[2013] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 226/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JOAN ALLEN**	**1ST APPLICANT**
	LOUISE JOHNSON	**2ND APPLICANT**
AND	**ROWAN MULLINGS**	**RESPONDENT**

Gayle Nelson and Miss Analisa Chapman instructed by Gayle Nelson and Company for the applicants

Miss Gillian Mullings instructed by Naylor and Mullings for the respondent

27 February, 1, 8 March and 31 July 2013

MORRISON JA

[1] I have read in draft the reasons for judgment of my sister Phillips JA and agree with her reasoning. I have nothing to add.

PHILLIPS JA

[2] This matter raises the issue as to whether a party can obtain an order during the course of a trial to adduce expert evidence at that trial. The trial judge in the instant case refused such an application. He also ruled that leave to appeal could not properly be granted in respect of a ruling made on the admissibility/inadmissibility of evidence, or any ruling made during a trial. He found that such a ruling would not constitute a proper basis for a procedural appeal under rules 1.1(8) and 2.4 of the Court of Appeal Rules (CAR).

[3] The application which therefore came before this court was initially an application for permission to appeal, but, by and with the consent of counsel for both parties and the approval of the court, the application for permission to appeal, if granted, was to be treated as the appeal itself.

[4] The decision of K Anderson J was given on 18 October 2012, wherein he specifically denied:

(i) the applicants' oral application that a letter dated 24 January 2012 and a surveyor's report dated 10 January 2012 prepared by Isa Angulu, commissioned land surveyor, enclosed therein, be deemed expert evidence and/or that the relevant sections of the letter constitute evidence of the primary facts contained therein; and

(ii) the applicants' amended notice of application for court orders filed on 20 July 2012 requesting permission to obtain an expert report from the said

Isa Angulu in respect of whether the concrete wall at the rear of premises between 115 and 117 East Mountain Pride Avenue was situated within the boundary of the applicants' premises.

As indicated above, the learned judge also found that he had no jurisdiction to grant leave to appeal in respect of interim orders made during the course of the trial.

[5] Although the applicants had not yet received the written reasons of K Anderson J (which were provided to us at the commencement of the appeal for our deliberations) there were 16 proposed grounds of appeal which were set out as the grounds of the application for permission to appeal. The main grounds are the following six:

> "(a) The learned Judge erred in law and in fact in finding that, in circumstances where the Court-appointed Independent Expert had been found not to be qualified to address a crucial issue necessary to determine the Defendants' counterclaim (and who, at all material times had been thought by the court to be qualified to address that issue), the Defendants should not be granted permission to produce and put forward an Expert Report to address that outstanding issue;
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> (b) The learned Judge erred in law and in fact in not permitting the Defendants to put forward crucial evidence that was necessary to assist the Court in determining the merits of the Counterclaim and the issue of encroachment claimed therein;
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> (c) The learned Judge erred in law and in fact in not finding that the overriding objective and the overriding interests of justice were aimed at determining a matter based on its merits, and that permitting the Defendants to prepare and produce an expert report on an issue that was not addressed by the court-appointed expert and could not be so addressed due to lack of qualification, was in furtherance of these objectives;

(e) The learned Judge erred in fact and in law in failing to properly consider that although the trial of the matter herein was part-heard, the relevant foundation had been laid through evidence marshalled from Mr Easton Douglas, the court-appointed expert, concerning the qualifications and experience of Mr Angulu; also there had been marshalling of evidence from the 1st defendant that she had commissioned Mr Angulu to do a report; and that he had produced a report; and for the Defendants, oral submissions and applications had been made concerning Mr Angulu's qualifications based on the evidence of Mr Easton Douglas and an Affidavit of Analisa Chapman; and the Court was made aware of the deficiency in the relevant independent expert's report several months before the Defendants were scheduled to resume their case in October 2012.

(m) The learned Judge erred in law and in fact in finding that a desire to avoid any delays or adjournments of the matter outweighed the need to allow the Defendants' evidence which would assist the court in its overriding objective of a just determination of the matter and would prevent the need for further litigation in the future.

(o) The learned Judge erred in law in finding that the Court has no jurisdiction to grant leave to appeal in respect of the orders it made concerning the Defendants' applications, as they were orders made during the course of trial."

[6] Having heard the application for permission to appeal on 8 March 2013, and pursuant to the agreed procedure as mentioned previously, we made the following orders:

> "Application for leave to appeal is granted. The hearing of the application is treated as the hearing of the appeal which is allowed.
>
> The order of Anderson J made on the 18 October, 2012 is set aside and the following orders are made:

1. Mr Isa Angulu, Commissioned Land Surveyor of Angulu and Associates, is hereby deemed to be an expert for the purposes of these proceedings;

2. The said Mr Isa Angulu shall prepare and produce an expert report by 30th day of April 2013 in respect of:

   a. the registered boundaries between the premises at 115 and 117 East Mountain Pride Avenue, and

   b. the location and height of the concrete wall at the rear of the said premises;

3. There shall be no order as to costs for the application for leave to appeal and the appeal."

These are the reasons we promised to provide.

The proceedings

[7] The matter has had a rather unusual history through the courts. The claim was originally filed by the respondent against the applicants on 6 May 2009 asking that they:

a. remove and/or destroy the portion of the dividing wall which was in breach of the restrictive covenants on the certificates of title for the properties owned by the parties which adjoin each other;

b. construct a proper trench and/or other landscaping feature to prevent the accumulation of water in the area behind the boundary wall and onto the respondent's property;

c. clean the trench and the trench area behind the boundary wall in order to prevent flooding and the accumulation of water on the premises; and

d. maintain the trench and access to it in clean and clear condition.

The respondent also sought, inter alia, an order for damages for breach of covenant and damage to his premises.

[8] The applicants' defence and counterclaim were not filed until 19 February 2010, and by then for the purposes of this application much had occurred. Of particular importance, Rattray J had on 28 October 2009, on the respondent's interim application for a mandatory injunction, inter alia, but with counsel for the applicants present, appointed Mr Easton Douglas as an expert witness to determine whether there was a breach of covenant affecting the respondent's certificate of title. Other orders were made with regard to the timetable for the production of Mr Douglas' expert report, for questions to be posed to him, and for answers to be submitted by him. Affidavits and submissions were also to be filed and the matter was adjourned to be heard on 26 April 2010.

[9] The 1st report of Mr Douglas dated 28 January 2010, was served on the applicants' attorneys on 29 January 2010, in keeping with the court's directed schedule. Prior to that, however, the applicants' attorney had submitted to Mr Douglas, surveyor's identification reports from Donald Simpson and Mr Angulu, commissioned land

surveyors on 3 November 2009, and Mr Douglas had also attended the premises of the parties and conducted a survey of the same on 11 January 2010. A defence to counterclaim was filed on 20 March 2010 and the respondent's application scheduled for 26 April 2010 was adjourned on that date, heard by Campbell J on 30 April 2010 and the mandatory injunction which had been asked for was refused.

[10] Campbell J adjourned the case management conference to facilitate mediation, which occurred on 9 November 2010, but which was unsuccessful. The case management conference took place before Sinclair-Haynes J and among the orders made was that the trial date was set for 10 and 11 February 2011 with time-tables for standard disclosure, inspection, production and service of witness statements. However, an oral application by the applicants' attorneys for a further expert report to be permitted was not heard by the judge due to a conflict of interest.

[11] On 23 November 2010 Edwards J ordered, on the basis of an application before her, that the report by the court-appointed expert had been done in respect of the interim application then before the court, and before the applicants' pleadings had been filed, that Mr Douglas, chartered surveyor (who was present at the application), conduct a further survey of the premises. It was ordered that the parties submit their respective contentions to him and that Mr Douglas attend on the premises for a further survey on 2 December 2010 at noon. The draft expert report was to be submitted by 7 December 2010, questions on the same by 21 December 2010, and the final expert report was to be submitted by 10 January 2011.

[12] Prior to the production of the final report, it was the applicants' contention that their attorneys had submitted to Mr Douglas two items of correspondence, namely letters dated 16 and 30 November 2010, informing, inter alia, that the applicants alleged that the respondent had committed several breaches by using the applicants' wall as the backing of his basement level accommodation and attaching stairs to their wall thereby encroaching onto their premises by about 4 inches. They also asked the expert to distinguish between a chartered land surveyor and a chartered surveyor.

[13] The final expert report dated 10 January 2011, was received on the following day by the attorneys. At the pre-trial review the applicants' attorneys requested that the expert attend court as certain matters had not been addressed in his report. The application was opposed, however, the court ruled: that the expert report of Mr Douglas dated 10 January 2011 be admissible at trial; that he should attend the trial and each party would be at liberty to cross-examine him; and that the costs of his attendance was to be borne by the applicants.

[14] The trial date fixed for 10 February 2011 was adjourned as senior counsel for the applicants was ill, but counsel for the applicants claimed that the fact that the boundary line and the matter of the encroachment had not been addressed in the expert report had been brought to the attention of the court. On 31 October 2011, the respondent filed a "Notice of Intention to Amend Defence to Counterclaim" in essence denying the allegations of encroachment, trespass and breach of restrictive covenants claimed by the applicants in their counterclaim. The trial commenced on 21 November 2011.

[15] At the trial, the respondent contended that the applicants disclosed a surveyors' report of Mr Angulu dated 23 October 2009, which did not address the issues raised in the applicants' counterclaim. The applicants then made their oral application for the court to accept a letter dated 24 January 2012 and a surveyor's report of Mr Angulu dated 10 January 2012 as expert evidence which then addressed the issue of the boundary line and the encroachment. The application was heard and the learned judge adjourned his ruling until October 2012.

[16] In the interim, the applicants prepared a notice of application to have Mr Angulu appointed as an expert and for them to obtain an expert report from him. That matter came before Rattray J. The file could not be located, but in any event the learned judge thought it prudent that as the claim was part-heard before Anderson J the parties should endeavour to have the application heard by him, perhaps in the legal vacation before the trial was to continue. In fact, the application was not heard until the trial re-commenced in open court on 5 October 2012 and was refused by Anderson J as indicated previously.

The ruling of Anderson J

[17] The learned trial judge provided detailed and comprehensive written reasons for his refusal of the applications before him. He commenced by saying that although the application was dated and filed in July 2012 and there was an effort to have the matter heard in chambers before the trial recommenced, he was of the view that as the matter was already being heard in open court, any application in relation to the trial would

have to be heard in open court also, which is why the written application was heard on 5 October 2012, the day fixed for the continuation of the trial. The learned judge referred to the notices of intention to tender hearsay statements, filed by the applicants, and which referred to the surveyor's reports prepared by Mr Angulu dated 23 October 2009 and 10 January 2012. There were no objections filed in respect of these notices, and the learned judge acknowledged that the applicants would not therefore have been obliged to comply with the conditions expressed in section 31E of the Evidence Act and the documents could have been tendered as hearsay documents in the case for the defence at the trial. However, he did circumscribe that by stating that even if the technical requirements of the Evidence Act had been met, there were still other conditions to which admissibility of the evidence would be subject, which were its relevance, whether its probative value outweighed its prejudicial effect and whether there had been compliance with the Civil Procedure Rules 2002 (CPR).

[18] The learned judge rejected the contention of the applicants that Mr Angulu could be permitted to give "first hand evidence" or evidence of primary facts. The learned judge stated that the survey drawings could not be taken as "constituting evidence of facts" as a survey drawing is "of necessity a drawing based on the expert opinion of a surveyor as derived from years of academic training and practical experience in the field of land surveying and the preparation of survey drawings". He found that the letter dated 24 January 2012 which spoke to the disputed boundary wall between the two premises being on the applicants' premises and inches from the registered boundary line, and the survey diagrams would be of no relevance if not

being tendered as opinion evidence, which, he said, could only properly be permitted by the court if adduced as expert evidence. However, he concluded that the applicants having not obtained and/or served an expert report had failed to comply with rule 31 of the CPR, the provisions of which were expressed in mandatory terms, which could not be waived.

[19] The judge then dealt with whether the applicants should be permitted to have Mr Angulu provide expert evidence and also whether he should be permitted to provide an export report. He made it clear that the letter dated 24 January 2012 and the survey report dated 10 January 2012 did not comply with the provisions of rule 32 of the CPR, as neither of them was an expert report within the meaning of that rule, the provisions of which, he stated, were also expressed in mandatory terms and could not be waived. The oral application which had been part heard by him in February 2012, asking for the above documents to be accepted as expert evidence was therefore refused.

[20] The learned judge accepted that the remaining issue before him as to whether Mr Angulu should give expert evidence and/or produce an expert report, was not an easy one. He set out how he viewed the objective of expert testimony and the fact that the expert must understand his duty to the court and, he stated, having specialized knowledge alone was not enough. Additionally, he indicated that the court should not appoint an expert who had not expressed a willingness to act in that capacity. The learned judge concluded that he was not satisfied that Mr Angulu was willing to act as an expert as there was no evidence placed before him to "remotely suggest that".

[21] The judge also indicated that there were numerous factors that the court ought to take into consideration when deciding if the proposed expert could assist the court in resolving the proceedings justly, especially since an expert had already been appointed by the court. He referred to **Cosgrove and Another v Pattison and Another** (2001) Times, 13 February 2001, [2000] All ER (D) 2007 naming some of the factors as: the nature of the dispute; the number of disputes on which the expert evidence was relevant; the reasons for needing another expert report; the amount of money at stake; and the delay that calling a further expert witness would cause, which list of factors, he stated, was not exhaustive.

[22] Of course, the judge mentioned that one of the first factors for consideration was whether the expert had the appropriate academic and technical qualifications and practical expertise. He indicated that he could not accept the curriculum vitae of Mr Angulu which had been attached to the affidavit of Analisa Chapman, as no source in respect of that information had been provided, but acknowledged that the court-appointed expert, Mr Douglas, had testified to, and thereby established Mr Angulu's training and competence as a commissioned land surveyor.

[23] The judge examined the history of the matter, with particular reference to the fact that the claim had been pending since 2009, that the trial had commenced in November 2011 and should only have taken up two days of the court's time. He referred to the fact that the defence and counter-claim had been filed in 2010 and the expert report had been completed in January 2011. There did not seem to be, in his view, any good and sufficient reason for the application before the court to have been

made at that late stage of the proceedings, when the case for the respondent had been closed. He stated that the applicants should have been aware that they had to prove their case in respect of trespass and encroachment and that they required the services of a commissioned land surveyor to do so.

[24] He did not accept that the applicants only became aware of the distinction between the two branches of the profession, viz chartered surveyor, which is what Mr Douglas is, and a commissioned land surveyor, which is what Mr Angulu is, when Mr Douglas was being cross-examined. In his view, that distinction ought to have been recognised on the production of the expert report and, in any event was foreshadowed, he said, by certain questions posed to Mr Douglas by the applicants' attorneys by way of letter dated 30 November 2010.

[25] Although he accepted that the respondent had a duty also to assist the court, as neither the respondent, the applicants nor the court appeared at the time of the appointment of Mr Douglas to have appreciated that in his discipline he did not do specific land measurements and so could not testify as to whether the disputed wall was within a registered boundary, but was trained in estate management and land administration etc, the learned judge decided that it was more incumbent on the applicants to have brought this anomaly to the attention of the court as the burden lay on them to prove their case. It concerned the judge that given the circumstances then existing, the respondent may require time to obtain another expert to give evidence to counter that which Mr Angulu proposed to give; the respondent's case would have to be reopened and the result of all that would mean that the case would take up thrice the

time initially reserved for it on the court's schedule. The judge concluded that the delay could only be attributed to "a failure by the Defendants' counsel to conduct their legal work pertaining to this case in a manner which would assist in furthering this court's over-riding objective to deal with cases justly" and indicated that this would weigh heavily on the prospect of success of the application.

[26] The judge then turned his attention to what he described as an important concern, which was the required objectivity of a person to be appointed as an expert by the court, one who ought not to tailor his opinions in his expert report to suit one side or the other. He expressed concern with regard to the fact that Mr Angulu had provided a particular opinion for one of the parties in the claim and that, therefore, he said, left the court "feeling skeptical about Mr Angulu's independence and/or unbiased approach". The judge said that even if Mr Angulu could be thought, after careful consideration not to be influenced by his findings, he having created those findings while working at the behest of the applicants his objectivity could not be presumed. On this point the learned judge said at paragraph [45]:

> " ..insofar as the relevant issue is concerned, nonetheless Mr. Angulu certainly cannot, under any circumstances, start of with, as it were, 'a clean sheet,' in-so-far as his objectivity is concerned. This is simply because, the Court should not presume objectivity based merely on a person's professional expertise and/or training as to do so, would be impractical. Objectivity on the part of an expert is always to be hoped for and indeed is what the Rules of Court expects, [sic] but may simply in the particular context of a particular case and with a particular expert operating in that context, simply be unattainable. This is because, as recognized in various Court Judgments, both emanating from within and without the

> Caribbean region, bias can be conscious as well as unconscious."

[27] To understand the complete thinking of the judge on this very important aspect of the exercise of his discretion whether to allow the application before him, I think it necessary to set out some rather unusual statements made by him at paragraph [49] of the judgment. He stated:

> "Like it or not, everyone will not be possessed of that requisite objectivity in each and every matter in respect of which his or her expertise is being sought. This can be for varying reasons, many of which are quite readily understandable. It could be because of personal closeness to one of the litigating parties which in and of itself, may create an unconscious bias which the proposed expert is himself or herself, unaware of. It could also be because of several other reasons, not the least amongst which being that prior to one having been sought as an expert, one had been engaged in a commercial relationship, particularly in one such concerning the very same matter which is now in dispute between the litigating parties. Even if one can actually be objective as an expert in such a circumstance, nonetheless, the appearance of objectivity in that type of circumstance, would be far less than apparent. This is why the maxim- 'Justice must not only be done, but manifestly and undoubtedly be seen to be done,' is of such importance, in a context such as the one now at hand. The litigating parties should be able to have confidence in the decision of this Court to appoint someone as an expert, who is possessed, not only of the requisite skills and/or academic training but also, of the requisite objectivity. Such confidence though, cannot properly be expected to exist in a circumstance wherein a party whose assistance as an expert is being sought in a particular case, had previously performed services of the same nature which it is later sought to have him perform as an expert, for one of the parties to the relevant dispute under litigation..."

[28] The learned judge rejected any submission from counsel for the applicants that a certification by the expert that he understood his duty to the court was sufficient, as he indicated that the court ought never to be viewed as a rubber stamp. He also rejected a further submission from counsel that the court should wait to see if any perceived bias could be unearthed in cross-examination, as he stated, it was for the court to determine whether one should be permitted to be appointed an expert from the outset, pursuant to the rules.

[29] He therefore ruled for the reasons stated, that the documents could not be deemed expert evidence, nor could Mr Angulu be permitted to be an expert in the proceedings at that late stage, nor would he be permitted to submit an expert report.

[30] He also refused leave to appeal his ruling as he stated that leave could not properly be granted on any ruling in respect of admissibility of evidence, or any ruling **during a trial,** as it would not constitute a proper basis for a procedural appeal under rules 1.1(8) and 2.4 of the CAR.

The application

[31] The application for permission to appeal was supported by two affidavits sworn to on 1 November 2012 by Analisa Chapman, one stated to be in support of the application and the other stated to be of urgency. The affidavits set out the background to the matter, the chronology of the matter before the courts as previously set out herein and attached exhibits and written submissions filed in the court below.

[32] Mr Nelson submitted that the position taken by the trial judge that he had no jurisdiction to grant leave to appeal in respect of a decision made during the trial was clearly wrong, and he referred to section 11 of the Judicature (Appellate Jurisdiction) Act and rule 1.8(2) of the CAR. Counsel submitted that the trial judge ought to have granted the application before him as the court appointed expert did not have the qualifications to deal with the crucial issue that he was required to investigate and which the proposed expert was being asked to assist the court with. The issue was whether the wall between the two premises is on the boundary line as the respondent alleges, or 4 inches within the boundary on the applicants' property, as the applicants contend.

[33] Counsel relied on the principles enunciated in **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties and Another** [2011] EWHC 1918 (Ch) [2011] 1 WLR 3235 stating "that all parties should be given the fullest opportunity to fairly and fully present their case" and **Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074, wherein, he submitted, it was stated that, "there is an overriding need to ensure that justice is not sacrificed".

[34] Counsel submitted that if the application was not granted, the applicants would suffer irremediable harm, whilst although the respondent complained of the delay which may be the result, and the learned judge had referred to it, the respondent had been given permission to re-open his case and to address certain aspects of his witness statement which had previously not been permitted. Thus, in those circumstances the respondent would suffer no prejudice. Additionally, counsel argued that had the oral

application been granted in January 2012, or the written application been heard in chambers, as it could have been before the continuation of the trial in October 2012 in open court, the expert report could have been obtained in time for the re-commencement of the trial, and no time would have been lost.

[35] Counsel argued that an expert witness can give evidence of primary facts. Also, the respondent had the option and opportunity for Mr Angulu to be called and cross-examined in respect of the notices of intention to rely on hearsay documents, which he did not do. Counsel complained that the reason the applicants were unable to comply with rules 31 and 32 of the CPR was that they were awaiting the permission of the court to do so. Counsel submitted that the court should not require any more "evidence" in relation to whether the expert was willing to attend court to give evidence than the fact that one of the parties before the court has made an application for him to do so. Equally, counsel argued, the learned judge had erred in contending that Mr Angulu lacked objectivity, because there was no legitimate basis for coming to that conclusion, as the CPR does not preclude an expert from giving evidence simply because he has done work in the past, for the party who is seeking the order for him to be appointed as an expert for the court. What is important, counsel submitted, is that rule 32 is complied with.

[36] Counsel submitted further that the statement by the judge that he rejected the position of counsel that they only realised for the first time that they required a commissioned land surveyor when Mr Douglas was being cross-examined, was a misunderstanding of the applicants' position, which they contended was that they only

realised when Mr Douglas was being cross-examined that he was not qualified to give evidence on encroachment as he was "only" a chartered surveyor.

[37] In keeping with the justice of the case, the overriding objective and the principles set out in **Hannigan v Hannigan** [2002] 2 FCR 650, **Hertsmere Primary Care Trust and Ors v The Estate of Rabindra-Amandh** [2005] EWHC 320 (Ch) and endorsed in this court in **Medical and Immuniodiagnostic Laboratory Ltd v Dorett O'Meally Johnson** [2010] JMCA Civ 42, counsel asked that the application be granted and the appeal be allowed.

[38] Miss Mullings for the respondent referred to the chronology of the case through the courts and said that the court had not erred in refusing the application as the applicants should have known that the proper person to conduct the survey was a commissioned land surveyor, and the resume of Mr Douglas had pointed that out. It was too late, counsel argued, to endeavor to bring in an expert at a time when the respondent had closed his case. Counsel submitted that the three issues before the court were whether the appeal was an abuse of process, particularly in light of the non-compliance with the CPR, whether the court could proceed in the absence of the notes of evidence and whether the Court of Appeal should allow an appeal on an interim issue when the substantive matter was still being heard by the court below.

[39] Counsel put forward several contentions which included the fact that: (i) the respondent and the court-appointed expert had already been cross-examined and the court did not have those notes before it; (ii) that the applicants had failed to comply

with the CPR and particularly could not show that Mr Angulu had the requisite objectivity especially as required by rule 32; (iii) the matter was being presided over by the trial judge who had exercised his discretion lawfully, which the court should not disturb; and (iv) in any event sufficient time had already been spent on the case and any further delays would be prejudicial to the respondent.

[40] Counsel reiterated that it was an abuse of the court's process to have failed to comply with the mandatory requirements of the CPR and particularly referred to rules 31 and 32 and, the case of **Dorothy Vendryes v Dr Richard Keane and Karene Keane** [2011] JMCA Civ 15, for that submission. Counsel entreated the court not to proceed without the benefit of the notes of evidence as the court would be proceeding at a disadvantage as it would not have before it all the material that was before the trial judge. Counsel also stressed the fact that any appointment of an expert after the close of the respondent's case would be extremely prejudicial to him and ought not to be countenanced by the court, as it would open the flood gates for litigants to challenge the applicability and operation of mandatory rules of court. Counsel argued that in all the circumstances of this case the appeal should be dismissed.

Discussion and analysis

[41] In this application and appeal I recognise that the court is exercising what Lord Diplock referred to in **Hadmor Productions Ltd and others v Hamilton and Others** [1982] 1 All ER 1042, 1045, as "a limited function". Although in that case their Lordships were dealing with the grant/refusal of an injunction, the Board was similarly

considering the exercise of the discretion of the judge(s) in the court below, so the principles are applicable. At page 1046, Lord Diplock in delivering the seminal judgment of the court, had this to say:

> " ..the function of an appellate court…. is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it…"

[42] It became clear from the evidence in this case that subsequent to the filing of the defence and counterclaim on 19 February 2010 one of the main issues which the court had to decide was whether the respondent was trespassing on the applicants' property, in that a stairwell had been built, affixed to the wall between the parties' two properties and, if the wall was within the boundary of the applicants' adjoining property then the respondent could be trespassing on the applicants' property. It therefore required the services of a professional who was qualified to measure the boundaries of lots 115 and 117 East Mountain Pride Avenue to ascertain where exactly the wall was located with regard to the respective premises and the respective plans

attached to the relevant certificates of title, and to produce a report accordingly. This issue could not be decided without the help of the trained eye and expertise of the professional qualified to undertake that work. It is also clear that before the filing of the defence and counterclaim the issue before the court was different, requiring a different assessment from the professional. Measurement was not the issue, but the issue related to landscaping with regard to accumulation of water in existing trenches, the responsibility to clean and maintain the same, and whether a breach of the relevant restrictive covenants existed. So when the expert was appointed by the court on 28 October 2009, the focus of the court and the parties was different. I do not believe, on the papers before me, that the clear distinction between the two disciplines was initially readily apparent, certainly not in 2009, but possibly it ought to have emerged on examination of the addendum to Mr Douglas' certification, attached to the January 2010 preliminary report, which stated:

> "3. LIMITATIONS:
>
> a) The report is not prepared from a survey made in accordance with the Land Surveyors Act and Regulations."

and certainly later when the final report was produced in January 2011.

This limitation was repeated in the final report, but by that time Mr Douglas was also responding to questions posed to him and endeavoured to explain that:

> "A Chartered Surveyor is a person that qualifies by study and examination under the curricular of The Royal Institution of Chartered Surveyors, London,"

being:

> "a person... trained in Estate Management or Land Administration Qualifies after successful examination as a Chartered Surveyor-General Practice"

whereas:

> "A Commissioned Land Surveyor qualifies by training at the University of Technology for three years, examination and test of professional competence after which a Commission is awarded by the responsible Minister of Government to enable practice under the Land Surveyors Act."

Mr Douglas also made it clear that:

> "A Commissioned Land Surveyor or Chartered Land Surveyor practices boundary, hydrographic, topographical, trigono-metrical Surveys etc, under the Land Surveyors Act."

and that:

> "A Chartered Survey-General Practice, practices property services, appraisals, sales, leases, rental, auctioneering, building surveying, planning and development, property management etc."

[43] What is also clear is that it was not until January 2012 that the applicants made their application before Anderson J initially orally and then in writing by way of notice of application filed in July 2012 to have Mr Angulu appointed expert and/or to adduce expert evidence from him. The letter dated 24 January 2012 from Mr Angulu, referred to in the application, stated that he had carried out a survey on the applicants' premises in January 2012, in accordance with the Land Surveyors Act, and he noted, inter alia, that:

> "To the rear of the townhouse on the lot, there is a concrete wall separating the subject of my survey and adjoining premises number 117 East Mountain Pride Avenue.

> The said concrete wall is within number 115 East Mountain Pride Avenue, a few inches from the registered boundary line."

He had also done a survey diagram.

[44] There is no doubt that the application by the applicants was late. The only explanation for this tardiness seems to be that the appellants' attorneys appeared not to have been aware until the cross-examination of Mr Douglas, that he was unable to conduct a detailed measurement of the registered boundaries of the properties so as to provide a report to the court. This appears on the face of it, although in conflict with the understanding of the learned trial judge as to their particular contention on this aspect of the matter, in my view, unacceptable. It is true that Mr Douglas should have indicated with clarity that he was not able to do what was expected of him. Rule 32.4 (4) of the CPR requires that the expert witness must state if a particular matter or issue falls outside his/her expertise. Mr Douglas could have, in order to avoid all these difficulties which have unfolded, stated that he was not qualified to do what was expected of him as it required the expertise of a commissioned land surveyor, instead of the rather obfuscating statement that the report was not being made in accordance with the Land Surveyors Act, which, in my view, was unhelpful. That being said however, the applicants, as the respondent has asserted, had to prove their case and should have ascertained with some certainty long before 2012 or certainly at or around January 2011 when the final expert report was produced, that it was not sufficient for their purposes, and endeavoured with dispatch to act in protection of their interests and the administration of justice, and obtain a report that was helpful in time for the trial,

so that time was not lost. The application therefore could have been made at least a year previously.

[45] That however, is not the end of the matter as the court still has an obligation in keeping with the overriding objective, to deal with cases justly, and as I understand the situation, the respondent has been granted the opportunity to reopen his case and to give evidence not previously permitted. Additionally, there is no possibility that the respondent could be claiming that he was surprised that there was an issue in the case relating to the position of the boundary between the two premises. He has filed a defence to the counterclaim and that would be the issue to be determined. It would also assist the court to have all the matters in controversy between the parties before it determined at one and the same time and to have all the assistance, if required, that can be provided by expert evidence. The respondent does not seem to me to be so severely prejudiced by an adjournment to facilitate obtaining a report that he could not have been compensated by costs. At the end of the day, the parties reside beside each other and should want a definitive ruling from the court with regard to all the issues arising relative to their respective premises in order to dictate the way forward. It seems therefore as Cooke JA said in **RBTT Bank Jamaica Limited v YP Seaton and Others** SCCA No 107/2007, delivered 19 December 2008, when dealing with a judgment striking out the appellant's statement of case because of late delivery of a witness statement, in circumstances where a trial date had been fixed and a counterclaim was still to be tried:

> "It means therefore that at this stage the court should not be casting its eyes backward. The future beckoned. In my view the court below should have concentrated on the application before it. Alas, it seemed it was more interested in punishing the appellant for its past delinquency. The application ought to have been determined within the context of the circumstances which then obtained."

So too in this case, the respondent and the court should have focused on the way forward and not on the unfortunate history of the proceedings which had gone before. That, in my view, was the correct approach to adopt. The learned judge's failure to recognise the benefit of having that report, in that context, was an error in law, and it is on that basis that we have disturbed his decision, despite the fact that it was an exercise of a discretion.

[46] It is important that I address certain statements made by the learned trial judge with regard to the alleged potential lack of objectivity and impartiality of Mr Angulu. It is entirely wrong to suggest and could be considered offensive to any serious professional that once having been contracted by a party to the action, he/she is likely to tailor his evidence to suit that party although having been accepted as an expert to the court. That suggests that professional persons without more, and without any specific evidence pointing in that direction would be without integrity and dishonest. I do not accept that at all and think that to the extent that that thinking may have influenced the learned trial judge in the exercise of his discretion, he would have proceeded with the wrong approach. There is no doubt that the expectation is that the expert should provide independent and impartial assistance to the court within his expertise, and it is that objectivity and expertise that the court should use as its test for

the admissibility of expert evidence. The questions are: does the witness have the expertise and is the witness aware of his primary duty to the court if he gives expert evidence? It has been held that the apparent bias test applicable to a court or tribunal, referred to by the trial judge, is not the correct test in deciding whether the evidence of the expert should be excluded, but the test is as stated above (see **Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8)** [2003] QB 381). What must be recognised always, as stated by Harris JA in this court in **Cherry Dixon-Hall v Jamaica Grande Limited**, SCCA No 26/2007 delivered 21 November 2008, is that the role of the expert is to assist the trial judge, and he must put before the court all the material necessary for testing the accuracy of his findings and conclusions. It is also trite law that the findings of the expert are never binding on the judge and he can accept or reject the expert's opinion.

[47] It is also of importance that I make it clear that it is only because of the unusual and peculiar circumstances of this case that the orders set out in paragraph [6] were made, and do not in any way suggest that the obligations and processes set out in parts 31 and 32 of the CPR are not to be complied with strictly, for instance, inter alia, that documents intended to be used in the proceedings must be disclosed, that the expert witness cannot be accepted as such without the permission of the court and, that he must submit a report to the court which must be in the required format and be subject to questions from the parties and directions of the court.

[48] It must be stated, however, and it is important to this case, that the fact that evidence is late ought not to be the sole consideration in the exercise of the judge's discretion. In **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd and Another** which concerned an application for the admission of further evidence by the claimant when the matter had already run the 10 days allotted to it, Peter Smith J granted the application. In doing so he was following the judgment of the Court of Appeal in **Cobbold v London Borough of Greenwich**. His decision was recorded as a Practice Note. A summary of the decision is taken from the headnote:

> "The decision whether to allow late evidence to be adduced is a matter of discretion to be exercised by the trial judge in accordance with the principles sent [sic] out in CPR Pts 1 and 3, with the overriding backcloth of the duty of the courts to ensure that every party has the fullest opportunity fairly and fully to present their case, ensuring that a decision in favour of one party does not unfairly impact on other parties. If during the trial late evidence emerges which is important it is essential that that evidence is heard, provided that it will not cause a fatal prejudice to the other party. Where such late evidence cannot be properly dealt with by the other side, it is almost inevitable that the application to adduce the evidence will be refused, but where it can be so dealt with, even on terms as to adjournment in costs, the evidence should ordinarily be allowed. A decision to exclude evidence should not be made merely because the evidence is late. A trial judge should consider all factors, including lateness and prejudice, when exercising his discretion but should not give lateness a greater significance. A party seeking to introduce the evidence does not have a heavy onus to justify it merely because it is late."

At paragraph 33 the learned judge said this:

> "It might be said that this is a *relaxed* attitude to non compliance with the rules. I am not sure what the word

> *relaxed* means in that context but the whole thrust of the CPR is that parties are not to be punished fatally for mistakes or non compliance with the rules if those mistakes and non-compliance matters can be addressed without causing an injustice to the other party."

[49] I agree. I also accept that the applications before Anderson J were late but that fact ought not to have been the main consideration of the learned judge, which it appeared to have been. There also was no evidence that Mr Angulu was unwilling to be an expert witness in the case, and no evidence whatsoever that if called upon to give expert evidence, being a person of competence and experience in the area of controversy before the judge, that he would not be independent and impartial and understand his duty to the court. There was also no evidence of any prejudice that the respondent would suffer in the circumstances of this case. In my view, it was clear that the judge had exercised his discretion wrongly and, it was therefore necessary for this court to interfere.

[50] On the matter as to whether the judge could have granted leave to appeal, I must state that section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act does give the power to the judge of the Supreme Court or the Court of Appeal to grant leave in respect of an interlocutory judgment or order. Rule 1.8(2) of the CAR states that such an application must first be made to the court below. In this respect, the learned judge would also have erred.

Conclusion

[51] In the light of all of the above we made the orders set out herein.

BROOKS JA

[52] I have read the draft reasons for judgment of my learned sister and agree with her reasoning.