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Ref: **GIL7558**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **18/6/09**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

REV COLM McCAUGHAN and REV JOSEPH GLOVER AS TRUSTEES OF ST MARY'S STAR OF THE SEA PRIMARY SCHOOL

Appellants;

and

SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent.

GILLEN J

The Appeal

[1] This is an appeal from a ruling by Her Honour Judge Kennedy at Belfast Recorders' Court on 19 February 2009 when it was adjudged that the respondent was not liable for witness expenses incurred by the appellants, the trustees of a primary school, in instructing Neill Simms and Company (hereinafter called "NS"), a firm of chartered loss adjusters and surveyors, during the course of a claim under the provisions of the Criminal Damage (Compensation) (Northern Ireland) Order 1977 arising out of damage to the school .

Background

[2] According to a police report which was before me, on 25 July 2006 a fire occurred at Star of the Sea Primary School in Newtownabbey. Police and Fire Service reports indicated that the fire had been malicious in that a protective metal grill had been prised open and a window had been broken in the gymnasium. Flammable material had been poured in and set alight. Extensive damage had been caused to the gym due to fire and water. The police report further records "there were no reports of rioting or unlawful

assembly in that particular area at or about the material time. No person has been made amenable for this offence".

[3] A Notice of Intention and Application for Compensation under the relevant legislation were then made. The case was settled for £20,745.44 and announced to the Court on 20 November 2008.The current issue on the fees of the expert first came before Her Honour Judge Kennedy on 19 February 2009.

[4] Prior to this, Mr Simms, a partner in NS had been retained on behalf of the insurance company who insured the school. He described his task as being to establish the cause and to identify the nature and extent of the damage in order to ascertain if it fell within the terms of the insurance policy. Having done that, he then was requested to assist in determining whether a subrogation claim should be made under the terms of the Criminal Damage (Compensation) (Northern Ireland) Order 1977 ("the 1977 Order"). It was common case that the difficulty that the appellants faced was satisfying the court that under the terms of the 1977 Order three or more persons were unlawfully assembled causing damage to the property. Mr Simms had inspected the site, taken various photographs and made a report to the insurance company having attended the scene of the crime on the morning after the fire. He had discussed the matter with the fire officers present on site as well as the police. His report and photographs recorded that fencing had been forced apart, that metal protection to a window had been forced, that strong Georgian wire glass had been broken and that inflammable liquid had been poured in.

[5] Mr Simms was subsequently invited by the solicitor on behalf of the applicants to prepare a map of the local area together with photographs to help identify the line of attack taken to the building before the miscreants had set the place on fire. I had before me a letter from the solicitors on behalf of the appellants addressed to Mr Simms dated 18 February 2008 in the following terms:

> "James McNulty QC has found your report in the above case very helpful in that it suggests that those who perpetrated the fire had sufficient equipment:
>
> (a) to force apart the fencing to force off the well secured window protection (sic);
>
> (b) smashed the strong Georgian wire glass; and
>
> (c) poured in inflammable liquid.

> He is not entirely clear however from this what the likely access route was to get to the palisade fencing. The incident occurred at 1.30am. Assuming the miscreants came across the golf course, what is the most likely entry point for them onto the course, and how visible would they have been carrying the equipment they needed?"

[6] As a result of these instructions Mr Simms carried out work on behalf of the appellants. That bill came to £640 plus VAT of £112 amounting to £752. The breakdown of that bill was before me in the following terms:

> "Discussing quantum with Compensation Agency adjusters – 1 hour.
>
> Liability discussions/correspondence with Peter Conlon/James McNulty QC – 2 hours.
>
> Site visit: photographs: mapping etc – 2¼ hours.
>
> Preparation of maps/photographs etc – 1 hour.
>
> Abortive court attendance on 24 October 2008 – 3½ hours.
> Total 9¾ hours."

Mr Simms charged 8 hours at £80 per hour giving a total of £640.

[7] In the event the insurance company had paid to the appellants £50,246.26 and the subrogation claim was settled with the respondent on a compromise basis for £20,744.38.

The argument on behalf of the Compensation Agency

[8] Mr McEvoy, who appeared on behalf of the respondent argued that Mr Simms was not an expert in that his role was confined merely to that of someone who took photographs. Counsel contended that a careful perusal of the police report/fire report and documents which could have been obtained by way of disclosure following the principles set out in Carnaghan & Anor v Chief Constable of the Royal Ulster Constabulary [1988] NI 484 (whereby a County Court has power to order disclosure of documents against a non party where appropriate) would all have been sufficient to mount the appellants' claim. Mr McEvoy asserted that the witness had no qualification either forensic or otherwise as an expert to investigate the cause of this fire. The presence of the reference to accelerants in the police report indicated that

this was a planned attack without the need for any expert advice in this regard. In short the appellants' case was that Mr Simms had not sufficient expertise to assist the court in coming to a conclusion on the relevant matters and therefore the costs should be disallowed.

[9] Mr McEvoy drew my attention to the County Court Rules Order 55 rule 6 which provides that "without prejudice to any discretion exercisable by the Taxing Master of the Supreme Court under the Solicitors (Northern Ireland) Order 1976 there may be allowed to or in respect of witnesses such fees and expenses as the judge shall in his discretion think just." Moreover under Article 12(2) of the 1977 Order

> "Where on an application under this Order the Secretary of State pays compensation to any person, the Secretary of State shall also pay to that person in respect of the costs and expenses incurred by him in making out and verifying his claim to that compensation such sum as is reasonable having regard to the circumstances and references to compensation …"

[10] Counsel also relied upon Gilmour v Smyth, (a decision of the Recorder of Belfast) [1999] 3 BNIL 76 where the Recorder said:

> "Whilst the fact that counsel directed that an expert witness be retained must be of considerable weight when the Taxing Officer is deciding whether it was `reasonable' to retain that witness, counsel's direction cannot be decisive because, as Carswell LJ observed, (in Carr v Poots [1995] NI at p433), it is only a `general rule' that a solicitor who acts on counsel's direction cannot be said to be acting unreasonably".

[11] Mr McEvoy also contended that the rate struck at £80 per hour by Mr Simms was the rate of someone acting as a loss adjuster and not a witness who was merely taking photographs as in this instance. He resisted Mr Simms' contention that £80 was reasonable because that was the rate that the insurance company paid him per hour for his services on the basis that the two activities were entirely separate.

The Appellants' Case

[12] Mr McNulty QC, who appeared on behalf of the appellant contended that Mr Simms was being used to investigate the validity of the claim. He urged that it has been the conventional practice for solicitors, acting within

the framework of the legislation, not to introduce engineers in such instances but rather to employ loss adjusters who are present on site and are regularly directed by counsel to carry out a survey of the locus in order to present evidence in addition to that of the Police Service and Fire Service. In this instance senior counsel had directed that Mr Simms carry out a survey of the locus to establish the approach to the building, that it was hidden from view, the density of the population in the area and the general topography all of which could have been of relevance in dealing with this case.

[13] Mr McNulty contended that the police report and the Fire Service report had been bereft of any plan, photograph or survey and that rather than employ the expensive services of an engineer, the services of Mr Simms had been deployed.

[14] He urged on the court that the definition of expert was a flexible one and should embrace the concept of competence based on skill and experience in investigative work and not be confined to paper qualifications. It would have been illogical in his submission not to avail of the services of Mr Simms who had personal knowledge from the scene. His role was to gather information in order to arm counsel with the necessary information to argue the case.

Conclusion

[15] The competency of an expert is a preliminary question for a judge and is one where, in practice, considerable laxity prevails. (See Phipson on Evidence 16th Edition at paragraph 33-46). The classic statement as to the test of admissibility is that set out in R v Bonython [1984] 38 SAR 45:

> "The first question is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This … 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 or 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 organised or recognised 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 in 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."

[16] Phipson goes on to record at paragraph 33-46:

> "Though the expert must be `skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility … Equally one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work notwithstanding that the expertise is derived from experience and not from formal training. Police officers habitually give evidence relating to matters about which they have acquired in-depth knowledge in the course of their duties, such as the value of prohibited drugs and the paraphernalia associated with using it or with dealing with drugs."

[17] In Liddell v Middleton [1996] PIQR p36 the Court of Appeal considered the issue of expertise in a road traffic accident. Stuart Smith LJ said at p41:

> "An expert is only qualified to give expert evidence on a relevant matter, if his knowledge and expertise relate to a matter which is outside the knowledge and experience of a layman."

[18] The Judge went on to relate at page 42:

> "In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect `I have considered the statements and/or evidence of the eyewitnesses in this case and I conclude from their evidence that the defendant was going at a certain speed or that he could have seen the plaintiff at a certain point'. These are facts for the trial judge to find based on

the evidence that he accepts and such inferences as he draws from the primary facts found."

[19] Each case must be considered on its own facts. I am satisfied that there may well be instances where a loss adjuster would be a totally inappropriate witness to take up the cudgels as an expert on liability. Much will depend upon the expertise, experience, knowledge and skill of the witness concerned. Relevant facts will include the nature of the liability issues, the aspects of liability upon which he is commenting, the type of damage involved, the witness's experience and knowledge of similar situations and the information that he has been in a position to gather.

[20] In this instance, I am satisfied that Mr Simms was a relevant and necessary expert witness on behalf of the appellants. He has had 35 years experience as a loss adjuster attending scenes probably not dissimilar to the instant case. It was his view that many loss assessors have a similar expertise. His expertise was to establish the manner in which the miscreants may have accessed the building and this is something in which he has experience over the years i.e. in establishing how premises have been entered. He was able to take informed photographs showing access through the fence, the nature of the window grill that had been prised off, and the reinforced panel that had been smashed. Informed photographs of relevant areas may well have been crucial in establishing the determined and premeditated nature of this attack and the nature of any equipment or implement that would likely have been used to affect such entry. Mr Simms was able to hazard an informed guess that some form of lever would have been necessary to prise off the bolts fitted to the wall. There was no mention in the police report of the access point through the golf course or of the nature of the topography in that area. These photographs could have lent information touching upon the methodology, determination and perhaps even numbers of those who were the miscreants in this instance. It did not surprise me at all that experienced senior counsel acting on behalf of the appellants had sought assistance from Mr Simms as to the likely access route to get to the palisade fencing, the likely entry point onto the golf course and how visible the miscreants would have been carrying the equipment they needed.

[21] Borrowing from the criteria set out Liddel's case, I am satisfied that Mr Simms' knowledge and expertise over the 35 years in this type of work were matters which were outside the knowledge and experience of a layman. Carefully selected photographs taken on such an informed basis would have been able to furnish the judge with the necessary assistance based on his skill and experience to interpret the factual evidence put forward in this case. It was not Mr Simms' task to decide if three or more people had entered the premises or that there had been a sufficient breach of the peace. However the map and photographs which he took would have been of great assistance to the judge in coming to that conclusion. I do not believe that such photographs

or maps could have been supplied by someone without his experience and skill. I consider that in this instance this case was within the general rule adumbrated by Carswell LJ in Carr v Poots and Hart J in Gilmour v Smyth. Accordingly the appellants' solicitor was entitled to accept the advice of senior counsel to retain Mr Simms as outlined in the letter of 18 February 2008.

[22] I conclude that the number of hours, namely 8, charged by the witness in this case is reasonable. So far as the rate of £80 per hour is concerned, no evidence was called by the Respondent to set up any alternative rate. It may well be that in future cases, evidence will be called to establish that the tasks carried out by Mr Simms or similar loss adjusters merit figures lower than £80 per hour. I heard no such evidence in this case. The only material before me was that Mr Simms in carrying out his work as a loss assessor was paid £80 by the insurance company who had originally employed him. I find no reason at this stage to conclude that this is anything other than a realistic rate and accordingly I am satisfied it should be paid. I emphasise however that this is not to be treated as a precedent for such payments and I am making this order because of the absence of evidence of any alternative reasonable rate.

[23] In all the circumstances I therefore reverse the decision of the learned County Court judge and award the fees of Mr Simms together with the costs of this appeal.