EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

ST. CHRSITOPHER AND NEVIS

SKBHCVAP2017/0016

BETWEEN

SOUTH ASIA ENERGY LIMITED

Appellant

and

HYCARBEX-AMERICAN ENERGY INC

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On written submissions:

Ms. Dia C. Forrester and Ms. Michelle Jan Slack for the Appellant
Ms. Midge A. Morton for the Respondent.

2018: April 13.

Civil appeal – Evidence – Expert witness on questions of foreign law – Parts 31 and 32 of Civil Procedure Rules 2000 ("CPR") – Expert witness' undisclosed material conflict of interest – Whether learned judge erred in exercise of her discretion in allowing respondent's expert witness to be called when he had a conflict of interest which was not disclosed – Whether learned judge erred in disallowing appellant's expert witness to be called on the basis of non-compliance with CPR Parts 31 and 32

The appellant, South Asia East Energy Limited ("SAE") commenced a claim against the respondent, Hycarbex-American Energy Inc. ("Hycarbex") for damages arising from breach of a series of contracts, the benefit of which SAE says was assigned to it for which Hycarbex is liable. Hycarbex denies liability and asserts that any agreements executed for and on its behalf were without its authority and that it was a victim of fraud with the collusion of officers of SAE. Hycarbex relies on a final partial International Chamber of Commerce ("ICC") Award which it says, declared the agreements to be null and void based on fraud.

At a case management conference, the learned master, on giving directions and orders in respect of matters such as disclosure and the filing of witness statements, granted leave to the parties to call expert witnesses on application in accordance with Part 32 of the Civil Procedure Rules 2000 ("CPR"). By way of notice of application, Hycarbex applied for it to be permitted to call one Mr. Mohammed Ali–Raza ("Mr. Raza"), an advocate of the Supreme Court of Pakistan, as an expert witness. Additionally, Hycarbex sought 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). A witness statement had been previously filed by Mr. Raza within the time given by the master for filing witness statements. SAE also applied on notice to call Mr. Bilal Tarar ("Mr. Tarar") as its expert for the purpose of adducing evidence on various questions of foreign law.

The applications were heard simultaneously on18th March 2017, with each party opposing the other party's application. SAE's opposition was mainly on the basis that Mr. Raza was a person with a significant conflict of interest given his advocacy and appearances on behalf of Hycarbex's parent company before the ICC Tribunal, which was a matter at the core of the instant proceedings, coupled with the fact that Hycarbex had failed to disclose to the court the conflict of interest given his active role in the ICC proceedings in which he argued for a particular position. The learned judge found that the evidence produced by SAE seeking to debar Mr. Raza was neither cogent nor compelling and accordingly granted Hycarbex's application to call Mr. Raza as an expert witness. However, the learned judge refused SAE's application on the bases that SAE had failed to give notice of its intention to adduce evidence on foreign law, pursuant to CPR 31.2 and that it had failed to plead foreign law. The learned judge also stated that SAE would be required to seek relief from sanctions pursuant to CPR 26.7 and 26.8 before making its application.

SAE, being dissatisfied with the judge's decision, appealed. Its main complaints were that the learned trial judge erred in the exercise of her discretion in (a) allowing Mr. Raza to be called as an expert witness on foreign law, where he had a significant conflict of interest and (b) in circumstances where Hycarbex had failed to disclose it; and (c) in striking out its application to call an expert witness on an improper procedural basis.

Held: Allowing the appeal and making the orders set out in paragraph 34 of the judgment, that:

1. 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. A party wishing to call an expert with a potential conflict of interest (other than of an obviously immaterial kind should disclose details of that conflict at the earliest opportunity. Part 32 of the Civil Procedure Rules 2000 ("CPR") contains safeguards in respect of the receipt and use by the court of expert evidence.

   Toth v Jarman [2006] EWCA Civ 1028 applied.
2. In the case at bar, the evidence put forward by SAE that Mr. Raza had acted as advocate in the arbitration on behalf of Hycarbex's parent company was not disputed. Nor was it in dispute that Hycarbex was placing great reliance on the

final partial award of the ICC Arbitration as a primary basis for resisting SAE's claim. This raises a serious conflict of interest on the part of Mr. Raza. It was therefore necessary for Hycarbex to expressly and clearly bring to the court's attention any information which posed or had the potential of posing a conflict of interest in respect of Mr. Raza and it failed to do so. Accordingly, the learned judge committed an error of principle in her consideration of the issue raised and failed to have regard to the relevant matters in exercising her discretion.

3. CPR 32.6 contemplates that where a party intends to call an expert witness, the party must first seek permission and place before the court, the name of the expert and identify the nature of his/her expertise. The court will then assess whether the person put forward satisfies it as to the nature of the expertise being sought, having regard to the parties' pleaded cases. If so satisfied, the court then fixes a period for the submission of the expert's report. It is impermissible for a party to put in a witness statement and then seek thereafter to have the witness statement deemed an expert report. Therefore, the procedure adopted by Hycarbex, for permission to call its expert witness was flawed having regard to CPR 32.6.

4. CPR 31.2(2) states that a party who intends to adduce evidence on a question of foreign law must first give every other party notice of that intention. The Rules do not provide for the notice to be in any particular form. CPR 31.2(3) states that the notice must be given not less than 42 days before the hearing at which the parties propose to adduce the evidence. In this case, the notices of application filed and served by both sides in circumstances where no trial date had been fixed was sufficient notice for the purposes of CPR 31.2(3). Thus, SAE had complied with CPR 31.2 and there was no basis on which the judge could have dismissed SAE'S application and allowed Hycarbex's when both applications were made in a similar manner.

JUDGMENT

[1] **PEREIRA, CJ:** This is a judgment of the Court in respect of which all members of the panel have had input. An interlocutory appeal was brought by the appellant, South Asia Energy Inc. ("SAE"), against the decision of the learned judge made on 28th September 2017, in which she allowed the respondent, Hycarbex-American Energy Inc. ("Hycarbex"), to call one Mohammed Ali-Raza ("Mr. Raza") as an expert witness on its behalf and disallowed SAE from calling Mr. Bilal Akbar Tarar ("Mr. Tarar") on its behalf as an expert witness to give evidence on a question of foreign law.

[2] **Background summary**

A short background summary is set out for placing the appeal in context. SAE brought a claim against Hycarbex for damages arising from breach of a series of contracts, the benefit of which SAE says was assigned to it for which Hycarbex is liable. Hycarbex, in its defence denies liability and essentially asserts that any agreements executed for and on its behalf were without its authority and that it was a victim of fraud with the collusion of officers of SAE. Hycarbex relies on a final partial International Chamber of Commerce ("ICC") Award dated 15th April 2015 which it says, declared the agreements to be null and void on the basis of fraud. SAE, in its reply, denied any collusion or involvement in any fraud. SAE denied further that it was not a party to the arbitration giving rise to the final partial award but also raised issues as to the legal effect on the agreements of the ICC award and challenged further the want of authority of various officers as asserted by Hycarbex. The pleadings were thus so joined.

[3] At a case management conference held on 17th October 2016, the learned master on giving directions and orders in respect of matters such as disclosure and the filing of witness statements, granted 'leave to the parties to call expert witnesses on application in accordance with CPR [Part] 32'. Additionally, she ordered that the parties may apply for further directions and orders on or before 30th December 2016.

[4] On 20th December 2016, Hycarbex applied on notice that it be permitted to call Mr. Raza, an advocate of the Supreme Court of Pakistan, as an expert witness 'for the 'purpose of the court proceedings herein.' Additionally, Hycarbex sought permission to provide copies of documents referred to in the witness statement of Mr. Raza 'in accordance with rules 32.14(4) and 32.14(5) of the **Civil Procedure Rules 2000** ("CPR"). A witness statement had been previously filed by Mr. Raza within the time given by the master for filing witness statements. On 29th December 2016, SAE also applied on notice to call Mr. Tarar as its expert for the purpose of adducing evidence on various questions of foreign law. The questions

on which the expert's evidence was to be adduced were attached to the application.

[5] Both applications came on for hearing before the learned judge on 18th March 2017, each party opposing the other party's application for the calling of their respective expert. SAE opposed Hycarbex's application mainly on the basis that Mr. Raza was a person with a significant conflict of interest given his advocacy and appearances on behalf of Hycarbex before the ICC Tribunal, which was a matter at the core of the instant proceedings, coupled with the fact that Hycarbex had failed to disclose to the court the conflict of interest given his active role in the ICC proceedings in which he argued for a particular position and being an expert to the court in these proceedings which required an unbiased and independent opinion. The learned judge rendered her decision on the applications on 28th September 2017. In essence, she granted Hycarbex's application but struck out SAE's application.

[6] The bases on which the learned judge refused the application of SAE, was that it had failed to give notice of its intention to adduce foreign evidence on foreign law, pursuant to CPR 31.2 and that it had failed to plead foreign law. The learned judge also stated that SAE would be required to seek relief from sanctions pursuant to CPR 26.7 and 26.8.

[7] The learned judge, in paragraphs 30-42 of her judgment, considered the issue of a conflict of interest in relation to Mr. Raza, as well as the fact that Hycarbex had failed to disclose to the court Mr. Raza's conflict of interest.

[8] At paragraph 33, the learned judge accepted and concurred that the existence of a conflict of interest ought to have been disclosed to enable the court to properly assess the conflict of interest. In support, the learned judge cited the case of **Fields v Leeds City Council**.[1]

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[1] [1999] All ER (D) 1406.

[9] Then at paragraph 38 the learned judge, relying on **Fields v Leeds City Council**, stated the matters to which she considered the court should be concerned in these terms:

> "… 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."

[10] At paragraph 39 the learned judge then observed this, '… 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…' This tends to suggest that the learned judge may have considered the issue to be one to be determined at trial and to decide at that stage what weight should be given to the expert evidence.

[11] In granting permission to Hycarbex to call Mr. Raza as an expert witness, the learned judge concluded at paragraph 42 that the evidence produced by SAE seeking to debar him was 'neither cogent nor compelling.'

The Grounds of Appeal

[12] SAE's complaints in a nutshell are that the learned trial judge erred in the exercise of her discretion in (a) allowing Mr. Raza to be called as an expert witness on foreign law, where he had a significant conflict of interest and (b) in circumstances where Hycarbex had failed to disclose it.

[13] Additionally, SAE complains that Hycarbex failed to comply with CPR Parts 31 and 32 in respect of its intention to have Mr. Raza as an expert and that its application to call Mr. Tarar as an expert, made in a similar manner as Hycarbex, was struck out for failure to comply with CPR Parts 31 and 32.

[14] **The conflict of interest**

The decision of Court of Appeal of England in **Toth v Jarman**[2] provides useful guidance when a court is considering the appointment of an expert. There the court observed in essence that:

(a) An expert witness in the court should never assume the role of an advocate;

(b) 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. 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 observation was more forcefully made by the UK Supreme Court in **Kennedy v Cordia (Services) LLP**[3] at paragraph 51, under the rubric "Impartiality and other duties" where Lords Reid and Hodge observed:

> "If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible: *Toth v Jarman* [2006] EWCA Civ 1028; [2006] 4 All ER 1276, paras 100-102. In *Field v Leeds City Council* [2000] 1 EGLR 54, the Court of Appeal upheld the decision of a district judge, who, having ordered the Council to provide an independent surveyor's report, excluded at an interim hearing the evidence of a surveyor whom the Council proposed to lead in evidence on the ground that his impartiality had not been demonstrated. It is unlikely that the court could make such a prior ruling on admissibility in those Scottish procedures in which there is as yet no judicial case management. But the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence."

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[2] [2006] EWCA Civ 1028.

[3] (2016) UKSC 6.

(c) A party wishing to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should disclose details of that conflict at the earliest opportunity.

(d) Similarly, an opposing party should disclose any objection it may have to the admission of expert evidence at the earliest opportunity.

We are in full agreement with these guiding principles having regard to the overriding objective of dealing with cases justly declared in the CPR, and further buttressed by the safeguards contained in CPR Part 32 in respect of the receipt and use by the court of expert evidence.

[15] CPR 32.4 (1) and (2) state:

> "(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 relation to matters within the witness' expertise."

[16] Although the learned judge considered the relevant case law, it is apparent that she failed to carry out the necessary assessment of the evidence before her, so as decide whether it was demonstrated that Mr. Raza had a significant conflict of interest. This would have required her to consider the very nature of the allegations made in the context of the parties' pleaded cases and to assess whether the allegations were central to the issues raised in the parties' cases.

[17] Having regard to what the learned judge stated at paragraph 38, in our view she narrowed improperly the scope of her inquiry in evaluating the matters put forward in addressing the question which she had to decide. To simply say that she found the evidence relied on by SAE as not being cogent and compelling, without stating why she so found is not in our respectful view sufficient. This is particularly so in light of the fact that statements made by SAE as to Mr. Raza's role in the prior ICC

arbitration were not seriously disputed by Hycarbex. Nor was it in dispute that Hycarbex was placing great reliance on the final partial award of the ICC arbitration as a primary basis for resisting SAE's claim.

[18] Further, the learned judge appears to have been swayed by a statement speaking to Mr. Raza's conflict of interest as being one made on behalf of Hycarbex, when in fact it was made by Mr. Welser, on behalf of SAE, in pointing out to the court Mr. Raza's conflict of interest. This led the learned judge to accept incorrectly at paragraph 35 that there was never a failure on the part of Hycarbex 'to disclose any facts'.

[19] It is not disputed that Hycarbex relied solely by way of disclosure from which it says that the court could have gleaned such conflicts, on the list of documents filed and exchanged by Hycarbex pursuant to standard disclosure orders. But in our view, this would not suffice given the unyielding obligations, imposed by CPR part 32.4(1) which states 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 demands of the litigation' coupled with CPR 32. 4(2). In our view, it was necessary for Hycarbex to expressly and clearly bring to the court's attention any and all information which posed or had the potential of posing a conflict of interest in respect of Mr. Raza.

[20] The crux of Hycarbex's case before the court was that the loan agreements in respect of which SAE was pursuing its claim against it, were in essence, agreements procured by fraud and that the contracts forming the subject matter and that an ICC arbitral tribunal, in its partial final award in case no: 18627/ARP/MD/To **the American Energy Group Limited vs Hycarbex American Energy Inc, Hydro Tur Ltd and Hycarbex Asia Pte Ltd Singapore**, had ruled that the agreements were void on the basis of fraud.

[21] The evidence put forward by SAE that Mr. Raza had acted as the oral and written advocate in the arbitration on behalf of Hycarbex's parent company was not disputed.

[22] Given the core issue raised by Hycarbex in relation to its parent company and the pleaded case that it had been a victim of fraud making the agreements sued upon by SAE null and void on the ground of fraud and the fact that Mr. Raza was the written and oral advocate on behalf of Hycarbex's parent company in respect of the ICC Arbitration which gave its partial award in this very issue, to our minds raise a serious conflict of interest on the part of Mr. Raza. It was, in our view, necessary for Hycarbex to bring this material information to the attention of the court and it failed to do so.

[23] Even though the learned trial judge accepted that Hycarbex needed to disclose this conflict of interest, had she carried the assessment so as to determine whether the conflict was of a significant or material nature as distinct from one which was obviously immaterial, coupled with the fact of non-disclosure on its part, she would have been led irresistibly to the conclusion that Mr. Raza had not met the threshold of being and being seen to be independent and uninfluenced by the demands of the litigation. This is particularly so given the active role he played as advocate for Hycarbex's parent company in respect of the very matters which are centrally in issue in these proceedings.

[24] It is clear to us that the learned judge failed to carry out this critical exercise, and failed to take relevant matters into account. Accordingly, in our view, she committed an error of principle, in her consideration of the issue raised and failed to have regard to the relevant matters in exercising her discretion as she did.

[25] The court having found that the evidence produced by SAE demonstrated that Mr. Raza has a significant conflict of interest, coupled with the fact that this conflict of interest was not disclosed, is sufficient for this Court to exercise its discretion in

not permitting Mr. Raza to be called as an expert witness. The Court would accordingly set aside the learned judge's order permitting Mr. Raza to be called as an expert witness.

Non-compliance with CPR Part 32

[26] For completeness, the Court would point out that the procedure adopted by Hycarbex, for permission to call its expert witness was in any event flawed having regard to CPR 32.6. CPR 32.6 contemplates that where a party intends to call an expert witness, the party must first seek permission and place before the court, the name of the expert and identify the nature of his/her expertise. On hearing the application for permission, the court will then assess whether the person put forward, satisfies it as to the nature of the expertise being sought, having regard to the parties' pleaded cases. If so satisfied, the court then fixes a period for the submission of the expert's report.

[27] What is not permissible is for a party to put in a witness statement, and then seek thereafter to have the witness statement deemed an expert report, because, at the filing of a witness statement it maybe that the party and indeed the witness making the statement (which would invariably be statements of fact and not opinion) would not have had regard to the safeguards contained in CPR 32.14 for providing expert evidence and which would not ordinarily come into play for the purpose of a witness statement.

CPR Part 31- 32 in respect of SAE's Application

[28] CPR 31.2(2) states: '[a] party who intends to adduce evidence on a question of foreign law must first give every other party notice of that intention'. Hycarbex and SAE each issued an application on notice on 20th and 29th December 2016, respectively, which was within the time fixed by the master's order for so doing, seeking to call an expert witness. It is not clear the basis on which Hycarbex's notice of application was sufficient notice for the purposes of CPR 31.2(3) but SAE's was not, as, in essence, they filed the applications for similar purposes

without issuing any other notice. CPR 31.2 does not provide for the notice to be in any particular form. CPR 31.2(3) stipulates that notice for the purpose of adducing evidence in respect of a question of law must be given not less than 42 days before the hearing at which the parties propose to adduce the evidence.

[29] Here it was common ground that the expert evidence being sought to be adduced was for use at the trial of the action. The Court also observes that as at the date of the applications no trial date had as yet been fixed. In our view therefore, the notices of application served and filed by both sides where no trial date had yet been fixed and within the time given by the master, was sufficient notice for the purposes of CPR 31.2(3).

[30] Furthermore, both parties pleaded matters of foreign law, and thus the learned judge erred in holding that SAE had failed to give notice pursuant to CPR 31.2, while not similarly holding for Hycarbex, and that matters of foreign law had not been pleaded on the part of SAE, when a perusal of the pleadings (SAE's reply) showed that it had.

[31] On the evidence, there is nothing to suggest that the expert as to foreign law sought to be called by SAE was in any way not qualified to be so called. No issue was taken as to his qualification or suitability by Hycarbex. Rather, the application was essentially opposed on procedural grounds repeated before this Court. This led the learned judge to simply dismiss SAE's application on the technical basis of a failure to comply with CPR 31.2. Having found that there was compliance with CPR 31.2, we hold that this was not a proper basis for dismissing SAE's application and more so having failed to apply the same treatment to Hycarbex.

[32] Furthermore, SAE's application would have met the requirements of CPR 32.6 by putting forward the name of the expert, the area of expertise and the questions of foreign law on which SAE was seeking to adduce evidence. For these reasons and in the exercise of our discretion, we hold that SAE has met the requirements

for the grant of permission to call Mr. Tarar as an expert witness to adduce evidence on a question of foreign law and we would so order.

[33] For completeness, we observe that SAE would not have required relief from sanctions as stated by the learned judge as no sanction had been imposed by any rule, direction, the master's order or any other order of the court.[4]

Conclusion:

[34] For the reasons given, the appeal is allowed and the following orders made:

(1) The permission granted to Hycarbex to call Mr. Raza as an expert witness is hereby set aside.

(2) Permission is hereby granted to SAE to call Mr. Tarar as an expert witness, the conditions of CPR Part 31.2 and the relevant provisions of CPR Part 32 having being satisfied.

(3) The expert shall file and serve his report within 45 days of the date of this order.

[4] See: The Attorney General v Keron Matthews [2011] UKPC 38 and Carleen Pemberton v Mark Brantley SKBHCVAP2011/0009 (delivered 14th October 2011, unreported)

(4) The costs of this appeal shall be borne by the respondent, Hycarbex, to be assessed unless agreed within 21 days.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar