[2025] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL COA2022CV00009

BETWEEN	**ALTON-LEE BRAMWELL**	**1st APPELLANT**
	ROCHELLE BRAMWELL	**2nd APPELLANT**
	NEVILLE MCFARLANE	**3rd APPELLANT**
	VINCENT ATKINSON	**4th APPELLANT**
AND	**JAMAICA NORTH-SOUTH HIGHWAY COMPANY LIMITED**	**1st RESPONDENT**
AND	**CHINA HARBOUR ENGINEERING COMPANY LIMITED**	**2nd RESPONDENT**

Ian Wilkinson KC, Lenroy Stewart and Miss Khadine Dixon instructed by Dixon & Associates Legal Practice for the appellants

Maurice Manning KC and Miss Allyandra Thompson instructed by Nunes Scholefield Deleon & Co for the respondent

15, 17 March 2023 and 4 July 2025

Civil practice and procedure – Expert evidence of court-appointed expert – Whether trial judge exercised discretion judicially when refusing to give effect to a pre-trial review order by which expert reports were ordered admitted into evidence – Whether addenda to the expert reports, permitted at pre-trial review, met the threshold for admission into evidence – Whether trial judge exercised discretion judicially in refusing to allow court-appointed expert witnesses to amplify expert reports ordered admitted into evidence at pre-trial review – Civil Procedure Rules, Parts 25, 26 and 32

F WILLIAMS JA

[1] I have read, in draft, the reasons for judgment of Dunbar Green JA. I agree that they accord with my own reasons for concurring with the order of the court as outlined in para. [3] herein.

DUNBAR GREEN JA

Introduction

[2] On 15 and 17 March 2023, we heard an appeal by the appellants (four of several claimants in the court below), from the judgment of Wiltshire J ('the learned judge') given in favour of the respondents (defendants in the court below). The appellants contended that the learned judge erred when she refused to allow expert witnesses, Messrs Roland Barrett and Paul M Carroll, to either give evidence or rely on their expert reports, at the trial, even though they had been appointed by the court, at pre-trial review ('PTR'), as expert witnesses and their respective reports ordered as "tendered into evidence". The appellants also contended that the exclusion of the experts' evidence precluded the learned judge from dealing justly with the case, having regard to, among other things, the number of claimants, the importance of the case and the complexity of the issues involved.

[3] Having heard and considered the written and oral submissions, we agreed that the learned judge erred in her refusal to allow the appellants to rely on the evidence of their expert witnesses and/or their respective reports. Accordingly, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The judgment of Wiltshire J, delivered on 20 December 2021 and orders are set aside.
>
> 3. A new trial is hereby ordered to take place as soon as possible before a different judge.
>
> 4. Costs of the appeal to the appellants to be agreed or taxed."

[4] Our reasons, as promised, now follow.

Factual Background

Amended claim form

[5] By amended claim form and amended particulars of claim, filed on 6 July 2016, the appellants, together with 14 other claimants, filed an action against the respondents seeking, among other things, damages for nuisance. The appellants pleaded that they suffered damage to their respective properties at Caymanas Country Club Estate in the parish of Saint Catherine ('the Country Club') during the construction of the North-South Highway ('the highway') between December 2014 and June 2015. Specifically, they claimed that the respondents conducted unannounced blasting exercises, on 22 December 2014 and 22 June 2015, which caused (a) damage to their homes; (b) personal injury; (c) great distress due to significant dust, noise, heavy vibration and infestation of mosquitoes; and (d) financial loss.

The defence and ancillary claim

[6] The respondents denied liability, contending that they carried out no blasting exercises on the dates alleged and that the complaints may have been caused by other large-scale construction and industrial activities conducted by third parties at or in the vicinity of the Country Club. They asserted that while blasting works were conducted by MIDAC Equipment Limited ('the ancillary defendant'), an independent contractor, to the best of their knowledge, those vibrations were fully monitored and remained well within accepted international standards. Additionally, the 2nd respondent had filed an ancillary claim, which sought an indemnity and/or contribution pursuant to the subcontract it entered with the ancillary defendant.

The ancillary defence

[7] The ancillary defendant pleaded, among other things, that its blasting activities were managed safely and conducted in accordance with the protocol for blasting by the Division of Mines and Geology and permits from the National Environmental Planning

Agency ('NEPA'). The ancillary defendant also denied that the appellants suffered any injury or loss arising from their actions under the sub-contract agreement.

[8] The ancillary defendant is not a party to this appeal.

The trial

[9] The trial occurred between 22 February and 20 December 2021. Judgment was entered and costs ordered in favour of the respondents against all the claimants, and the ancillary defendant against the respondents. There was a further order that the latter costs be recoverable by the respondents against the appellants and the other claimants.

[10] The appellants, being dissatisfied with the learned judge's treatment of the appellants' expert evidence, among other things, brought this appeal.

The amended notice of appeal

[11] On 20 May 2022, the appellants filed their amended notice of appeal on the following grounds:

> "i. The learned judge erred in law in permitting the Respondents (the Defendants/Ancillary Claimants in the Claim below), through their Attorneys-at-law, to advance objections and oral submissions at the trial against the admission in evidence of the Expert Reports of Mr Roland Barrett and Mr Paul Carroll, on whom the Appellants intended to rely to prove their case in the Court below, as they had already been deemed experts and permitted to file Expert Reports by another judge of the Supreme Court.
>
> ii. The learned judge erred in law in allowing the Respondents, through their Attorneys-at-law, to advance the said objections and oral submissions at the trial against the admission in evidence of the Expert reports of the said Mr Roland Barrett and Mr Paul Caroll without the Respondents giving advance notice to the Appellants that such an objection would be taken.
>
> iii. The learned judge erred in law in failing to appreciate the effect of the Amended particulars of Claim specifically

indicating which Claimant obtained a structural Engineer's report and which claimant obtained a noise conduction survey, and that the said Expert reports were disclosed and served on the Defendants.

iv. The learned judge erred in law in acceding to the Respondents' objection to prohibit the expert witness Mr Roland Barrett from continuing to give viva voce evidence during his examination-in-chief, although he was giving the said viva voce evidence pursuant to a notice filed by the Respondents requiring him to give the said viva voce evidence regarding his said Expert Report.

v. The learned judge erred and exercised her discretion incorrectly or injudiciously in not allowing any of the Claimants to amplify their witness statements to give further evidence of having commissioned the said expert witnesses Mr Roland Barrett and Mr Paul Carroll to provide Expert Reports and to give evidence at the trial of the Claim below.

vi. The learned judge erred in refusing the Claimants' request to file supplemental witness statements to establish any relevant or necessary nexus between the Claimants and the said expert, Mr Roland Barrett.

vii. The learned judge erred by failing to consider, sufficiently or at all, that the expert witnesses Mr Roland Barrett and Mr Paul Carroll were appointed or deemed expert witnesses of the Court below by a prior Court order made by a Judge of coordinate jurisdiction.

viii. The learned judge erred in refusing to allow the evidence of the appellants said expert witnesses thereby depriving herself of the opportunity to consider the relevance, significance, veracity and /or weight of the said expert reports on the salient issues between or among the parties.

ix. The learned judge erred in allowing the evidence of the Ancillary Defendant's expert witness **Dr Lyndon Brown** although acknowledging that the Ancillary Defendant had not established any necessary nexus with its said expert witness.

x. The learned judge failed to apply the overriding objective recognised by the law including the Civil Procedure Rules, and the fundamental principle of access to justice whereby the

parties have a right to have their cases heard on the merits and should not be defeated by a purely procedural and technical breach which does not in any way impact the trial or justice of the case.

xi. The learned Judge's handling, or mishandling, of the issue of evidence from the expert witnesses, particularly the Appellant's said expert witnesses, deprived the Appellants of a fair trial and resulted in a serious miscarriage of justice;

xii. The learned judge erred in failing to allow the Appellants to adduce in evidence the verbatim notes of the issues raised at the community meeting at the Caymanas Golf and Country Club held on the 8th day of January, 2015.

xiii. The learned judge erred in allowing the Respondents to adduce in evidence the Respondents (sic) written response to the verbatim notes of the community meeting at the Caymanas Golf and Country Club held on the 8th day of January, 2015, having refused to allow the Appellants to adduce the said verbatim notes.

xiv. The learned Judge erred, or misapplied the law, in redacting and/or striking-out sections of the Appellants' witness statements.

xv. The learned Judge erred, and/or misapplied the law in ordering that the Claimants pay the costs awarded to the Ancillary Defendant against the Ancillary Claimant".

Issues on appeal

[12] I gratefully adopted the issues as set out by the appellants in their skeleton submissions. They are:

"a. Whether the learned judge was correct in excluding the [appellants] expert witnesses from either giving evidence or their reports from being relied upon at the trial (Grounds i-viii);

b. Whether the learned judge erred in permitting the Ancillary Defendant's expert to give evidence although the learned judge said it suffered from the same defects which caused her to prevent the [appellants'] expert witnesses from either

> giving evidence or their expert reports from being relied upon at the trial (Ground ix);
>
> c. Whether the appellants were deprived of a fair trial (Grounds x-xiv); [and]
>
> d. Whether the learned judge erred in awarding costs to the ancillary defendant which were to be recovered from the claimants since the claimants did not bring any claim against the ancillary defendant. (Ground xv)"

[13] Having found that the learned judge erroneously excluded the appellants' expert evidence at the trial, I did not consider it necessary to deal with issues c. and d.

Summary of the relevant submissions

For the appellants

[14] King's Counsel, Mr Wilkinson, submitted that the appeal was essentially concerned with whether the learned judge erred in law by refusing to allow the evidence of the appellants' experts, in the face of the PTR order. King's Counsel submitted that **CAC 2000 Ltd v X-Ray Diagnostic Ultrasound Consultants Ltd** [2014] JMCA Civ 27 ('**CAC 2000 Ltd**'), bears striking resemblance to the instant issues. He also relied on **Bergan v Evans** [2019] UKPC 33, for the submission that expert reports are not "real evidence" or "documentary evidence" for which a foundation has to be laid and for which a nexus to another witness's testimony has to be demonstrated. Even if that were necessary, it was argued, Mr Roland Barrett had done so from the witness box before his evidence was curtailed. Moreover, King's Counsel argued, there is no requirement under Part 32 of the Civil Procedure Rules, 2002 ('CPR') for the litigant's witness statement to refer expressly to consultation with the expert, in order for the expert witness to be permitted to give oral evidence.

[15] Mr Wilkinson also highlighted that there had been no objection to the expert reports as hearsay. Neither had there been any challenge to the substance of the expert reports, and it was the respondents and ancillary defendant who had specifically requested that Mr Roland Barrett attend the trial for cross-examination. It was further

submitted that the learned judge seemed more concerned with procedure than substance, in stark contrast with how she treated the report relied on by the ancillary defendant's expert witness.

[16] King's Counsel also referred to **The Public Service Commission and anor v Deanroy Ralston Bernard** [2021] JMCA Civ 2, (paras. 50, 51, and 56) for the principle that "the court, unless expressly prohibited should interpret the rules in such a way which gives precedence to fairness, efficiency and unnecessary costs not being incurred".

[17] We were referred to **Leymon Strachan v The Gleaner Co. Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. Relying on that case, Mr Wilkinson submitted that since the orders of the PTR judge had not been challenged, they stood as good orders, and the learned judge erred in essentially setting aside or rendering nugatory the orders of a judge of coordinate jurisdiction.

For the respondents

[18] King's Counsel, Mr Manning, submitted that the appellants were non-compliant with the PTR order for addenda to the experts' reports, to bring the reports into compliance with rules 32.12 and 32.13(1), (2), and (3) of the CPR. He pointed out that the need for an expert witness to give oral evidence is generally rare, and for that reason, the expert reports are expected to comply with the requirements under rule 32.13 of the CPR.

[19] Mr Manning submitted that there was a complete disregard for the PTR order, in circumstances where there was no good reason for the non-compliance. This, he posited, entitled the respondents to renew their objection to the expert reports being tendered for admission. King's Counsel argued that the appellants should not have been surprised, as they knew the point was taken at the PTR and understood that there ought to have been compliance with Part 32, as ordered by the PTR judge.

[20] Mr Manning contrasted the situation with Dr Brown's expert report, relied on by the ancillary defendant, which had not been the subject of any prior complaint as to its form or any perceived deficiency.

[21] We were referred to **Davie v Edinburgh Magistrates** [1953] SC 34; **Kennedy v Cordia (Services) LLP (Scotland)** [2016] UKSC 6; and **National Commercial Bank Jamaica Limited (Successors to Mutual Security Bank Limited) v K & B Enterprises Limited**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 70/2005, judgment delivered 5 September,2005.

Discussion and disposal of the appeal

[22] Rule 1.1 of the CPR states that the overriding objective is to "deal with cases justly", and rule 1.2 provides that: "[t]he court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules".

[23] The provisions of Parts 25 and 26 of the CPR give a judge exercising case management functions wide discretion to actively manage cases in preparation for trial, including directions to ensure that the trial proceeds quickly and efficiently, to further the overriding objective of dealing with cases justly (see rules 25.1 and 26(2) (v)). This could mean giving directions on evidence that the court will permit to be adduced at trial.

[24] Part 32 of the CPR deals comprehensively with the provision of expert evidence to the court, the general rule being that permission is to be given at a case management conference to call an expert witness or to put into evidence an expert witness's report (rule 32.6).

[25] In the instant case, the PTR judge gave permission for the appellants to call Messrs Barrett and Carroll as expert witnesses. She also accepted their expert reports as having been "tendered into evidence" and indicated that there was no need to call those expert witnesses at trial. Importantly, she went on to permit the said expert witnesses to file addenda to bring their reports into compliance with rules 32.12 and 32.13 of the CPR.

[26] These are the orders she made:

> "1. This Honourable Court certifies Roland F Barrett, P.E., Civil/Structural Engineer and Paul Carroll, Technological & Environmental Manager as expert witnesses to this Honourable Court.
>
> The Noise Assessment Report dated 27th day of April 2016, prepared by Paul M Carroll of TEM Network Limited and Fourteen (14) Structural Engineer's Reports dated the 19th day of July, 17th day of September 2015 and 1st day of December 2015, prepared by Roland F. Barrett of Ultimate Engineering Limited, are treated as expert reports.
>
> **That the said reports are tendered into evidence as hearsay documents without the need to call the makers of the reports at the trial of this matter pursuant to Civil Procedure Rules and section 31E of the Evidence (Amendment) Act 1995.**
>
> **Roland F Barrett and Paul M Carroll are allowed to give an addendum to their reports in compliance with Rule 32.12 and Rule 33.13(1)(2)(3)(sic) of the Civil Procedure Rules 2002…**
>
> 2….
>
> Dr Lyndon Brown, Adjunct Professor in the Department of Physical Geology at Lone Star College, Houston, Texas in the United States of America is deemed and accepted as an expert witness by this Honourable Court.
>
> The Ancillary Defendant is permitted to file an expert report prepared by Dr Lyndon Brown…
>
> …
>
> 3. The report from Dr Lyndon Brown is to be filed and served on or before the 25th day of January 2021.
>
> 4. The parties are permitted to put questions in writing to the experts certified at paragraphs one and two above on or before the 3rd day of February 2021.

5. The answers to the written questions are to be filed and served on or before the 12th day of February 2021.

6. The parties are to give written notice by the 16th of February, 2021 to indicate whether the experts are required to attend court for cross-examination.

7. Lyndon Brown is permitted to attend trial by Zoom…" (Emphasis added)

The relevant reports did not form a part of the record of appeal.

[27] I find it useful to set out the requirements of rules 32.12 and 32.13.

[28] Rule 32.12 states that "an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions".

[29] Rules 32.13(1) to (3) provide as follows:

"(1) An expert witness's report must –

(a) give details of the expert witness's qualifications;

(b) give details of any literature or other material which the expert witness has used in making the report;

(c) say who carried out any test or experiment which the expert witness has used for the report;

(d) give details of the qualifications of the person who carried out any such test or experiment;

(e) where there is a range of opinion on the matters dealt with in the report-

(i) summarise the range of opinion; and

(ii) give reasons for his or her opinion; and

(f) contain a summary of the conclusions reached.

(2) At the end of an expert witness's report there must be a statement that the expert witness-

(a) understands his or her duty as set out in rules 32.3 and 32.4;

(b) has complied with that duty;

(c) has included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and

(d) has given details in the report of any matters which to his or her knowledge might affect the validity of the report.

(3) There must also be attached to an expert witness's report copies of –

(a) all written instructions given to the expert witness;

(b) any supplemental instructions given to the expert witness since the original instructions were given; and

(c) a note of any oral instructions given to the expert witness, and the expert witness must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert witness, the party's attorney-at-law or any other person acting on behalf of the party.

(4) Where an expert report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as service of the report.

(5) Where it is not practicable to provide a copy of the documents referred to in paragraph (4) such documents must be made available for inspection by the other party or any expert witness instructed by that party within 7 days of a request so to do."

[30] I will return to the issue of admissibility of the expert reports after I have set out the relevant procedural chronology.

Relevant procedural chronology

[31] On 8 February 2021, the ancillary defendant filed written questions to the appellants' expert witnesses, and, on 16 February 2021, Mr Barrett provided answers to those questions.

[32] On 15 February 2021, the respondents filed a notice requiring Messrs Barrett and Carroll to attend for cross-examination. On 16 February 2021, the ancillary defendant also filed a notice requiring Mr Barrett to attend for cross-examination. The respondents' notice of intention to tender in evidence hearsay statements made in documents was also filed on 16 February 2021.

[33] It was noted that on the first morning of trial, documents were served on the appellants' attorney. Additional documents were filed on the second day. The learned judge noted that "all documents filed by [the respondents] and Ancillary Defendant [were] agreed" (see pages 1-3 of the notes of evidence ('the notes')).

[34] It was also noted that the learned judge sustained an objection to the amplification of para. 12 of the first appellant's witness statement. The amplification was intended to establish a nexus between the first appellant's evidence and the expert witnesses' reports.

[35] On 4 March 2021, in purported compliance with the relevant order of the PTR judge and rules 32.12 and 32.13, the appellants filed an addendum to Mr Barrett's report. Mr Barrett commenced his testimony on the said date, by giving his name, qualifications, place of employment, instructions received from the first appellant, the methodology he adopted, and indicated that he could "recognise the reports" from his name, the names of the clients, the contents of the reports and his company's address.

[36] Counsel for the ancillary defendant objected to Mr Barrett's report being admitted into evidence on the basis that there were shortcomings in relation to the requirements

of rules 32.3(1), 32.12 and 32.13 of the CPR. A similar objection was taken by counsel for the respondents, who also argued that Mr Barrett's report was not objective. The respondents stated that the expert witness did not appear to understand his duty and seemed to be an ordinary witness, and that aspects of the report would be hearsay (see pages 420 to 423 of the notes).

[37] The appellants pointed out that similar objections had been made at the PTR, but the reports had, nevertheless, been allowed. They also relied on **Eagle Merchant Bank of Jamaica Ltd v Crown Eagle Life Insurance Co Ltd and Others** (unreported), Supreme Court, Jamaica, Claim No CL 1998/E 095, judgment delivered 19 May 2003 and **R v Kearley** [1992] 2 AC 228, as supporting the admissibility of the reports. The court was also informed that an addendum to Mr Barrett's structural engineer's report had been filed and served on counsel.

[38] The learned judge ruled that Mr Barrett's expert report would not be allowed into evidence. She said it failed to conform with Part 32 of the CPR and as the appellants had shown no nexus with the maker of the report. Furthermore, the overriding objective could not be relied on when there was a failure to obey a court order. She also reiterated that the appellants' expert witnesses' reports were not among the agreed documents.

[39] There was a similar objection by the appellants to the ancillary defendant's expert witness. However, the learned judge admitted his report. She said, "[t]he same fate that met the reports on which the [appellants] had sought to rely, would have been suffered by the [ancillary defendant's expert] Report, except it had already been agreed by the parties as evidence" (see para. [59] of the judgment).

[40] At para. [77] of the judgment, the learned judge went on to make the following findings about the absence of expert evidence by the appellants:

> "[77] The [appellants] allege in their particulars of claim that the [respondents'] activity caused cracks and damage to their houses and a number of them have testified that these cracks were not present when they did their walk through prior to

> taking possession. The nature of this aspect of the claim requires proof from expert evidence as to the effect of the [respondents] and the Ancillary Defendant's activities on the [appellants'] properties. They have however produced no evidence of the cause of the cracks or linked the cracks directly to the [respondents'] activities."

[41] She also made these findings in relation to the expert evidence called by the ancillary defendant:

> "…This is in contrast to the evidence given by Dr Brown in which he concludes, from his analysis of the seismic readings collected by the Ancillary Defendant, that the blasting operations, even at the highest recorded vibration, could not have affected concrete structures. The court notes that Miss Dixon did challenge Dr. Brown's evidence on the integrity of the calibration of one blaster, #17794, and Dr Brown conceded that this table was incomplete. He however indicated his reliance on the certificate confirming calibration. The court has taken note of said certificate which was one of the documents agreed by Counsel."

The admissibility question

[42] The established principle is that this court will not interfere with the exercise of discretion by a judge of first instance unless there has been a "misunderstanding by the judge of the law or of the evidence before him… 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" (see paras. [19] and [20] of **The Attorney General of Jamaica v John McKay** [2012] JMCA App 2).

[43] It follows that a trial judge has the unfettered discretion to control the evidence at trial. This will invariably include questions of admissibility of evidence. However, the discretion must be exercised judicially (see para. [42] **Marilyn Hamilton v Advantage General Insurance Company Limited** [2019] JMCA Civ 48).

[44] The appellants' main argument was that the admissibility requirements in Part 32 of the CPR had been met. These are (a) that the party seeking to rely on the expert

reports had received the court's permission at a PTR (case management conference) (rules 32.6(1) and (2) of the CPR); (b) the reports were served on and/or disclosed to all parties to the litigation (rules 32.6(4) and 32.15); and (c) the reports were not hearsay (32.7(1) and (2)).

[45] The United Kingdom Supreme Court, in **Kennedy v Cordia (Services) LLP (Scotland)**, identified other factors which govern the admissibility of expert evidence in civil proceedings. These are:

> (i) whether the proposed skilled evidence will assist the court in its task;
>
> (ii) whether the witness has the necessary knowledge and experience;
>
> (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
>
> (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

[46] The question of whether, in the circumstances of the instant case, the learned judge had the discretion to exclude the respective reports of Messrs Barrett and Caroll, and their oral testimonies, or had done so judicially, turned narrowly, on whether the threshold for admissibility of the experts' reports had been met. This necessarily involved the interpretation of the third and fourth paragraphs of order 1 of the PTR orders, and whether the appellants' expert witnesses had complied with the fourth paragraph of the said order.

[47] The PTR judge's orders, from which there was no appeal, followed robust submissions on the admissibility issue. On a reading of the third paragraph of order 1, wherein the PTR judge accepted the expert reports as having been "tendered in evidence" and ordered that there was no need to call the expert witnesses at the trial, it appeared that the learned judge would not have left questions surrounding the admissibility of those reports to the trial judge. However, that was clearly not the case because, as the

next paragraph in order 1 made plain, the PTR judge recognised that the reports were not fully compliant with rule 32 of the CPR and gave the appellants the opportunity to bring them into conformity. The cumulative effect of those paragraphs of order 1, therefore, was that the admissibility of the expert reports was conditional on the expert witnesses filing suitable addenda to bring them into compliance with rules 32:12 and 32:13 of the CPR.

[48] Consequently, as the respondents argued, the learned judge had a role in determining whether the reports were to be admitted at trial; that being to assess whether the defects in the reports had been cured.

Did the learned judge exercise her discretion judicially?

[49] At the commencement of the trial, the expert reports of the two expert witnesses had not only been disclosed to the opposing parties but acted upon by them. They had posed questions to the expert witnesses and received answers. Both the questions and answers, therefore, formed part of the expert evidence at that point. The opposing parties had also served notices for the expert witnesses to be cross-examined at the trial.

[50] Further to this, at the trial, Mr Barrett's addendum to his expert report, which had been filed and served prior to him giving evidence, was brought to the attention of the learned judge. It purported to bring his expert report into compliance with rules 32.12 and 32.13. Its contents were essentially that (a) "the expert report was now addressed to the Supreme Court…[and that the expert witness understood his] "duty to the court as set out in Rules 32.3 and 32.4 of the Civil Procedure Rules, 2002"; (b) the expert had "complied with [that] duty [as well as his duty as set out] in rules [32.2 and 32.4] of the CPR"; and (c) the report "…included all matters within [the expert's] knowledge and area of expertise relevant to the issue on which the expert evidence [was] given; and ...[gave] details in the report of any matters which to [his] knowledge might affect the validity of the report".

[51] The evidence pertaining to Mr Carroll's expert report and addendum was similar, the differences being in (a) the filing and service of the addenda; and (b) the absence of any oral testimony from Mr Carroll.

[52] Mr Barrett had also been allowed to commence giving oral evidence at the trial. He spoke to his qualifications and experience and indicated that he was commissioned by the 1st appellant and others to investigate damage to their houses. He said that he had completed 13 reports and gave details on how he collected the relevant data. He also gave evidence about his costs for the reports. Finally, he stated that he could recognise the reports by features, including his name.

[53] I came to the view that the learned judge erred in excluding the expert evidence of Messrs Barrett and Caroll for the following reasons.

[54] Firstly, in answering the questions surrounding the admissibility of the expert evidence for the appellants, she failed to consider or sufficiently consider that:

> (a) this was the type of case that required expert evidence to prove or disprove the appellants' allegations;
>
> (b) the expert witnesses were already certified by the court;
>
> (c) the substance of the expert reports had been disclosed to the parties;
>
> (d) the expert reports were also appended to the amended particulars of claim;
>
> (e) there was purported compliance, by the expert witnesses, with the requirements of rules 32.12 and 32.13 in so far as the filing, service and content of the addenda were concerned;
>
> (f) the PTR judge did not limit the date for filing and service of the addenda, albeit good practice required that they should be done before the start of the trial;
>
> (g) there was late filing of documents by at least one other party, so the addenda were not the only late documents; and

> (h) the ancillary defendant had also not complied with the requirements of rules 32:12 and 32:13, yet, with the agreement of all the parties, its expert witness's report was entered into the evidence and relied upon, and the said expert witness was allowed to give oral testimony in the trial.

[55] Had the learned judge given adequate weight to those factors, she would likely have dealt with the admissibility questions differently. Where, as in the instant case, the substance of the evidence was already disclosed or given, the interest of fairness and balance weighed in favour of the exercise of discretion to make appropriate orders, where necessary, including to allow the expert witnesses to expand their reports and addenda by giving oral evidence, and, if necessary, to allow for amplification of the appellants' evidence as regards the commissioning and costs of the expert reports.

[56] Secondly, I was particularly concerned about the difference in treatment of the expert witness's report for the ancillary defendant, which was deficient in its compliance with Part 32 of the CPR. I did not accept, as an important distinction, that the expert report for the ancillary defendant had been agreed. This reasoning was flawed because, on the face of it, the appellants' expert witnesses had filed addenda in purported compliance with the PTR judge's order, negating agreement as a relevant consideration in how to treat with those reports. Moreover, the differences in treatment of the expert reports, on both sides, created an "unnecessary imbalance which was not in the interests of justice", as had been determined in **CAC 2000 Ltd**. That case, though distinguishable on the facts, was relevant on the principle of fairness.

[57] The appeal in **CAC 2000 Ltd** was from a decision in which the trial judge struck out the report of the appellant's expert witness on the basis that there was a failure to meet the requirements of Part 32 of the CPR. Counsel had made an application for the report to be admitted, and evidence was taken from the expert with a view to "clearing any procedural barriers that there may have been". The learned judge denied the application and went on to find that "there [was] no competing expert evidence opposing the [respondent's] account…with the result that the conclusions of [the respondent's] expert are unchallenged". The learned judge also denied the request for the appellant's

expert witness to give oral evidence on the basis that it would require a court order. Yet, the respondent's expert witness was allowed to give evidence as regards the contents of the appellant expert witness's report and his subsequent investigations after reviewing it.

[58] The appeal succeeded. This court held, at para. [9]:

> "In view of the learned judge's stance in respect of [the appellant's expert witness's] report, and the failure to allow evidence to be given in the manner suggested by [counsel], it was not open to [the respondent's expert witness] to be allowed to give evidence as regards the contents of [the appellant's witness's] report and his subsequent investigations. This situation created an unnecessary imbalance which was not in the interests of justice…"

[59] I accepted the appellants' submission that the overriding objective of doing justice between the parties was not served by excluding the appellants' expert reports on the grounds that they did not comply with the CPR while accepting another (the ancillary defendant's expert's) which was similarly defective, then concluding there was no challenge to the expert evidence which was allowed.

[60] It was also my view that the point about nexus ought not to have been a barrier to their admissibility. In any event, the oral testimony that Mr Barrett gave seemed sufficient to establish a nexus with the first appellant's evidence.

[61] More to the point, the excluded witnesses had already been certified as experts of the court. Consequently, their reports were required to be addressed to the court. In compliance with Rule 32.12, each expert was obliged to acknowledge his duty to the court and demonstrate a clear understanding of that duty. In their capacity as expert witnesses, they were expected to provide independent and objective assistance by presenting unbiased evidence, to assist the court on scientific or technical matters, and to provide expertise in areas which would not be within the court's knowledge. Moreover, expert witnesses are also allowed to give explanations and comment on evidence already

adduced (see **Field v Leeds City Council** [2000] HLR 618, 623, and pages 435-436 of A Practical Approach to Civil Procedure, Stuart Sime, 14th edition).

[62] Allowing the appellants to amplify their evidence for the limited purpose of establishing the nexus, based on the substance of the contents of their witness statements (rule 29.9 of the CPR), and allowing them to rely on the reports and addenda of their expert witnesses would not have imposed any obligation on the learned judge to accept the evidence of the expert witnesses, if she found their reports and testimonies to be unreliable or falling short of the mark of expert evidence. As the fact finder, she would have been entitled to weigh their evidence and decide whether the conclusions in their reports were supported by facts, authoritative literature, and scientific assessment or otherwise.

[63] It was for these reasons that I concluded that the learned judge erred in excluding the appellants' expert witnesses' respective reports, addendum and oral testimony. Doing so did not comport with the overriding objective to deal with cases justly, and no reasonable judge, regardful of that duty, could have reached such a decision (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, 1046).

Conclusion

[64] Having considered the submissions of counsel, the relevant aspects of the CPR, and the material before us, I concluded that the learned judge was plainly wrong in the exercise of her discretion when she excluded the expert evidence of the appellants and their respective reports. For those reasons, I concurred with the orders at para. [3] above.

BROWN JA

[65] I too have read the draft reasons for judgment of Dunbar Green JA and agree.