

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2015/0121

BETWEEN:

South Asia Energy Ltd.

Claimant

and

Hycarbex American Energy Inc.

Defendant

Appearances:-

Mr. Jomokie Phillips and Ms. Dia Forrester for the Claimant.
Ms. Midge Morton for the Defendant.

2017: September 28

JUDGMENT

- [1] **WILLIAMS, J.:** On the 17th October 2016, the Honorable Master Agnes Actie gave Case Management directions in this matter. As part of those directions, leave was granted to the parties to call expert witnesses on application in accordance with CPR Part 32 and that the parties may apply for further directions and orders, such application to be made on or before 30th December 2016.
- [2] On the 15th December 2016, the parties filed and served witness statements. On the 20th December 2016, the Defendant filed a Notice of application supported by Affidavits and Exhibits for leave of the Court to call an expert witness for the purpose of Court proceedings.

- [3] On the 29th December 2016, the Claimant filed a Notice of Application supported by an Affidavit and Exhibits seeking permission for an expert witness to be appointed.
- [4] On the 13th February 2017, the Claimant filed an Affidavit in response to the Defendant's application dated 20th December 2016 for an appointment of an Expert Witness.
- [5] On the 29th December 2016, the Claimant filed an application dated 20th December 2016 for an expert witness to be appointed.

The Issues

- a) What is the law in relation to the appointment of expert witnesses and the admittance of that witness's evidence in Court?
- b) Have the parties complied with the rules in relation to evidence on foreign law?
- c) Can a lawyer as an officer of the Court provide expert evidence to the Court notwithstanding that the lawyer is a member of a law firm that acts for a party?

The Law

- [6] Parts 31 and 32 of the CPR 2000 are relevant to the applications before the Court.
- [7] CPR 31:2 – **Evidence on questions of Foreign Law**

“A party who intends to adduce evidence on a question of Foreign Law must first give every other party notice of that intention (3) Notice under paragraph (2) must be given not less than 42 days before the hearing at which the party proposes to adduce evidence.”

Rule 32:3 (1) speaks to the Expert's overriding duty to the Court:

1. "It is the duty of an expert witness to help the Court impartially on the matters relevant to his or her expertise."
2. This duty overrides any obligation to the person by whom he or she is instructed or paid.

See: **Whitehouse vs Jordan**¹

[8] Rule 32:4 sets out in detail the way in which the expert's duty to the Court is to be carried out. The rule leaves no doubt about the importance attached to the impartiality of the expert and the need for that impartiality to be seen.

[9] Rule 32:6 gives the Court the power to restrict expert evidence and states that "A party may not call an expert witness or put in the report of an expert witness without the Court's permission."

32.6 (4) states:

"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 intends to give."

[10] Other rules under CPR 32 speak to the contents of the expert's report and that the expert's report must be addressed to the Court.

[11] While there is no doubt that the Court can appoint a person to provide an expert report even though the person's services are paid for by one of the parties providing that the Court is satisfied that the evidence is not likely to be partisan.

[12] However there are several safeguards which seek to ensure that the expert report is objective and these are contained in Part 32:14 (2) and 32:14 (3). These permissions underscore the need for the expert to assist **the Court** and not the party who has instructed the witness.

¹ [1981] 1 WLR 246-256

- [13] In the Claimant's Notice of Application to appoint an Expert witness dated 29th December 2016, there is no notice of the Claimant's intention to put into evidence any finding on a question of Foreign Law, neither has the Claimant sought leave of the Court to make this present application before the Court.
- [14] Part 32:6 of CPR 2000 states that as a general rule, the Court's permission is to be given at a Case Management Conference. However as Justice Blenman observes in **Everton Corenelius trading as VEC Construction Company vs Allan Stevens & Christine Stevens**² at paragraph 40 of the Judgment that; "At case management, the Court determines the issues to be determined and whether there is the need for any expert evidence. There are very good reasons for this."
- [15] In this instant case the learned Master Actie when giving case management directions gave both parties leave to file applications for expert witnesses to be appointed.
- [16] The question is whether the Claimant's application is properly before the Court in that the Claimant has not given any notice of an intention to rely on evidence on issues of Foreign Law or inserted any statement to that effect in the pleadings.
- [17] In the case of **Vinos vs Marks & Spencer**³ May L.J observed at page 789 paragraph J:

"Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not mean, not that the plain meaning should be ignored."
- [18] The Court is satisfied from the issues presented by the Claimant and the Defendant in their pre-trial memoranda that there are several issues relating to Foreign Law to be addressed and that expert evidence is required to assist the Court to deal with matters justly and fairly.

² ANUHCv2006/0234

³ 3 A11 ER 784

[19] The Court also adopts the reasoning of Blenman J (as she then was) in the case of **Everton Cornelius vs Allan Stevens and Christine Stevens** at paragraph 41 of the Judgment;

“Once a person is appointed as an Expert witness he becomes **the Court’s expert**. The expert’s duty is to assist the Court in matters within his expertise; the duty overrides the duty or any obligation to the party who has instructed him. The expert evidence is usually admissible in order to enable the Judge to form a properly informed decision on a technical matter.”

[20] The Law is therefore well settled in relation to **Issue 1** of this matter.

[21] The Claimant has filed an application dated the 29th December 2016 seeking permission for Mr. Bilal Akbar Tarar to be appointed as an expert witness to provide information.

[22] The application is opposed by the Defendant on the ground that the Claimant has not complied with CPR 32:6 (1).

The Defendant contends that the Claimant South Asia Energy Ltd has not sought and obtained the Court’s permission to tender an Expert Report and is therefore debarred from adducing expert evidence without the Court’s permission. The Defendant also states that the Claimant’s application is not properly before the Court for the above stated reason.

[23] Likewise the Claimants vigorously oppose the Defendant Hycarbex-American Energy Inc.’s application dated the 20th December 2016 to permit Mr. Ali Raza an advocate of the Supreme Court of Pakistan to be called as an Expert witness for the purpose of the Court proceedings as this poses a conflict of interest.

[24] The Claimants further contend that there has been a failure on the part of the Defendants to give notice of its intention to adduce evidence of Foreign Law and this has been compounded by a further breach of CPR 31 (2) (4) (b) since there is no indication as to the questions to which Mr. Raza is responding to in his witness

statement and the instructions which were given to him orally or otherwise by Counsel for the Defendants.

[25] The Claimants also submit that Ali Raza has not indicated in his witness statement filed on the 18th December 2016 that he acted as advocate in **South East Asia Energy Holding AG vs Hycarbex-American Energy Ltd and Hycarbex Asia PTE Ltd**⁴; and the **ICC International Arbitration Court Case**⁵ as Counsel, which raises significant and material conflict of interest issues.

[26] The Claimants argue that since Mr. Ali Raza was an advocate on the ICC and argued a particular position, he cannot be deemed to be an individual who can provide impartial, independent, objective and unbiased assistance to the Court as to the interpretation and application of Pakistan Law.

[27] The Claimants further contend that Mr. Raza's partiality and failure to disclose pertinent information is in contravention of the provision of the Rules 31 and 32 of the CPR and indicates that he is not a proper person to provide expert evidence.

Court's analysis

[28] CPR 32:3 provides that an Expert witness has a duty to help the Court impartially which duty overrides any obligation to the person by whom he or she is instructed or paid.

[29] CPR 32:4 provides that the expert evidence 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, and an expert witness must provide independent assistance to the Court by way of objective, unbiased, opinion.

[30] The question is if a lawyer has a duty to the Court, as an officer of the Court, can he or she provide such expert witness assistance even if the lawyer is a member of a law firm that acts for a particular party?

⁴ CM 63 of 2013 Civil Suit No. 105

⁵ No. 18627/ARP/MD/TO

[31] The case of **Glory Advance International Ltd vs Merit Fortune Holdings Ltd & Chu Kong**⁶ per Leon J is instructive;

At paragraph 66 of the Judgment the learned Judge states;

“There may be circumstances in International Commercial Litigation where the exigencies of time and/or cost/ and or available expertise may make it practical if not ideal to consider receiving expert evidence on Foreign Law from a lawyer in a Law firm representing the party, particularly if not on a central issue. It may be that in such contexts, evidence can be received from such a lawyer and given appropriate weight.

[32] In the case of **Arpad Toth vs David Michael Jarman**⁷, the Court of Appeal observed that the presence of a conflict of interest does not automatically disqualify an expert’s opinion. “The key question is whether the expert’s opinion is independent of the parties and the pressures of litigation.”

“However while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is a sufficient condition in itself; where an expert has a material or significant conflict of interest, the Court is likely to decline to act on his evidence or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert witness with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible.”

[33] Counsels for the Claimant make several submissions about the existence of the conflict of interest and the need to disclose it which I accept and concur. The relevant information should have been made available to the other party and the Court to enable it to properly assess the conflict of interest.

See: **Field vs Leeds City Council**⁸

⁶ BVIHCV(com)2015/0090

⁷ [2006] EWCA CIV 1028

⁸ [2000] 17E6 165

- [34] In my considered opinion, the obligation to disclose the existence of a conflict of interest stems from the overriding duty of an expert to which I have already referred, and which is clearly laid down in CPR 32:3. There is also the duty of the parties to help the Court to further the overriding objective of dealing with cases justly. This Court needs to be assisted by information as to any potential conflict of interest so that it can decide for itself whether it should act in reliance on the evidence of that expert.
- [35] The Defendants posit that it has never sought to, nor have made it a surreptitious fact that Mr. Raza and/or his firm has acted for its parent company in relation to matters before other tribunal in other fora. The Defendants rely on the Affidavit of Manfred Welser and the exhibits attached to that Affidavit and contend that there has never been a failure on their part to disclose any facts.
- [36] The Defendants also cite the case of **Anthony Martin vs Lime Dominica Ltd.**⁹ in support of their contention that Mr. Ali Raza is a suitable person to be deemed an expert in the case and that the Claimant has not shown from the evidence that Mr. Raza has any interest in the outcome of the matter before the Court. Moreover the Defendants argue that Mr. Raza has the relevant expertise and has complied with the relevant provisions of CPR 32 as evidenced by paragraph 40 his witness statement.
- [37] At paragraph 13 of the Judgment of Master Actie, in **Martin vs Lime** the learned Master states quite succinctly;
- “The fact that the witness was a past employee and terminated on similar ground should not preclude the Court from appointing her as an expert to present information to assist the Court in determining the issue in dispute. An expert’s connection to the parties or interest in the outcome of the matter; the admissibility and or weight to be given to his/her evidence will normally depend on the nature and extent of the connection and interest, and this is usually explored at the trial itself.

⁹ DOMHCV2013/0407

See: Armchair passenger vs Helical¹⁰

- [38] In my considered opinion, the Court when deciding whether someone should be able to give expert evidence must concern itself with;
- i. Whether it can be demonstrated that the person to be appointed has relevant expertise in an area that is in issue in the case.
 - ii. Whether it can be demonstrated that the proposed expert is aware of their primary duty to the Court if they give expert evidence.

See: Fields Leeds City Council ¹¹

- [39] It must be noted that it is for the Trial Judge to accept or reject the evidence produced by the expert and also to decide what weight to attach to the expert evidence. A Court in the exercise of its discretion may reject altogether evidence tendered by experts whom the Court knows or suspects of having a financial stake in the outcome of the litigation.

- [40] I am buttressed in my view by the decision in Gladys Scatliffe vs The BVI Health Services Authority¹² per Ellis J at paragraph 43 of her Judgment;

“The real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may from its own judgment by its own observation of those materials. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Court with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria.”

See: Titli vs Jones Air ¹³

¹⁰ [2003] EWHC 367 Q.B

¹¹ [1999] CPLR 833

¹² BVIHCV2011/0087

- [41] The Court is guided by the authorities that have settled the Law in this area and is therefore minded to exercise its discretion positively and taking into account the totality of the circumstances including the overriding objective to deal with cases justly.
- [42] Accordingly the Court will grant leave to have Mr. Ali Raza provide an expert report to the Court as the evidence presented by the Claimants to debar him from giving expert evidence on Foreign Law is neither cogent nor compelling to the Court.
- [43] The Claimant on the other hand has not given any notice of an intention to rely on evidence on questions of Foreign Law and has contravened CPR 31:2; there is also no statement to that effect in the pleadings of the Claimant.
- [44] In the circumstances, the Claimant must first seek relief from sanctions pursuant to CPR 26:7 and 26:8 before making its application dated the 29th December 2016, since they have not complied with the Rules in relation to evidence to be given on Foreign Law.

Conclusion

- [45] In view of the foregoing the Court orders as follows:
- a) The Defendant is permitted to call Mr. Mohammed Ali Raza, an Advocate of the Supreme Court of Pakistan as an expert witness for the purpose of these Court proceedings.
 - b) The Defendant is granted permission to provide copies of documents referred to in the witness statement of Mr. Raza in accordance with CPR 32:14 (4) and 32:14 (5) and to file and serve the expert's report within 28 days of the date of this Order.
 - c) The Claimant's Notice of Application dated 29th December 2016 is hereby struck out.

- d) The matter shall be listed for further case management on a date to be fixed by the Registrar in the new term.
- e) Costs to be costs in the cause.

[46] I thank learned Counsel on both sides for their very helpful submissions.

Lorraine Williams
High Court Judge

By the Court

Registrar