

Neutral Citation No. [2011] NICH 6

Ref: DEEH6061.T

*Summing Up: approved by the Court for handing down (subject to editorial corrections)*

Delivered: 11/03/11

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
CHANCERY DIVISION

BETWEEN:

ALISTAIR NIGEL HAYES

Plaintiff;

and

MARLYN JEAN ELIZABETH McGUIGAN  
THOMAS JOHN BERTRAM McGUIGAN  
GABRIEL NOEL LOCKHART McGUIGAN  
WENDY MIRANDA MARINA CLARKE  
NOELEEN JEANETTE LYNDA McGINLEY  
THOMAS JAMES McGUIGAN

Defendants.

DEENY J

[1] In this action Alistair Nigel Hayes sues Marlyn Jean Elizabeth McGuigan and others. He is seeking a declaration that the boundary between the plaintiff's property and defendants' property is as shown on a map prepared by the Hutcheson Irvine Partnership annexed to the Writ of Summons and an order that the Land Registry entries be amended accordingly in accordance with that map. In short form, therefore, it is a boundary dispute between these parties.

[2] On foot of the court's management of the action the court earlier directed that there be an exchange of expert reports between Mr John Hutcheson of Hutcheson Irvine Chartered Architects and the defendant's expert, Mr Declan Cosgrove, who is a consulting engineer with experience in these courts. No objection is taken to the fact that he is an engineer in regard to these matters. The court was minded to direct that the two experts should meet in advance of the hearing. The hearing is currently listed for 16 and 17 June 2011. Following the

expert meeting there would be a joint minute produced of that meeting and then in turn a joint consultation between the parties.

[3] Mr Kevin Denvir, counsel for the defendants, raised concern at that time that, prompted by his own engineer, Mr Cosgrove, it would seem. They questioned the independence of Mr Hutcheson as the plaintiff's expert. It seemed best to deal with this as a preliminary point for this reason. If an expert could not comply with the practice direction in the High Court, no. 11 of 2003, and was not an expert at all and was so found not to be an expert for these purposes at the commencement of a trial, the trial might have to be aborted to allow the party concerned to retain a fresh expert or the party would be prejudiced. On foot of that concern the defendants issued a summons here supported by affidavit and the two relevant reports.

[4] The thrust of the defendants' case is, as I say, prompted by their own witness it seems, that Mr Hutcheson's independence is compromised because he has acted and is acting for the plaintiff, Alastair Nigel Hayes, not only in this matter but in certain other matters relating to planning development particularly in and about Mr Hayes' lands at the location in question at Seven Mile Straight in Muckamore, County Antrim.

[5] In response to that Mr Hutcheson does not deny that he acts in that way. But he has set out in an affidavit received by the court, handed in at the hearing but bearing the date of 10 March 2011, a number of significant averments. First of all he says that although he acts in this regard:

“there is no commission-based remuneration and nothing whatsoever as between the plaintiff and our partnership which is contingent upon a successful or partially successful outcome in this particular case.”

He goes on to refer to another matter in which he is retained on a fee per hour basis by the plaintiff. He goes on to say at paragraph 5:

“I have experience as an expert witness in building defects in professional negligence cases and in the course of furnishing expert reports and giving evidence I often come across experts who have acted for and against the party they are currently representing. It is unfortunately a by-product of having a relatively small jurisdiction. Most experts in building and boundary disputes are aware of one another and I have never questioned their impartiality, nor indeed has anyone to date ever questioned mine.”

And, finally, for these purposes at paragraph 6 he confirms that though the plaintiff is an important client he is not their only client nor their biggest client. That they do

not operate any contingency fee arrangement with the plaintiff and, indeed, strictly speaking are not retained by the plaintiff but by his solicitors, Messrs Simmons Meglaughlin & Orr.

[6] He made a declaration as part of his report at paragraph 1.3 thereof in accordance with the practice direction number 11. That practice direction does not require the putative expert to say "I have never acted for the party whom I am now advising"; that is not a declaration they have to make. They do have to say and he does say:

"I have where possible formed an independent view on matters suggested to me by others including my instructing lawyers and their client; where I have relied upon information from others including my instructing lawyers and their client I have so disclosed in my report."

[7] His duty to be independent and to assist the court is not, it seems to me, necessarily or inferentially undermined by the fact that he may act in several other proceedings for the party concerned. I readily accept that in certain circumstances even a professional person might be prohibited from acting as an expert before the court. That would be so if they had agreed to act on the basis that their fee would be larger if the client succeeded in his proceedings than if the client failed. It would be so, in my view, if the expert had some other financial interest in the outcome e.g. if he were the owner of the premises which were sought to be licensed in a licensing case, as has actually occurred. The granting of the licence may increase the value of the premises and create a conflict of interest for an otherwise independent witness. It would seem to me improper for him then to give evidence before the court as an independent expert. A person may not be an appropriate expert witness if they are a full-time employee of the party which wishes to call them. That would not normally be acceptable unless they were possessed of some particular skill which made it very difficult to replicate their expertise. (They might still be a witness of fact.) Another witness might by his reports or by his conduct have shown such bias in favour of one party that it is better for the court to declare that little or no credence would be given to his evidence and that the party who had wished to call him would be better with a genuinely independent witness but that would not be a common occurrence. The witness, of course, has to have expertise in the field with regard to which he is giving evidence. I set these matters out for assistance in case the issue arises in other cases. There is a valuable note on the topic in The Ikarian Reefer [1993] 2 Lloyd's Rep.68 at p.81.

[8] It seems to me that the defendant here falls well short of proving such an impediment to Mr Hutcheson giving evidence in this case and so I refuse the relief sought.