

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2023/0010

BETWEEN

LESLIE PHILLIP

Appellant

and

KYRON WILLIAMS

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Esco Henry
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Ruggles Ferguson KC, with him Ms. McKaeda Augustin for the Appellant
Ms. Caryn Adams for the Respondent

2025: January 27;
March 26.

Interlocutory Appeal - Expert evidence - Refusal of application for leave to call expert witness - Exercise of discretion by master - Whether the master failed to appreciate the importance of the proposed expert evidence to the disposition of the matter - Rule 32.2 of the Civil Procedure Rules 2000 – Application of CPR 32.2 and 32.4 Whether expert evidence was reasonably required to resolve the proceedings justly - Whether master erred in finding that the expertise of the proposed expert witness would not assist the court with the matters in issue and the just disposal of the case

On or about 30th March 2019, a traffic accident occurred involving a Mitsubishi Fuso truck bearing registration number TS482 owned by the respondent. At the time of the accident, the vehicle was being driven by the appellant who allegedly had rented or borrowed the vehicle from the respondent. As a result of the accident, the vehicle was damaged extensively and was written off.

By claim form filed on 8th January 2020, the respondent sued the appellant for general damages for breach of contract and negligence and/or breach of statutory duty. He pleaded that the accident was caused solely by the appellant's, or his servant's or agent's negligent driving and he claimed \$73,126.00 as special damages.

On 15th June 2022, the appellant applied to the court for an order to admit the expert evidence of Sergeant #364 Denis Powlette, a mechanic and vehicle inspector attached to the Traffic Department of the Royal Grenada Police Force. Sergeant Powlette had carried out an examination of the truck after the accident and prepared a report on his observations. However, the report was not exhibited to the claim form, the defence or other pleadings or witness statements. The respondent objected to the application and the appellant thereafter withdrew it.

On 17th October 2022, the appellant filed an application for leave to call Mr. Eric Bridgeman, a qualified auto mechanic, as a witness pursuant to rule 32.6 of the **Civil Procedure Rules 2000 ("CPR")**, for the purposes of assisting the court impartially by providing his opinion on whether the defects observed on inspection of motor vehicle TS482 could have caused the accident. By affidavit in opposition filed on 2nd November 2022, the respondent averred that the proposed expert does not meet the requirements under **CPR** 32.6 for reliance to be placed on his report. On 16th January 2023, the appellant filed an amended application for leave to call Mr. Eric Bridgeman as an expert witness, for the purpose of assisting the court regarding whether the brakes on the said truck were defective at the time of the accident instead of the earlier objective of providing assistance 'regarding the cause of the accident'. On 31st January 2023, the respondent filed a further affidavit in opposition, stating that the truck was no longer available as he had scrapped it and used the parts. He noted that the appellant did not seek the court's approval to rely on Sergeant Powlette's report and the proposed expert could not inspect the truck. The respondent argued that it would be unfair for the expert to rely on an unqualified report and asked the court to dismiss the application, as the expert could not provide independent assistance as required by **CPR** Part 32.

By oral decision delivered on 16th February 2023, the learned master refused the appellant's application to call an expert and scheduled a pre-trial review conference. While acknowledging the proposed expert's qualifications, the master found that due to the truck's unavailability, the expert's examination would not assist the court. He concluded that the court could resolve the issues based on the existing evidence and refused the application for leave to adduce expert testimony.

Being dissatisfied with this ruling the appellant filed his notice of interlocutory appeal on 8th May 2023 having been granted leave to appeal. He advanced five grounds of appeal : -

1. The learned master was plainly wrong in the exercise of his discretion not to grant the appellant's application for leave to call an expert witness.
2. The learned master failed to take into account the existence of a police report and the thrust of the appellant's case that the brakes of the truck were not functioning at the time of the accident.

3. Even though the truck is no longer available, an expert can form a reasonable opinion based on existing reports and the version of witnesses with respect to the malfunctioning brakes.
4. The learned master failed to appreciate or fully appreciate the critical importance of expert evidence and, in particular, the issue of malfunctioning brakes to arrive at a just disposition of this matter.
5. Given the nature of the case, the denial of expert evidence is potentially prejudicial to the appellant's case.

Held: allowing the appellant's interlocutory appeal of the learned master's decision of 16th February 2023, ordering that the appellant's application for leave to call Mr. Eric Bridgeman as an expert witness be remitted for determination by the learned trial judge and the respondent to pay to the appellant the costs of this appeal to be assessed within 21 days if not agreed, that:

1. This matter involves the examination of the exercise of discretion by the learned master. The exercise of judicial discretion engages the overriding objective of the **Civil Procedure Rules - 2000 ("CPR")** which is to do justice between the parties. This encompasses several factors including ensuring as far as practicable that the parties are on equal footing. The court is enjoined to act judicially when called on to exercise any discretionary power. In doing so, it must consider any prejudice or advantage that may be occasioned to a litigant arising from its determination.
2. This dispute engages the application of rules 32.2, 32.4 and 32.6 of the CPR. Rule 32.2 is unambiguous. It stipulates that only expert evidence that is 'reasonably required to resolve the proceedings justly' will be permitted in civil proceedings. It follows that a judicial officer faced with an application for leave to permit a witness to provide expert opinion must satisfy himself or herself that such evidence is reasonably required to justly resolve the proceedings. **CPR 32.4(2)** addresses the content of such expert evidence and makes it pellucid that subjective, biased opinions outside the expert witness' expertise are inadmissible and can form no part of the expert witness' testimony. These two sub-rules make clear that a decision of whether to permit an expert to present expert testimony is one of admissibility of expert evidence. **CPR 32.6** touches and concerns the question of whether expert evidence is necessary for resolving the proceedings and in a general sense what kind of expert evidence is relevant and admissible towards that end. The issue of what specific expert evidence would be admissible can only be decided when an expert report is prepared and is being produced at trial. It is only at that point that the full considerations of relevance can be entertained. Such an exercise may be conducted only by a trial judge who will have to marshal the material facts, the issues and the law.

Rule 32.6 **Civil Procedure Rules 2000** applied; **Joseph W. Horsford v Geoffrey Croft ANUHCVP2014/0006** (delivered 22nd October 2014, unreported) applied.

3. In deciding whether to grant leave to adduce expert testimony, a judicial officer must determine firstly whether the subject matter is one in respect of which expert

evidence is permissible. This necessitates consideration of whether a person untrained, inexperienced or unskilled in that area would be able to arrive at a sound judgment without the testimony of an expert in the field and whether there exists a sufficiently established, reliable, organised and recognised 'body of knowledge or experience' in that discipline on which reliance can be placed in arriving at a just conclusion. Secondly, the court must be satisfied that the proposed expert witness possesses the requisite skills, knowledge or experience in the specialist area to enable him to provide the court with a useful opinion on the subject matter of the dispute.

R v Bonython (1984) 38 SASR considered.

4. The subject matter about which the appellant proposes to elicit expert evidence concerns a latent defect in the truck's brakes and falls within the field of mechanical engineering specific to automobiles. There can be no doubt that this is an area in which expert testimony is permissible. As to whether a lay person would be able to form a sound judgment on the question of whether the truck had a latent brake defect, the irrefutable answer is no. This matter required technical knowledge in mechanical engineering, which the judge could not be expected to have. Therefore, the master erred in principle and made an incorrect decision. The court takes judicial notice that there is a body of knowledge or experience which is sufficiently organised or recognised as a reliable body of knowledge and experience in the field of mechanical engineering, as this is a matter which is notoriously known by the public in general. While the learned master acknowledged the proposed expert's qualifications, he did not think that his opinion was necessary. He erred in this conclusion, as it was influenced by his earlier mistake in dismissing the need for expert evidence of the latent defect on the truck's brakes. This shows he did not fully grasp the importance of the expert evidence in resolving the dispute arising on the appellant's defence regarding the malfunctioning brakes.

R v Bonython (1984) 38 SASR followed.

5. A further consideration that arose was whether the proposed expert has to physically examine the truck in question or whether he could rely on the contents of the earlier report prepared by Sergeant Powlette. There is no need for the proposed expert witness to have personally examined the truck, provided that there is relevant available material and evidence from which he could present a satisfactory expert report to the court constituting relevant opinion evidence.

Myers, Brangman and Cox v The Queen [2015] UKPC 40 considered; **Kenny v Cordia (Services) LLP** [2016] 1 WLR 597 considered.

JUDGMENT

- [1] **HENRY JA** :This appeal raises the interesting question as to whether the exercise of judicial discretion by the learned master in denying an application to adduce the expert evidence of a qualified auto mechanic was wrong in principle in the circumstances of this case. A related issue for consideration is whether the intended expert evidence was necessary to ensure a just disposal of the proceedings.
- [2] The appeal relates to a traffic accident that happened on or about 30th March 2019¹ involving a 1995 Mitsubishi Fuso truck bearing registration number TS482 owned by the respondent. At the time of the accident, the vehicle was being driven by the appellant who allegedly had rented or borrowed the vehicle from the respondent. The vehicle was damaged extensively as a result of the accident and was written off.
- [3] The respondent subsequently sued the appellant² for general damages for breach of contract and negligence and/or breach of statutory duty³. He pleaded that the accident was caused solely by the appellant's or his servant's or agent's negligent driving. He claimed \$73,126.00 as special damages.
- [4] In his defence⁴, the appellant acknowledged that the truck was involved in an accident and was written off as alleged. He denied being negligent in driving the vehicle and attributed the cause of the accident to brake failure while driving downhill and by extension the failure by the respondent to have the truck repaired before renting it out.

¹ See para. 1 of Claim form filed on 8th January 2020 and para. 1 of the Amended Defence filed on 2nd November 2020.

² See claim form filed on 8th January 2020 at pages 4-8 of hearing bundle 1.

³ Pursuant to sections 49 and 50 of the Motor Vehicles and Road Traffic Act, Cap. 201 of the Laws of Grenada Revised Edition 2010.

⁴ See defence filed on 14th February 2020 at pages 25-28 of hearing bundle 1.

- [5] By application filed on 15th June 2022, the appellant applied to the court for an order to admit the expert evidence of Sergeant #364 Denis Powlette. It is undisputed that Sergeant Powlette is a mechanic and vehicle inspector attached to the Traffic Department of the Royal Grenada Police Force. He had carried out an examination of the truck after the accident and prepared a report on his observations. The report was not exhibited to the claim form, the defence or other pleadings or witness statements. The respondent objected to leave being granted to admit Sergeant Powlette's evidence as an expert. The appellant withdrew that application.
- [6] On 17th October 2022, the appellant filed an application for leave to call Mr. Eric Bridgeman as an expert witness pursuant to rule 32.6 of the **Civil Procedure Rules 2000 (CPR')**, for the purpose of assisting the court impartially by proving his opinion on whether the defects observed on inspection of motor vehicle TS482 could have caused the accident. It was supported by the affidavit testimony of Sharon Samuel, Senior Legal Clerk. Ms. Samuel averred that Mr. Bridgeman is a qualified auto mechanic who had received formal training as such and had operated an auto mechanic shop for over 20 years. She stated further that she is informed and believes that an expert report will assist the court in determining this matter since the critical issue in dispute is the cause of the accident.
- [7] The respondent filed an affidavit in opposition⁵ in which he averred that he has been advised by his attorneys and believes that the proposed expert does not meet the requirements under **CPR** 32.6 for reliance to be placed on his report. He averred further that the curriculum vitae attached to Ms. Samuel's affidavit reveals that the proposed expert is not qualified to determine whether the accident occurred as a result of negligence. He stated that the critical issues are the cause of the accident and specifically whether it was caused by the appellant's, his servant's or agent's negligence or by a defective truck supplied by him (the respondent). He added that the issue having been narrowed, forces the proposed expert to choose to support the appellant's assertion that the brakes were defective or the respondent's

⁵ See affidavit in opposition filed on 2nd November 2020 at pages 34-38 of hearing bundle 1.

assertion that the accident was caused by the driver's negligence. He reasoned that this choice hinders the expert's impartiality and independence which runs counter to the duty of an expert to provide independent assistance to the court.

[8] On 16th January 2023, the appellant filed an amended application for leave to call Mr. Bridgeman as an expert witness, for the purpose of assisting the court regarding whether the brakes on the said truck were defective at the time of the subject accident, instead of the earlier objective of providing assistance 'regarding the cause of the accident'. Ms. Samuel filed an 'amended affidavit' to like effect.

[9] The respondent filed⁶ a further affidavit opposing the amended application. He averred that the subject matter of the application was no longer available because he had scrapped it by breaking it down and using the parts for another truck. He indicated that he had informed his lawyer of this on 15th November 2022 when the matter was last before the court. He pointed out that the appellant did not seek leave from the court to rely on the police report prepared in the matter (ostensibly the report prepared by Sergeant Powlette). Furthermore, the proposed expert would not be able to inspect the truck and form his own independent opinion and therefore the only relevant material available would be Sergeant Powlette's report. He concluded that while technically permissible, it would be highly disadvantageous to him to permit the proposed expert to rely on a report prepared by someone who was not deemed qualified to make that report. He urged the court to dismiss the application on the basis that the proposed expert would not be able to impartially and independently assist the court in compliance with **CPR** Part 32.

[10] By oral decision delivered on 16th February 2023 and entered on 23rd March 2023, the learned master refused the appellant's application to call an expert and issued directions scheduling the pre-trial review conference. The learned master remarked that he was satisfied that the proposed expert was a qualified auto mechanic. He reasoned that in light of the subject matter of the claim (the truck) being unavailable,

⁶ See affidavit in opposition filed on 31st January 2023 at pages 75-78 of hearing bundle 1.

the examination of which would concern matters relevant to his expertise, the appointment of the expert would not serve to assist the court with the matters in issue and the just disposal of the case. He added that the court is well-placed to evaluate the evidence before it to resolve the matters in issue. He held that having reviewed and considered the proposed expert's qualifications and experience and the expertise being sought by the appellant, in view of the respective pleaded cases and the evidence before the court, he was not satisfied that the appellant's application for leave to call Mr. Bridgeman as an expert witness should be granted.

[11] Being dissatisfied with this ruling, the appellant filed his Notice of Interlocutory Appeal on 8th May 2023 having been granted leave to appeal⁷. He advanced five grounds of appeal:

- (1) The Learned Master was plainly wrong in the exercise of his discretion not to grant the appellant's application for leave to call an expert witness.
- (2) The Learned Master failed to take into account the existence of a police report and the thrust of the appellant's case that the brakes of the truck were not functioning at the time of the accident.
- (3) Even though the truck is no longer available, an expert can form a reasonable opinion based on existing reports and the version of witnesses with respect to the malfunctioning brakes.
- (4) The Learned Master failed to appreciate or fully appreciate the critical importance of expert evidence and, in particular, the issue of malfunctioning brakes to arrive at a just disposition of this matter.
- (5) Given the nature of the case, the denial of expert evidence is potentially prejudicial to the appellant's case.

⁷ By order of a single judge of the Court of Appeal dated 18th April 2023 at page 11 of hearing bundle 1.

- [12] The five grounds of appeal essentially raise the singular issue of whether the learned master erred in the exercise of his discretion and therefore made a decision which was blatantly wrong.
- [13] The respondent filed a notice of opposition to the appeal on 10th May 2023. He contended that the appeal should fail because the master was not blatantly wrong in arriving at the decision that he did.
- [14] It is now well-established that an appellate court will not lightly interfere with a determination made by a judicial officer in the exercise of discretion and will do so only if satisfied that the judicial officer erred in principle by either having regard to irrelevant matters or by giving too much or too little consideration to all or some of the relevant factors or by not considering them at all and thereby made a plainly wrong decision. This principle of law has been repeated numerous times in decisions by this court and most famously in **Michel Dufour and others v Helenair Corporation Limited and others**⁸. This Court's decisions in **Brilla Capital Investment Master Fund et al v Leeward Isles Resorts Ltd.**⁹ and **George Allert et al v Joshua Matheson et al**¹⁰ are also instructive on this point as is **AEI Rediffusion Ltd v Phonographic Performance Ltd.**¹¹. I bear this principle in mind as I consider the parties' respective contentions.

Appellant's submissions

- [15] On the appellant's behalf, learned King's counsel Mr. Ruggles Ferguson submitted that essentially the basis of the refusal is that the expert evidence will not assist the court in determining the matters in issue (i.e. whether the truck brakes were defective at the time of the accident) due to the unavailability of the truck and the consequential inability of the proposed expert to examine same. He submitted further that in considering the appellant's application, the learned master erred by,

⁸ (1996) 52 WIR 188.

⁹ AXAHCVP2013/0011 (delivered 27th June 2014, unreported.).

¹⁰ GDAHCVP2014/0007 (delivered 24th November 2014, unreported).

¹¹ [1999] 1 WLR 1507.

a) failing to take into account the existence of a police report setting out comprehensive evidence on the state of the truck and b) failing to fully appreciate the critical importance of expert evidence in relation to the issue of malfunctioning brakes, which is necessary to arrive at a just disposition of this matter. It was submitted that by dint of those failures, the master was plainly wrong.

- [16] As to the unavailability of the truck as a factor influencing the determination, learned King's counsel contended that this did not constitute a valid reason for denying the application, particularly where, the proposed expert's expertise and impartiality were not in question. Citing **CPR 32.4(3)** learned King's counsel pointed out that it imposes a duty on an expert witness to state the facts or assumptions upon which his or her opinion is based, to consider and include any material fact which could detract from his or her conclusion. Reliance was also placed on **Anthony Marin v. Lime Dominica Limited**¹² in which another learned master opined:

"An expert appointed to assist the court must explain the basis of his/her evidence which is not personal observation or sensation. The expert's opinion represents his/her reasoned conclusion based on facts or data, which are either common cause, or established by his/her own evidence or that of some other competent witness."

- [17] The appellant argued further that it is evident that the law contemplates that circumstances may exist where an expert is unable to base his evidence on personal observation or sensation as in the present case. However, the Court was invited to note that after the accident a police report was prepared by Sergeant Powlette who was attached to the police garage, which is responsible for inspecting vehicles nationwide. It was pointed out that Sergeant Powlette's report provides a comprehensive statement of his observations, and he is a competent witness whose account can be used as a basis for the proposed expert's report. The appellant acknowledged that Sergeant Powlette has not prepared and filed a witness statement or witness summary in the proceedings.

¹² DOMHCV2013/0407 (delivered 11th October 2016, unreported at para 12.

[18] As to the weight to be accorded to expert testimony, the case of **John Oliver Dyrud v Palmavon Jasamin Webster et al**¹³ was cited as authority for the proposition that it is for the trial judge to determine the proportionate weight to be attached to the expert's report by having regard among other things to the fact that the proposed expert did not personally inspect to vehicle. Delivering the judgment for this court in **John Oliver Dyrud**, Farara JA stated:

“the appropriate weight to be accorded to expert evidence or parts of it, are matters to be assessed by the trial judge taking all other relevant evidence and factors into account, factual and legal, including the cross-examination of the expert witness, and the evidence of another expert witness or witnesses called during the trial relevant to such issues.”

[19] The appellant argued that another relevant consideration is that it is the respondent who scrapped the truck, unbeknownst to the appellant, and effectively placed it out of the proposed expert's personal reach. In those circumstances therefore, the appellant should not be prejudiced in putting his case simply because the truck is no longer available.

[20] As to the necessity of having the proposed expert evidence in the case, learned King's counsel submitted that as outlined in **John Dyrud** the court is guided by four considerations in determining the admissibility of expert evidence in civil proceedings. In that case, Farara JA extracted from **Kenny v Cordia (Services) LLP**¹⁴ four considerations that Lord Reed and Lord Hodge of the UK Supreme Court identified as governing the admissibility of expert evidence in civil proceedings. They are, a) whether the proposed evidence will assist the court in its task of deciding the proceedings justly; b) whether the witness has the necessary and appropriate knowledge and experience; c) whether the witness is sufficiently impartial and independent of the parties so as to render their impartial opinion; and d) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. It was submitted that in this appeal, the relevant considerations are a) and d).

¹³ AXAHCVP2021/0010 (delivered 27th April 2022, unreported) at para 101.

¹⁴ [2016] UKSC 6 at para 43.

[21] Learned King’s counsel submitted that the appellant’s defence is that there was a latent defect in the truck’s brakes. The onus therefore fell on him to prove this assertion by supplying evidence showing that there was such a defect in the truck. The appellant cited **Carol Stapleton v. Randolph Chambers et al**¹⁵ in which the court observed that although the defendants advanced a defence of latent defect they failed to provide the disc brake pads or a report from a mechanic or other expert as to the condition or any defect in them, and thereby failed to discharge the burden of proof. The defendant in **Sonil Spencer v Colin Brown**¹⁶ had a similar outcome because he likewise proffered no expert evidence to substantiate his latent defect defence.

[22] The appellant reasoned that in a similar fashion, given the nature of this case, expert evidence is required to enable him to properly put forward his case and to facilitate the just disposition of this matter. Furthermore, his case would be prejudiced without expert evidence. He acknowledged that ultimately, the court will reach its own conclusions, but as stated in **John Oliver Dyrud** the expert evidence would provide material ‘from which the court can make its own findings’¹⁷. Accordingly, the appeal ought to be allowed.

Respondent’s submissions

[23] For the respondent, learned counsel Ms. Caryn Adams argued that **CPR 32.2** restricts expert evidence to that which is reasonably required ‘to resolve the proceedings justly’. She submitted that in **RBS Rights Issue Litigation**¹⁸ Justice Hildyard laid down a three-part test regarding what is reasonably required to justly resolve the issues, and this test can be used to determine the issues at hand. Referencing **British Airways Plc v Spencer and Others**¹⁹ as the source of the three-part test of what is ‘reasonably required’, Justice Hildyard opined that it is to

¹⁵ SVGHCV2007/002 (delivered 21st January 2015, unreported).

¹⁶ SVGHCV2007/0097 (delivered 2nd March 2010, unreported).

¹⁷ Supra at para 102.

¹⁸ [2015] EWHC 3433 (Ch).

¹⁹ [2015] EWHC 2477 (Ch).

be determined on a sliding scale from the essential to the useful. In this regard, the first question is 'whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. He added 'If it is necessary, rather than merely helpful, it seems to me that it must be admitted.'

[24] Justice Hildyard noted that the second question becomes relevant only if the expert evidence is not necessary. In such a case the second question is whether the expert evidence 'would be of assistance to the court in resolving' the central issue in question. It is self-evident that where evidence would be of assistance but unnecessary, 'the court would be able to determine the issue without it'. The third question becomes relevant in such cases, and it is whether 'in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. Justice Hildyard made the further observation that the rule of procedure under consideration refers not to 'issues' but only to 'proceedings'. Therefore, 'if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings.' He concluded that accordingly, a test directed at issues would merely serve as a filter.

[25] The respondent contended that in this case, the learned master addressed his mind to the three-question test outlined in **RBS** and concluded that the court is well placed to evaluate the evidence and resolve the matters in issue without the proposed expert evidence. Furthermore, the learned master did not limit himself to the content of the application filed by the respondent but also considered the respective parties' submissions. He therefore gave the matter careful consideration before making his ruling. The respondent argued further that a trial date having already been set and all witness statements and the accident report having been placed before the court, there is no indication that the evidence before the court is lacking.

[26] It was the respondent's further contention that the proposed expert is not an accident reconstructionist and therefore does not possess the requisite knowledge, skills,

qualifications and experience to assist the court with expert evidence in this matter. The cases of **Lonnie Robinson v Jasmine Samuel**²⁰ and the Canadian case of **Cooper v Garrett**²¹ were cited on this point as ones in which accident reconstructionist experts supplied expert opinion on factors such as impact speed, pre-impact vehicle positions and potential for collision to be avoided.

- [27] As to the unavailability of the truck for inspection by the proposed expert, learned counsel Ms. Adams submitted that the application to appoint Mr. Bridgeman as an expert was made over three years after the accident. Furthermore, the court made no order restraining the respondent from disposing of the truck.

Discussion

- [28] The issue to be resolved by this court involves not only the examination of the exercise of discretion by the learned master but also the application of **CPR** 32.2, 32.4 and 32.6. Of necessity, this exercise engages the overriding objective of the **CPR** which is to seek to do justice between the parties. This encompasses several factors including ensuring as far as practicable that the parties are on equal footing. The court is enjoined to act judicially when called on to exercise any discretionary power. In doing so, it must consider any prejudice or advantage that may be occasioned to a litigant arising from its determination. I remain mindful of those principles as I consider the arguments on this appeal.

- [29] A useful starting point is **CPR** rules 32.2 and 32.4(2) which provide respectively:

'General duty of court and of parties

32.2 Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.

'Way in which expert's duty to court is to be carried out

32.4 (1) ...

(2) An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise.' (Underlining added)

²⁰ SVGHCVAP2007/0042 (delivered 9th March 2010, unreported).

²¹ 2009 BCSC 35.

- [30] The court's power to admit or exclude expert evidence is set out in **CPR 32.6(1)** and (2) which provide:

'Court's power to restrict expert evidence

- 32.6 (1) A party may not call an expert witness or put in the report of an expert witness without the court's permission.
(2) The general rule is that the court's permission is to be given at a case management conference.'

- [31] **CPR 32.2** is unambiguous. It stipulates that only expert evidence that is 'reasonably required to resolve the proceedings justly' will be permitted in civil proceedings. It follows that a judicial officer faced with an application for leave to permit a witness to provide expert opinion must satisfy himself or herself that such evidence is reasonably required to justly resolve the proceedings. **CPR 32.4(2)** addresses the content of such expert evidence and makes it pellucid that subjective, biased opinions outside the expert witness' expertise is inadmissible and can form no part of the expert witness' testimony. These two sub-rules make clear that a decision of whether to permit an expert to present expert testimony is one of admissibility of expert evidence.

- [32] **CPR 32.6** in my opinion touches and concerns the question of whether expert evidence is necessary for resolving the proceedings and to a certain extent and in a general sense what kind of expert evidence is relevant and admissible towards that end. It seems to me that the more precise issue of what specific expert evidence would be admissible can only be decided when an expert report is prepared and is being produced at trial. It is only at that point that the full considerations of relevance can be entertained. In my opinion such an exercise can be conducted only by the trial judge who will have to marshal the material facts, the issues and the law. I am fortified in this position by the dictum of Blenman JA in **Joseph W. Horsford v Geoffrey Croft**²².

²² ANUHCVP2014/0006 (delivered 22nd October 2014, unreported).

- [33] Citing **Joseph W. Horsford v Geoffrey Croft**, the learned master in **Anthony Marin** quoted²³ Blenman JA as saying:

“It is noteworthy that the issue of **whether or not a case management judge** (my emphasis) should deal with the question of admissibility of evidence at a preliminary hearing was addressed in **Stroude v Beazer Homes Ltd.** [2005] EWCA CIV 265] In this case the Court of Appeal of England **answered the question in the negative** (my emphasis). It held that:

“In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action...”²⁴

- [34] In **John Oliver Dyrud**²⁵, this Court adopted the approach commended by the English Supreme Court in **Cordia** as to the admissibility of expert evidence where a report had already been prepared and presented to the court. Addressing this issue frontally, the English Court agreed with the formulation of South Australian Court in **R v Bonython** by King CJ that:

‘Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge and experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.’²⁶

- [35] The court in **RBS** condensed the essence of **CPR 32.2** without condescending to the particularisation and specificity of the learned Chief Justice in **Bonython**, as

²³ DOMHCV2013/0407 (delivered 12th August 2020, unreported) at para. 24.

²⁴ Supra at para. 38; emphasis in the original.

²⁵ AXAHCVP2021/0010 (delivered 27th April 2022, unreported) at para. 97.

²⁶ (1984) 38 SASR 45 at pp. 46-47.

approved and adopted by the learned Law Lords in **Cordia** and the learned Justices of Appeal of this Court in **John Oliver Dyrud**. Without discounting the correctness of the holding in **RBS**, I make the observation that **RBS** is a decision of the English High Court while **Cordia** is a judgment of the English Supreme Court and therefore of more persuasive authority in this jurisdiction. Additionally, the principles set out in **RBS** are captured and subsumed in **Bonython**. I am satisfied that the **Bonython** principles are relevant to a consideration of an application for leave to call an expert witness at the case management stage as well as at trial, on the issue of admissibility of the contents of an expert report and the answers to questions under cross-examination. The **Bonython** principles are well-established and I adopt them for present purposes.

[36] In essence, in deciding whether to grant leave to adduce expert testimony a judicial officer must determine firstly, whether the subject matter is one about which expert evidence is admissible. This necessitates consideration of whether a person untrained, inexperienced or unskilled in that area would be able to arrive at a sound judgment without the testimony of an expert in the field and whether there exists a sufficiently established, reliable, organised and recognised 'body of knowledge or experience' in that discipline on which reliance can be placed in arriving at a just conclusion. Secondly, the court must be satisfied that the proposed expert witness possesses the requisite skills, knowledge or experience in the specialist area to enable him to provide the court with a useful opinion on the subject matter of the dispute.

[37] The subject matter about which the appellant proposes to elicit expert evidence concerns a latent defect in the truck brakes and falls within the field of mechanical engineering specific to automobiles. Applying the learning in **Bonython**, in answering the first question, there can be no doubt in my view that this is an area in which expert testimony is permissible. The learned master did not engage expressly with this aspect of the issue before him. Turning next to whether a layperson would be able to form a sound judgment on the question of whether the truck had a latent

brake defect, the irrefutable answer is no. The learned master responded to this question in the affirmative when he stated that the learned trial judge was equipped to make a finding on this issue. It is pellucid that he did not appreciate that the resolution of that issue necessitated evidence of a technical nature that could only be supplied by a witness with the requisite expertise, skills and training in mechanical engineering which a trial judge could not be expected to have by training or otherwise in the normal course of duties, save through expert evidence. The learned master thereby erred in principle and thereby made a decision that was blatantly wrong when he held to the contrary.

[38] As to whether there is a body of knowledge or experience which is sufficiently organised or recognised as a reliable body of knowledge and experience in the field of mechanical engineering, the Court takes judicial notice that there is, as this is a matter which is notoriously known by the public in general. The learned master appeared to accept this but did not expressly so find. He was satisfied that the proposed expert witness was qualified to offer an opinion of value in resolving the issues in the proceedings. However, he did not think that such an opinion would be necessary or of value in resolving the proceedings. On this latter score, I am of the opinion that he erred because this finding would have been influenced by the error he made of determining that expert evidence was not necessary to resolve an issue of alleged latent defect in the truck's brakes. In my opinion, this demonstrates that he did not fully appreciate the critical importance of the evidence to a resolution of the proceedings and in particular, the issue raised by the appellant in his defence regarding the allegation that the brakes were malfunctioning. I would for this reason allow the appellant's fourth ground of appeal.

[39] A further consideration that arises is whether the proposed expert has to physically examine the truck in question or whether he could rely on the contents of the earlier report prepared by Sergeant Powlette. Counsel for the respective parties made submissions about the availability of that report but no evidence was placed before this court that could assist in determining the content of the report or its availability

for consideration at trial. In **Cordia**, the learned law lords relied on **Myers v The Queen; Brangman v The Queen; Cox v The Queen**²⁷ for the authority that:

'The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise: ...'²⁸ (Emphasis added)

[40] In light of this pronouncement with which I agree, there is no need for the proposed expert witness to have personally examined the subject truck, provided that there is relevant available material and evidence from which he could present a satisfactory expert report to the court constituting relevant opinion evidence. Accordingly, I would uphold the appellant's second and third grounds of appeal.

[41] In summary therefore, I am satisfied that the learned master erred in principle by a) not considering that resolution of the central issue in the dispute required expert testimony in the area of mechanical engineering and b) concluding that the learned trial judge was properly placed and sufficiently equipped and qualified to determine the - question of whether the brakes in the truck bearing registration number TS482 had latent defects. As a result, he erred further by concluding that expert evidence was unnecessary for resolving the proceedings. Moreover, he demonstrated that he did not fully appreciate the significance and necessity of the proposed expert evidence for resolution of the central issue in the proceedings -. He thereby erred. For these reasons, his decision to refuse the appellant leave to call Mr. Bridgeman as an expert is blatantly wrong. I would therefore allow the appeal and remit to be heard by the learned trial judge on the merits of the application for leave to call Mr. Bridgeman as an expert witness.

²⁷ [2015] UKPC 40 at para. 63.

²⁸ Ibid. at para. 50.

Miscellaneous

- 42] The respondent's contention that resolving the central issue in this case would require expert testimony of an accident reconstructionist does not find favour with me for the simple reason that on the pleadings no issue arises in relation to how the accident unfolded at the scene. Factors such as the speed at impact and associated expertise that may be forthcoming from a reconstructionist is in my opinion not necessary to address whether the truck's brakes had a latent defect.

Costs

- [43] The general rule is that costs follow the event unless the court is satisfied that departure from the rule is justified. I am of the opinion that there are no good reasons not to apply the general rule. I would therefore award the appellant his costs to be assessed, if not agreed.

Disposition

- [44] For the foregoing reasons, it is ordered that:
- (1) The appellant's interlocutory appeal of the learned master's decision of 16th February 2023, is allowed.
 - (2) The appellant's application for leave to call Mr. Eric Bridgeman as an expert witness is remitted for determination by the learned trial judge.
 - (3) The respondent shall pay to the appellant the costs of this appeal to be assessed within 21 days of today's date, if not agreed.

[45] In conclusion, I wish to thank counsel on both sides for their helpful submissions.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal (Ag.)

By the Court

Chief Registrar