tropics.

Our roofs are and installed to Miami / Dade High Velocity Hurricane Zone codes.”

[21] The court notes that Mr. Martin's education is in Applied Biology followed by training for an unspecified period in plumbing. There was also training for an unspecified period in an undisclosed field with J.M. Parry & Associates. The court concludes that as set out in his curriculum vitae he has not been formally educated in the areas of his proposed expertise. Therefore, in order to make a determination the court must now examine his experience.

[22] I accept that Mr. Martin worked in the construction field for a number of years. However, not every construction worker is a roofing expert. Although building a new house would, I assume, include construction of a roof, no special emphasis is mentioned with regard to roofs or identification of roofing defects during the years 1979 - 1985 and 2003 - 2007.

[23] In 2007 Mr. Martin formed a company “designing and manufacturing roofing products.” No information was disclosed as to nature of the roofing products. The statement “we have installed 35,000 sq ft of roof in Antigua” without further details provides an insufficient basis for the court to conclude that Mr. Martin has expertise in the area of construction and repairs of roofs and identifications of roofing defects.

I see no evidence that he has acquired expert knowledge in this particular sphere through repeated contact during the course of his work.

Connection with the defendants

- [24] The claimant also objected to Mr. Martin on the basis of his connection with the defendants. He had been employed by the defendants intermittently from 2008 to May 2012. It is this employment that the claimant contends further disqualifies him from being called as an expert in this matter.
- [25] The UK Court of Appeals in **Field v Leeds City Council**⁴ dealt with the issue of whether, under the CPR, it is inappropriate for an expert to be called who is an employee of a party to the litigation. There the proposed expert was an employee of the City, who wished to call him as their expert. It was accepted that if an expert is properly qualified to give evidence, then the fact that he is employed by the local authority would not disqualify him. The issue of impartiality goes to the weight of the evidence and not to the admissibility of the evidence⁵.
- [26] Mr. Martin's intermittent employment with the defendant, by itself, would not disqualify him from being called as an expert. But it was essential for Mr. Martin's Curriculum Vitae to clearly demonstrate that by reason of his education or experience, or both, that he had gained expert knowledge in the requested area. This has not been demonstrated. The court is left dissatisfied. Permission for him to be called as an expert therefore cannot be granted.

Mr. Tim Carter

Mr. Carter's Curriculum Vitae is set out in full below:

Tim Carter – Curriculum Vitae

Education:

Bachelor of Science – University of Cincinnati – 1974

Graduate of the State of Ohio Institute – 1976

⁴ Fields v Leeds City Council (2000) 17 EG 165, CA.

⁵ See also Creese v Joslyn Civil Claim No. 243 of 2004, St. Vincent & The Grenadines .

Professional Experience:

Master Custom Home Builder: 1984 – Present

Master Roofer and Roof Cutter: 1990 – Present

Master Carpenter: 1990 – Present

Master Plumber: 1980 – Present

Nationally Syndicated Newspaper Columnist: 1993 – Present

I've installed thousands of squares of asphalt roofing and countless rolls of Grace Ice and Watershield over the past decades.

Credibility:

Named Top 50 Remodelers in USA in 1993 – Remodeling magazine

Worked last year in conjunction with Grace Ice and Watershield Corp. to produce a **series of authoritative step-by-step videos** showing builders and homeowners exactly how Grace Ice and Watershields should be installed. Grace Ice and Watershields APPROVED the videos.

[27] With regard to his education, the Curriculum Vitae neglected to indicate the area of concentration in which he obtained his Bachelor of Science from the University of Cincinnati. Also missing is any information on his studies at the State of Ohio Institute. Therefore, as set out in his Curriculum Vitae, his education does not assist the court in determining his qualification as an expert in the fields requested.

[28] His professional experience is set out in very brief fashion. While he does indicate that from 1990 to present he has experience as a roofer and roof cutter, his failure to give any details of his employment during those 20 years is fatal. The court has little information upon which to judge his experience as a roofer.

He also indicates that he has installed thousands of squares of asphalt roof and countless rolls of Grace Ice and Watershield over the past decades. The Counterclaim alleges that the claimant negligently installed Watershield roofing.

[29] In addition he indicates that he worked in 2012 in conjunction with Grace Ice and Watershield Corp to produce a series of step by step videos showing builders how these products should be installed. The videos were approved by the companies.

[30] The most that the court can say is that Mr. Carter has acquired expert experience in the installation of Grace Ice and Watershield materials.

[31] The fact that Mr. Carter was engaged by the defendants in May 2012 to attempt to identify the cause of leaks to the said roof would not disqualify him from giving expert evidence. If anything it would go to the weight to be given to his evidence.

[32] The court is satisfied that Mr. Tim Carter has acquired expertise in the installation of Grace Ice and Watershield materials. However, insufficient information was given to qualify him as an expert in any other area.

E. Alicia Kirton-Garraway

[33] The defendants desire to call Ms Kirton-Garraway as an expert in civil and structural engineering and quantity surveying.

The educational qualification and work experience sections of her Resume are set out below.

RESUME

EDUCATIONAL QUALIFICATION

<u>Years Attended</u>	<u>Institution</u>	<u>Qualification</u>
1989-1994	Canje Secondary School	5 Subjects CXC
1994-1996	New Amsterdam Technical Institute	Craft Certificate Carpentry and Joinery
1996-1997	New Amsterdam Technical Institute	Technician Certificate Architectural Drawing
1998-2000	Government Technical Institute	Technician Diploma- Building & Civil Engineering
2000-2002	University of Guyana	Diploma- Architecture
2002	Global Institute of Computers	Auto-Cad Drawing

2002-2005	University of Guyana	Bachelor of Engineering (Arch)
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WORK EXPERIENCE

<u>Year</u>	<u>Company</u>	<u>Position</u>
1997-1998	Design Consultants Ltd (G/T-Guyana)	Draftsman & Assistant to Engineer /Quantity Surveyor
2000-2002	Dowding Quantity Surveying (G/T-Guyana)	Assistant Quantity Surveyor
2004-2005	Keystone Design & Reality Co Ltd (Antigua)	Draftsman & Site Supervision
2006-2008	Roberts Construction & Engineering Co Ltd	Assistant Project Manager Assistant
2008-2010	Waterpoint Caribbean Homes Ltd	Construction Manager/Project Manager/ Quantity Surveyor
2011-Present	Roberts Construction & Engineering Co Ltd	Quantity Surveyor Consultant

[34] Of note is the fact that Ms Kirton-Garraway holds a Craft Certificate in Carpentry and Joinery as well as a Diploma in Architecture. In 2005 she earned a Bachelor of Engineering – (Arch). In terms of her work experience, it demonstrates that the vast majority of her experience has been in Quantity Surveying.

[35] Based on her education and experience, the court is satisfied that she has expertise in the area of Quantity Surveying. However, the court can find no exposure to Civil Engineering sufficient to qualify her as an expert in that field, or in any other requested areas other than Quantity Surveying.

[36] The court is satisfied that both Mr. Carter and Ms. Kirton-Garraway understand their duty to the court and would be able to assist the court impartially on matters relevant to their expertise.

[37] Part 32 requires that the evidence of the expert witness be given in a written report, unless the court directs otherwise. The filing of regular witness statements on behalf of these persons before leave was obtained and without direction from the court was an error. Defendants accept that leave ought to have been obtained at

the Case Management Conference. They now seek the required leave and to be relieved from sanctions.

[38] In regard to Tim Carter and Ms. Kirton-Garraway the court now grants leave for both to be called as experts in the fields indicated by the court. The court is of the view that in granting leave at this time the claimant will not be unduly prejudice since the content of their reports are already known to the claimant. Further, the leave now granted will not prejudice any trial dates.

[39] Accordingly, the defendants' application is disposed of as follows:

1. Permission is hereby granted to call the following persons as experts:
 - (a) Tim Carter in the area of the installation of Grace Ice and Wathershield roofing materials.
 - (b) E. Alicia Kirton-Garraway in the area of quantity surveying only.
 - (c) David Watt in the area of Accounting.
2. Permission to call Dave Martin as an expert in the area of construction and repairs of roofs is denied. Defendants are at liberty to call him as a witness.
3. That part of the application for an order that the defendants be at liberty to rely on the respective Reports of the named experts included in the agreed bundle of documents filed on January 28, 2013 is denied. The defendants are to serve the reports of the experts' evidence on the claimant within 14 days of this order. Such Reports must be in accordance with Part 32. The witness statements of Tim Carter, E. Alicia Kirton-Garraway and David Watt previously filed are hereby struck out
4. Items 3, 4, and 5 of the defendant's application are denied.
5. In light of the above, the defendants are relieved from sanctions for not obtaining the court's permission at the Case Management Conference.


CLARE HENRY
High Court Judge
Antigua & Barbuda