[2015] JMCA Civ 69

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 43/2014

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**VRL OPERATORS LIMITED**	**APPELLANT**
AND	**NATIONAL WATER COMMISSION**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**THE NATIONAL WORKS AGENCY**	**3RD RESPONDENT**
AND	**STANLEY CONSULTANTS INC**	**4TH RESPONDENT**
AND	**FREDERICK RODRIGUES & ASSOCIATES LIMITED**	**5TH RESPONDENT**

Dr Lloyd Barnett and Hugh Hart instructed by Hart Muirhead Fatta for the appellant

Kevin Williams and Collin Alcott instructed by Williams Alcott Williams for the 1st respondent

Ms Carlene Larmond and André Moulton instructed by The Director of State Proceedings for the 2nd and 3rd respondents

Mrs Denise Kitson QC and Mrs Suzanne Risden-Foster instructed by Grant Stewart Phillips & Co for the 4th respondent

Charles Piper QC and Demar Hewitt instructed by Charles E Piper & Associates for the 5th respondent

26 October and 18 December 2015

MORRISON P (AG)

[1] I have read in draft the judgment of my brother F Williams JA (Ag). I agree with his reasoning and conclusion. I have nothing to add.

MCDONALD-BISHOP JA

[2] I too have read the draft judgment of F Williams JA (Ag) and agree with his reasoning and conclusion.

F WILLIAMS JA (AG)

[3] This is an appeal against an order of B Morrison J dated 19 May 2014, in which he awarded costs to the respondents on their notice of application filed in the court below on 7 November 2013. The notice of application was filed by the respondents on the basis, *inter alia*, that the appellant's counsel had improperly communicated with the court-appointed expert witness and that the expert witness had demonstrated an absence of impartiality and for those reasons ought to be disqualified.

Background

[4] In the court below the appellant initially claimed damages for negligence against the 1st and 2nd respondents only. It subsequently amended its claim to include a claim for damages against the 3rd, 4th, and 5th respondents jointly and severally. (There had been a 6th defendant at first instance; but that party is not involved in this appeal.) The claim was brought on the basis of the averment that the appellant had suffered considerable loss and damage by reason of the 1st respondent's (National Water

Commission, or NWC) supply of turbid water, water with low pressure of supply or no water at all between 2 and 5 March 2005 at the former Hedonism II hotel located in Runaway Bay, in the parish of Saint Ann. The appellant further claimed that the turbid water supply and other issues arose from road-improvement works (which involved modifications to the water lines) conducted on the Northern Coastal Highway, from Montego Bay to Ocho Rios (the main road through Runaway Bay being a part of that project).

[5] Subsequent to a case management conference in the matter, after hearing the applications of the appellant and the 4th respondent to appoint separate expert witnesses, the court, on 23 October 2012, appointed Mr Barry Walton, a civil engineer, as the single expert witness in the matter to prepare a report on certain issues arising in the case. Subsequently, the respondents contended that the appellant's counsel had communicated with the expert witness in relation to "substantive aspects of the evidence" and suggested that he seek directions in relation to the same, without sending copies of such correspondence to the respondents' counsel. It was also contended by the respondents' counsel that Mr Barry Walton's statements in email correspondence to the appellant's counsel and the 4th respondent's counsel and the without-notice nature of his request to seek further directions from the court disclosed an absence of impartiality.

[6] In the notice of application filed on the basis of the above contentions, the 1st respondent sought several orders, (which application was adopted by the other respondents). The orders sought were as follows:

> "1) That the Court provide such directions as are necessary relative to the Claimant's communications with the Expert Witness Mr Barry Walton, particularly since October 16, 2013;
>
> 2) That Mr. Barry Walton be disqualified as an Expert Witness in this matter;
>
> 3) That the trial dates of November 11-23, 2013 be vacated and new and further case management directions be given for the proper conduct of this matter;
>
> 4) That the costs of this Application and hearing be determined;
>
> 5) Such further and other relief and orders as this Honourable Court deems fit in the circumstances of this case."

[7] The learned judge, having heard the application on 11, 12, 13 and 15 November 2013, denied the application to disqualify the expert witness, ordered that the trial dates be vacated, and set the date of 21 November 2013 for a case management conference to be held in order for further orders to be given for the proper conduct of the matter. The learned judge also invited the parties to file submissions in relation to the issue of costs on or before 22 November 2013 (these orders are set out in the formal order filed 26 November 2013). The case management conference was subsequently held with several orders being made for the proper conduct of the matter.

[8] In the written judgment of the learned judge delivered 19 May 2014, which addressed what he described as "the vexed question of costs", the learned judge held

that the respondents were the successful litigants and as such were entitled to costs to be taxed, if not agreed. The learned judge, in determining who were the successful parties in the application, found, *inter alia*, that the appellant's counsel was guilty of misconduct, in the form of an irregularity, due to his communication with the expert witness. These were the learned judge's words at paragraph [17] of the judgment:

> "…I need only revert to my finding that there was misconduct on the part of the Claimant's counsel though such misconduct did not degenerate to the nadir of being designated moral turpitude. Even so, such misconduct cannot escape being labeled an irregularity. Against that finding the Application for Costs are [sic] well grounded and must go to the successful litigants, this is the Applicant/1st Defendant, the 2nd and 3rd Applicants/Defendants, the 5th Applicant/Defendant and the 6th Applicant/Defendant. Such costs are to be agreed and if not agreed, then such are to be taxed."

[9] The orders in the formal order filed on 21 May 2014 (the details of which, it is to be noted, in passing, are not exactly the same as the orders made in the judgment) provide that:

> "1) Costs of the Application and Costs thrown away to be that of the Defendants/Applicants;
>
> 2) Costs to be taxed, if not agreed, and be paid within forty five (45) days of such agreement or taxation.
>
> 3) Leave to appeal granted to the Claimant.
>
> 4) Stay of this Order, pending Claimant's Appeal, is granted.
>
> 5) 1st Defendant's Attorneys-at-Law to prepare, file and serve this Order."

Grounds of appeal

[10] The appellant set out very extensive grounds of appeal in the notice and grounds of appeal filed on 22 May 2014. The issues that are identifiable from the said grounds may be summarized as follows:

(a) that the learned judge had wrongly found that the respondents were the successful parties in making the costs order against the appellant, in the light of the respondents having been unsuccessful in the 'central, real and substantive application or issue' (grounds (h) and (i)).

(b) that in determining who were the successful parties, the learned judge had not given sufficient regard to all the orders which had been made upon the hearing of the notice of application, since the costs order did not accord with the results of the application where the appellant was the overall successful party (grounds (a), (b) and (c)).

(c) that the 'central, real and substantive application or issue' in the notice of application which had been filed by the respondents was to disqualify the expert witness (grounds (d) and (e)).

(d) that the learned judge erred in finding that there had been misconduct on the part of the appellant's counsel and had erred in failing to find that the appellant's counsel's challenged communication was not in breach of any provision of the Civil Procedure Rules (CPR) or other rule or law (grounds (j), (k), (l) (n) and (o)).

(e) that the learned judge erred in finding that the alleged misconduct meant that the respondents were the successful parties (ground (m)).

(f) that the learned judge erred in ordering taxation forthwith (ground (p)).

Submissions for the appellant

[11] Counsel for the appellant in his written submissions contended that the paramount objective of the respondents' notice of application was for the disqualification of the court-appointed expert witness. In the appellant's submission, the vacating of the trial dates sought at item 3 of the application was in essence intended by the 1st respondent to be consequential to the order sought for the disqualification of the expert witness.

[12] Additionally, counsel submitted that there would have been no need for further case-management orders had the respondents adhered to the time period set for the filing and serving of the various documents (in particular the witness statements); and had they attempted to do so within the period of the further extension of time granted by the court. The appellant submitted that it had filed its witness statements on time; however it was the 1st respondent's failure to comply with the order extending time to file witness statements (see paragraphs 16-17 of the appellant's written submissions) which necessitated further case management orders being made.

[13] Counsel for the appellant also submitted that the learned judge's award of costs was based on his finding of misconduct on the part of the appellant's counsel. However, such a finding, counsel submitted, was incorrect and not supported either by the facts or the law. Counsel also argued that the communication with the expert witness via the email correspondence did not speak to any substantive aspect of the evidence and had made absolutely no comments on the contents of the witness statements which were sent to the expert. Further, counsel submitted that the correspondence with the expert arose from the duty to provide the expert with all relevant materials. It was further submitted that the communication was consistent with the duty of the expert to assist the court impartially on all matters relevant to his expertise as well as the expert witness' right to apply to the court for directions to assist him to carry out his functions as an expert witness.

[14] Counsel further submitted that it was evident from the case-management orders that the expert witness was to be permitted to comment on opinions which were relevant to the report that he was required to provide to the court, since he was scheduled to give evidence after all the other witnesses in the matter had given theirs. Additionally, counsel stated that the alternative order which had been granted by the court had not been opposed by the appellant.

Submissions for the respondents

[15] Counsel for the respondents submitted that there was what amounted to impropriety in the appellant's counsel's communication with the expert witness, as an attorney-at-law is not empowered to act in disregard of the rules of court and/or the other parties in the proceedings. It was further submitted that the duty of the expert to assist the court impartially ought not to be directed by any one party to the proceedings.

[16] The respondents further submitted that the contention of the appellant that the learned judge did not take into account all the other orders sought in the notice of application was without merit, as all parties had had an opportunity to address the court on the orders sought.

[17] With regard to the court's determination of which parties were successful on the application, counsel submitted that the application for disqualification of the expert witness was only one of the orders sought. Thus, the court having decided two of the four orders sought in the respondents' favour while refusing one: that is, the order for

the disqualification of the expert witness and deferring the order for costs, the respondents were the successful party.

[18] It was further submitted that no permission was obtained by the appellant to appeal the finding of misconduct and that the fact of the appellant having obtained leave to appeal the costs order could not cure the defect of not having received leave to appeal the finding of misconduct. Counsel submitted that, consequently, the appellant had failed to comply with the requirements of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act (JAJA), which states that leave is required to appeal interlocutory orders save in certain circumstances. Further, counsel submitted that the failure to comply with the requirement of rule 1.8(2) of the Court of Appeal Rules (the CAR), could not be cured by the appellant subsequently obtaining permission in respect of the order relating to costs on 19 May 2014. On that basis, counsel contended that this court had no jurisdiction to hear the procedural appeal.

Issues

[19] On a consideration of the submissions of counsel, the issues which arise on this appeal for determination by the court are as follows:

1. Whether the appellant is precluded from appealing the finding of misconduct in its appeal against the order for costs, as there has been a breach of section 11(1)(f) of the JAJA; and rule 1.8(2) of the CAR.
2. Whether the learned judge had correctly applied the principles of law in finding that the respondents were the successful parties in the application.

3. Whether the order for the disqualification of the expert witness was the real and central order requested by the respondents in the notice of application.
4. Whether the learned judge had correctly found that the appellant's counsel was guilty of misconduct.

Of course, the overarching issue is whether the learned judge was correct in awarding costs to the respondents.

Law & analysis

Issue 1: Whether the appellant is precluded from appealing the finding of misconduct in its appeal against the order for costs

[18] The appellant was granted permission to appeal, as is indicated in the formal order filed on 21 May 2014. However, this issue arose from the fact that the application which formed the basis of this appeal was dealt with in two parts by the learned judge. The learned judge invited submissions from the parties on the issue of costs after hearing and ruling on the application pertaining to the issues regarding the expert witness and the request for further case-management orders. As a result there is the judgment dated 21 November 2013 disposing of three of the four orders sought in the application; and the judgment dated 19 May 2014 disposing of the costs order which had also been sought in the application. This important history of the matter is reflected in the very first paragraph of the judgment that is the subject of this appeal, which reads as follows:

> "[1] Following on the outcome of a Notice of Application for Court Orders filed by the first defendant and adopted by the second and third defendants and the fifth and sixth defendants I invited the parties to make written submissions on the vexed question of costs."

[19] In the notice of appeal filed in this court on 22 May 2014, the appellant has sought to appeal "the decision of Mr Justice B Morrison contained in the ruling delivered on the 19th day of May 2014". This formed the basis of the respondents' contention that permission to appeal would relate solely to the judgment of 19 May 2014 and as such the appellant would be precluded from appealing the issue of misconduct which arose from the prior decision of 21 November 2013.

Discussion

[20] While the respondents had rightly submitted that by virtue of section 11(1)(f) of the JAJA, permission is required to appeal interlocutory orders, and by virtue of rule 1.8(2) of the CAR, permission must first be sought in the court below, on a perusal of the two judgments, it will be seen that the learned judge made reference to the finding of misconduct in both judgments. Further, the critical consideration for the court ought to be whether both proceedings leading up to the two decisions are to be viewed as separate and distinct; or whether the latter judgment was really a continuation or completion of the earlier one.

[21] In **The Attorney General v National Transport Co-operative Society** [2012] JMCA App 30, one of the issues for the consideration of the court was whether the applicant had complied with section 3 of the Jamaica (Procedure in Appeals to Privy

Council) Order in Council 1962, which directs that an application for leave to appeal to the Privy Council must be filed within 21 days of the date of judgment. There had been three judgments dated 20 December 2010, 30 September 2011 and 9 March 2012. The first decision dealt with the scope of the referral and the admissibility of evidence; the second decision dealt with issues concerning quantum of damages, mitigation and interest and the third decision concerned the determination of the issue of costs.

[22] The challenge mounted by the respondent's counsel in that case, was to the effect that the application was out of time, since the matters sought to be appealed related to the 'December' and 'September' judgments. However the applicant submitted that since the court had completed its mandate from the Committee on 9 March 2012, the notice (which had been filed 29 March 2012), was filed within the stipulated period and leave should therefore be granted to it as prayed.

[23] McIntosh JA, accepting the applicant's submissions, held at paragraph [20] that:

> "The court was quite entitled, however, to decide how it would conduct the hearing and it decided to deal with the matter first, in two stages and, on application, added a third stage to the proceedings. After the first stage was concluded, the mandate was not complete and as [counsel for the applicant], submitted, correctly, in my opinion, the court's jurisdiction in the matter continued."

[24] In applying the dictum of McIntosh JA to this case, the second judgment could not properly be regarded as separate from the first; but was a continuation of the proceedings. Bearing particularly in mind paragraph [1] of the costs judgment, it becomes clear that the issue of costs flowed directly from the application; and the

learned judge, exercising his discretion, decided to deal with the question of costs at a further sitting. The learned judge having instructed the parties to make written submissions on the issue of costs, the court's jurisdiction continued in the matter. Consequently, both judgments ought to be viewed as two points on one and the same continuum; and not as being separate and discrete. Therefore, this court would have the jurisdiction to hear this appeal, as permission to appeal had been granted in respect of the order of B Morrison J.

[25] It is convenient to deal with issues 2 and 4 together.

Issue 2: Whether the learned judge had correctly applied the relevant principles of law in finding that the respondents were the successful parties in the application

Issue 4: Whether the learned judge had correctly found that the appellant's junior counsel was guilty of misconduct.

[26] The learned judge, in his consideration of which party was entitled to costs, considered section 47 of the Judicature (Supreme Court) Act (JSCA). That section of the JSCA places the issue of determining costs in the discretion of the court, in the absence of express provision to the contrary. Since the award of costs is discretionary, the dictum of Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and others** [1982] 1 All ER 1042, requires some consideration. In setting out the circumstances under which an appellate court may interfere with the exercise of the discretion of a judge below, Lord Diplock stated at page 1046 as follows:

> "[The appellate court] 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."

[27] Similarly, Morrison JA, (as he then was) in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, relied on the dictum of Lord Diplock in **Hadmor Productions** to state the circumstances which would warrant an appellate court's interference with the exercise of the discretion of a judge below. Morrison JA stated at paragraph [20] of the judgment that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it"."

[28] In summary, this court would only interfere with the learned judge's award of costs where such a decision is shown to be demonstrably wrong.

[29] In his written judgment on costs, the learned judge, upon considering the provisions of rule 64 of the CPR, found that the issue that he had to determine in deciding what order as to costs to make was which party was successful in the application, having regard to all the circumstances of the case. The learned judge relied on a number of authorities, among them the English decision of **HLB Kidsons (A Firm) v Lloyds Underwriters Subscribing to Lloyds Policy No. 621/PKID00101 and Others** [2007] EWHC 2699 (Comm), which sets out a number of relevant

principles relating to costs. The general principles distilled by the learned judge were that: the aim of the court is to make a costs order which reflects the overall justice of the case and that it is important to determine at the onset of the consideration, who is the successful party. The learned judge also noted that there was no automatic rule requiring reduction of a successful party's costs if he lost on one or more issue (see **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125).

[30] The learned judge further relied on the English Court of Appeal decision of **Scherer and Another v Counting Instruments Ltd** [1986] 1 WLR 615, noting that the normal rule is that costs follow the event. This rule is enshrined in rule 64.6(1) of the CPR which provides that if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. He noted as well that a judge has an unlimited discretion to make costs orders which are consistent with the justice of the case.

[31] Before considering the case law, the learned judge examined the full provisions of rule 64 of the CPR noting that in accordance with rule 64.6(4) the court must have regard to:

> "(a) The conduct of the parties both before and during the proceedings;
> (b) Whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
> (c) …
> (d) Whether it was reasonable for a party -
> i) to pursue a particular allegation; and/or
> ii) to raise a particular issue;
> (e) The manner in which a party has pursued-

i) that party's case;
ii) a particular allegation; or
iii) a particular issue;

(f) …

(g) …"

[32] The learned judge, having given due consideration to what might be regarded as the pertinent principles regarding the award of costs, then concluded at paragraph [17] of the written judgment (already reproduced at paragraph [8] of this judgment) that there had been misconduct on the part of the appellant's junior counsel.

[33] It appears convenient at this point to deal with the learned judge's finding of misconduct on which he based, at least partially, his decision to award costs to the respondents.

[34] Although not specifically raised (by direct use of the word "misconduct") as an issue in the court below, the issue of misconduct was briefly addressed by the learned judge otherwise than at paragraph [17] of his judgment on costs. At paragraph [38] of the judgment disposing of the notice of application the learned judge stated that:

> "[38]… I will venture to add that the ex parte communications between Mr. Walton and Mr. Weiden Daley [counsel for the appellant] and the use of the expressions in those communications of "spanner in the works" and "fall out" by Mr. Walton, that while they might yet signal the portent of impartiality that cannot by itself be the only consideration. Such dereliction from propriety may well amount to misconduct in the sense of denoting irregularity and not any moral turpitude or anything of that sort."

The questioned communication

[35] By email dated 16 October 2013, the appellant's counsel made contact with the expert witness, informing him that several witness statements had recently been filed, which contained comments on the expert report filed by him and suggesting that the expert might wish to seek further directions from the learned judge pursuant to rule 32.5 of the CPR. However, the gravamen of the respondents' contention is that the correspondence was not copied to all parties in the matter; neither were they initially made aware of the correspondence, albeit there was later correspondence which was copied to the 4th respondent but which made no reference to the first email correspondence.

[36] After seeking directions from the learned judge, as suggested by junior counsel for the appellant, (via a without-notice application), the expert witness submitted to junior counsel for the appellant and counsel for the 4th respondent, via email, an addendum to his report responding to the comments made by the other witnesses. In the said email the expert witness requested that the recipients advise of all "fallout" in relation to the addendum. The expert witness then pointed out that "Mr. Johnson's [a witness for the 1st respondent] statement might potentially throw a spanner in the works if NWC did not restore supply for two days yet the system was apparently full of water in the meantime".

[37] Having reviewed the orders made by the court on the appointment of the expert, I find that it is clear that those orders place no general limitation on counsel's right to

communicate with the expert, except to the extent that orders 6 and 8 state respectively that:

> "Written instructions to the named expert to be given by the Claimant and by the 5th Defendant, respectively, not later than 31st December, 2012."
>
> "Parties are at liberty to put questions to the expert not later than twenty one (21) days after receiving the report."

[38] Additionally, order 11 provided for the expert to seek directions from the court under rule 32.5 of the CPR by way of email to the judge.

[39] In my view, the communication by junior counsel for the appellant with the expert cannot be viewed as amounting to misconduct, or even an irregularity, in the light of the substance of the correspondence and all the circumstances. There was no breach of any provision of the CPR or any order of the court. No prejudice was caused to any of the respondents by what was done. No lack of impartiality has been established on the part of the expert witness, flowing from the questioned correspondence or otherwise. It appears as well that nothing of significance to the respondents arose from the expert witness' addendum. Had anything of significance arisen, then one would have expected one of, some or all the respondents to have put questions to the said expert, as they were allowed to do by one of the orders made by B Morrison J. No such questions have been put to the expert witness.

[40] At paragraph 3(c) of the respondents' speaking notes, the following submission was made:

> "c) The right of the Expert to apply to the Court for directions under rule 32.13… is not subject to the direction of any party to the proceedings. It is a right given to the Expert who, if he is to exercise his independent duty to the court must make his own assessment as to whether the need for directions arises and, on that basis and having regard to the Order of the Court make his/her own determination as to whether the application for directions ought to be made."

[41] The question which arises from that submission, however, is this: how would the expert witness become aware of newly filed witness statements and their contents and be able to decide whether the need for directions arose, if not through counsel? It is difficult to see how else. After all, there is no mechanism or order that would otherwise have ensured that such matters that might have had an impact on his testimony were brought to his attention.

[42] However, bearing in mind the challenge that arose in this case as a result of counsel's e-mail correspondence with the expert witness, it would seem advisable that counsel's communication with an expert should be open and transparent and copied to all other counsel, if only to prevent litigation that might otherwise have been avoided, such as this.

[43] In my view, the learned judge failed to properly apply the principles which he had distilled from the rules and the cases, as the finding that the appellant's counsel was guilty of misconduct was, with respect, unfounded; and, in any event could not have been decisive by itself of who was the successful party; but rather was one of several considerations to be borne in mind by the learned judge in deciding which party

was or parties were successful. The proper course to have been adopted by the learned judge was to assess whether the general principles of awarding costs should have been departed from if the appellant was found to be the successful party (as he ought to have found). In light of that failure on the part of the learned judge the award of costs against the appellant cannot stand, the decision of the learned judge being demonstrably wrong.

Issue 3: Whether the order for the disqualification of the expert witness was the real and substantive order requested in the notice of application.

[44] The appellant sought to advance the argument that it was the successful party in the application on the ground that the 'real, central and substantive' application before the court had been for the disqualification of the expert witness; and that that request was refused by the court. Counsel submitted that that assertion was supported by several factors surrounding the application, among them:

1. the fact that the 1st respondent very briefly in one of the 23 paragraphs of its amended submissions dealt with the alternative request to be permitted to put further questions to the expert witness;
2. the 4th respondent's written submissions had been headed "Submissions on Behalf of the 5th Defendant's in Support of Application to Disqualify Expert Witness'";

3. the 5th respondent in its application exclusively asked for the disqualification of the court appointed expert and an order for the exclusion of his report and addendum; and
4. it was upon the invitation of the court that the respondents other than the 1st respondent had made submissions upon the alternative relief of further case management orders.

[45] The respondents have not sought to refute the existence of these factors. Instead (for example, at paragraph 12 of the respondents' speaking notes), the following observations were made:

> "12. A great deal has been said in the submissions about what is considered to have been the primary objective of the application to the Court below and who was the successful party. Firstly, it is to be noted that the first item of the application for court orders seeks the court's directions relative to the Appellant's Junior Counsel's communication with the Expert. The application for the disqualification of the Expert was only one of the items of the order sought. Secondly, the Learned Judge's Order of November 15, 2015 grants two of the 4 items of the order, refuses one (the application to disqualify the Expert) and defers the 4th item (namely costs)."

[46] Looking at the submissions of both counsel, one is not certain of the benefit to be derived from this sort of numerical approach of considering how many orders were granted and how many refused. On the contrary, it is the substance or main aim or aims of the application that will present us with a clearer picture of which party achieved its objective, against the background of all the circumstances of the case. In the light of all the circumstances, it is my opinion that the substance of the application

before the court was to disqualify the expert witness while the other orders sought were indeed consequential to the said application to disqualify. Additionally, further case management orders would have been for the benefit of all parties in the matter, assisting in the proper conduct of the matter, going forward.

The late filing of the witness statements by the respondents

[47] In my view, there is some significance to be attached to the late filing of some of the witness statements in the matter and the effect that this ultimately had on the matter having to be adjourned.

[48] It will be remembered that, by the case management orders made on 20 July 2012, it was ordered that witness statements were to have been filed and exchanged by 26 April 2013. The witness statements that were given to the expert witness for his comments were filed on 10 June 2013 (those of Andrew Evans and Robert Jacobs); and 24 July 2013 (that of Garwaine Johnson). These, therefore, were filed out of time. At the pre-trial review held on 18 September 2013, the time for filing and serving witness statements was extended to 26 September 2013. In spite of this, the witness statement of Carlton Green was not filed and served until 8 October 2013.

[49] In contrast to this, when the expert witness was given directions by Sykes J on 29 October 2013, the four witness statements, which those directions permitted him to review, were provided to him that very day and he produced his addendum on 4 November 2013. The trial dates were 11-22 November 2014.

[50] Against this factual background, I cannot but accept the appellant's submission (at paragraph 39 of its skeleton submissions) that, had the respondents filed their witness statements by 26 April 2013 in compliance with the case management order, the addendum to the expert report could have been produced long before and any questions to have been put to him in relation to the addendum, could have been so put well within the timeline originally given.

[51] It is against this background as well that I find that the learned judge ought to have had especial and proper regard to rule 64.6(4) of the CPR, which requires a consideration of such matters as the conduct of the parties during the proceedings and whether a party has succeeded on a particular issue. Had this approach been taken, the question that would have to have been addressed is whether costs could ever fairly be awarded against a claimant in circumstances in which the late filing of witness statements by a defendant was at least a contributory factor to a trial having to be adjourned. Had that question been addressed, its answer would, naturally, have to have been "no".

The order for immediate taxation

[52] The order of the learned judge to the effect that the costs be taxed or agreed and paid within 45 days of taxation or agreement (and so, before the conclusion of the matter), formed another basis for complaint by the appellant. The ground for that complaint was that there was no reason for the learned judge to have departed from the general rule which, in the normal run of things, sees costs awarded but not

quantified through taxation or agreement and paid until the substantive action is completed. (The learned judge's order to that effect is reflected in the formal order and not in the judgment).

[53] The general rule in relation to the payment of costs is to be found in rule 65.15 of the CPR. It reads as follows:

> "**Time when taxation may be carried out**
>
> 65.15 The general rule is that the costs of any proceedings or any part of the proceedings are not to be taxed until the conclusion of the proceedings but the court may order them to be taxed immediately."

[54] That being the general rule, I share the appellant's concern with the learned judge's order that departs from the general rule. Perhaps the learned judge might very well have had a good reason for departing from the general rule. However, I do not see such a reason articulated in the said judgment or being otherwise apparent from a reading of it.

[55] In the court's experience, the general rule is departed from sometimes, for example, with a view to trying to achieve conformity in dealing with a delinquent or dilatory litigant or one who brings what the court might consider to be less-than-worthwhile applications; or applications found to be frivolous and vexatious and/or an abuse of the process of the court. So that, for example, a litigant who makes an application that is dismissed and makes another application seeking substantially the same relief, which is dismissed as being an abuse of the process of the court, might

very well find that the costs of that second application (and perhaps also the first) might be ordered to be taxed or agreed and paid within a limited period, in the absence of which payment, the suit would be stayed.

[56] It is not impossible that the order for immediate taxation was somehow linked to the learned judge's finding of misconduct. However, even if that were so, with the finding that the learned judge was in error in finding that there was misconduct, that approach would also have been flawed.

[57] The court's experience impels it to accept the appellant's submission that there are no special circumstances that exist in this case to justify a departure from the general rule. That being the case, this is another respect in which the learned judge fell into error, warranting this court's intervention.

Conclusion and disposition

[58] One main flaw in the learned judge's approach to the matter was the finding that the appellant's junior counsel's communication with the expert witness via the email correspondence amounted to misconduct in the form of an irregularity. It bears repeating that the communication did not breach any rules contained in the CPR or otherwise. Additionally, the communication with the expert did not speak to any substantive aspect of the evidence and had made absolutely no comments on the contents of the witness statements which were sent to the expert. Yet another consideration is that, had the expert witness not been made aware of the existence of the witness statements that were filed and, in giving his evidence, questions and/or

suggestions were directed to him about their contents that he was learning about for the first time, that in itself, could have occasioned an adjournment for him to have familiarized himself with the said documents.

[59] Another error is to be found in the finding that the respondents were the successful parties, when there is evidence to show that the attempt to obtain an order disqualifying the expert witness was one of the (if not the) main prongs of attack by the respondents.

[60] In fact, looking at the matter in its entirety, I am of the view that the most appropriate order in the circumstances of this case in which the appellant was successful on some points and the respondents were successful on others, would be for each party to bear its own costs.

[61] In the circumstances, these are the orders that I propose that we make:

i. The appeal is allowed.
ii. The order of B Morrison J that the appellants pay the costs of the application is set aside and an order for each party to bear its own costs in the court below substituted therefor.
iii. Costs of the appeal to the appellant to be agreed or taxed.

ORDER

MORRISON P (AG)

i. The appeal is allowed.

ii. The order of B Morrison J that the appellants pay the costs of the application is set aside and an order for each party to bear its own costs in the court below substituted therefor.

iii. Costs of the appeal to the appellant to be agreed or taxed.