CA on appeal from Cardiff CC (His Honour Judge Moseley QC) before Woolf LJ MR, Borrke LJ; Robert Walker LJ. 27th July 1999

JUDGMENT LORD WOOLF, MR:

1. This is an appeal by the defendant in a building dispute against two orders of His Honour Judge Moseley QC dated 4 and 7 May 1999. It requires the court to consider the Civil Procedure Rules ("CPR") Part 35 and the practice direction thereto. It is also necessary to consider whether effect should be given to an agreement to allow part of the appeal by consent.

THE BACKGROUND

2. For the purposes of the present judgment, the background can be conveniently taken from the skeleton argument prepared by Mr Keyser on behalf of the defendant. The claimant is a builder. His claim was for the sum of £8,674.89 plus VAT for work done and materials supplied to the defendant which were certified by the defendant's architect (the Part 20 party) in connection with the alteration and improvement to the defendant's premises at Bargoed in Mid Glamorgan.

3. The work was carried out in 1992/1993. The work was "arguably" (as expressed by the defendant) to be carried out in accordance with the standard form of JCT Building Contract 1980 Edition Private without Quantities. The contract was neither signed nor dated. The architect who supervised the work issued instructions and certified practical completion as 24 August 1993. He issued a final certificate in the amount claimed on 23 February 1995. The total value of the work certified was over £122,000.

4. The defendant counterclaims a sum in excess of £127,000 under various heads, including defective work, incomplete work and delay in completion.

5. In May 1995, proceedings were issued at the Pontypool County Court. They were subsequently transferred to the High Court. In the first half of 1997 a Mr Isaac was instructed on behalf of the defendant. He prepared schedules supporting the defendant's counterclaim. On 31 October 1997 a reamended defence was served and a Part 20 notice was issued against the architect based on the schedules of Mr Isaac.

6. On 29 April 1998 an order was made by Judge Graham Jones:
   (1) giving leave to both the claimant and the defendant to produce evidence from two expert witnesses (a structural engineer and a building surveyor);
   (2) requiring statements of lay witnesses to be exchanged not later than 22 July 1998;
   (3) requiring the defendant to serve upon the architect and on the builder a Scott schedule not later than 29 May 1998;
   (4) requiring the builder and the architect to serve their replies to the Scott schedule not later than 31 July 1998; and that there be a joint meeting of experts and like disciplines instructed on behalf of the parties, the last meeting to be held not later than 1 September 1998, such meeting to be held with a view to identifying the areas of agreement and/or disagreement;
   (5) that the experts in like discipline should prepare joint memoranda of matters agreed or disagreed, the same to be filed not later than 15 September 1998;
   (6) that there should be an exchange of experts' reports completed not later than 30 September 1998, and no expert's report, which had not been disclosed, should be permitted to be given in evidence at the trial; and
   (7) that the matter should be set down for hearing at the Cardiff County Court not later than September 1998.

7. That order was followed by a further order in the third party proceedings of 29 April 1998 which required the experts to meet by 1 September 1998; that there should be a joint memoranda prepared as a result of that meeting by 15 September 1998; and that the experts exchange reports by 30 September 1998. There were problems with regard to discovery and an order was made against the defendant that discovery should be given in the third party proceedings by 18 September 1998 with a supplementary list by 18 September. The defendant did not comply with that order. An order was also given at that time with regard to the exchange of witness statements by 2 October 1998.

8. There were difficulties in arranging the meeting of the experts. A further order was made on 9 October 1998 which required, among other things, that there should be a joint meeting of experts but that the meeting should not now be held later than 13 November 1998. A new date was given for the exchange of the joint memoranda, 27 November 1998, a new date for the exchange of expert reports by 15 January 1999 and a new date for witness statements, to which I need not refer specifically.

9. On 11 November 1998 an experts' meeting took place. Subsequent to that meeting, a memorandum of the agreement was sent by the other experts to Mr Isaac who, despite numerous reminders never responded satisfactorily to the drawing up of the memoranda of agreement. On 10 March 1999 there was a further application to the judge which resulted in an order of 26 March 1999 that the defendant's expert do comply with the requirements of the practice direction to Part 35.

"1. The Defendants expert Mr S J Isaac shall by 4.00pm on Monday 12 April 1999 set out in writing the details referred to in paragraph 12 in CPR part 35, a copy of which is annexed to this order.

2. In default of compliance with paragraph 1, the Defendant will be debarred from calling Mr S J Isaac as an expert witness in the third party proceedings."

10. Attached to the order was a copy of the practice direction to Part 35 in relation to experts and assessors. When the order and the practice direction are read together, it is immediately clear that there is a clerical error in paragraph 1 of the order that, instead of referring to CPR Part 35, it should refer to the practice direction to CPR Part 35 and, instead of referring to paragraph 12, it should refer to paragraph 1.2.

11. The practice direction sets out various important requirements in relation to experts' reports. It requires the expert report to be addressed to the court and not to a party from whom the expert has received instructions. In paragraph 1.2 it required the expert's report to:

"(1) give details of the expert's qualifications,

(2) give details of any literature or other material which the expert has relied on in making the report,

(3) say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision,

(4) give the qualifications of the person who carried out any test or experiment, and

(5) 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 own opinion,

(6) contain a summary of the conclusions reached,

(7) contain a statement that the expert understands his duty to the court and has complied with that duty (rule 35.10(2)), and

(8) contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based (rule 35.10(3))."

12. The order which was made in relation to Mr Isaac by the judge on that occasion was not complied with. As a result the defendant was debarred from calling Mr Isaac as an expert witness unless the court otherwise ordered. In view of Mr Isaac's failure to comply with the order, the matter came before the judge again on 4 May 1999 when he made the first of the orders which are the subject of the appeal. On that occasion the judge gave three different judgments to which I shall refer.

13. The judge had before him a letter written by Mr Isaac headed "S I Architecture" indicating that Mr Isaac was a Mr Steve Isaac B.Sc (Hons) Building Surveying. It stated in paragraph 1.2.1: *"Relevant qualification is a B.Sc (Hons) Building Surveying. However, I have been involved with Renovation and disabled grants in a professional capacity for over fifteen years, having been an associate of a Chartered Surveyor for six of those years, undertaking architectural designs, specification of remedial building rectification works, drawings, preparation of Bills of Quantities, site supervision, defect reports etc.*

Although I am not a Qualified nor a practising Architect, I have extensive experience in architectural design, having taught Computer-aided design and AutoCAD A E C (which is an architectural design package) at a number of colleges in South Wales. I have also prepared architectural drawings for large prestigious companies. I am able to, if required, submit copies of drawings so that they can be assessed for their architectural credibility."

14. The letter concludes: *"I submitted all reports to the best of my ability, and each report was a true and accurate account of the condition of the building at the time of the inspections."*

THE VIEWS OF THE JUDGE

15. When the parties came before the judge on 4 May 1999, the judge was aware that a trial date had been fixed for the hearing of the case on 7 June 1999 with a time estimate of 8 days. In his first judgment the judge indicated that it was the first time that he had heard an application in the case after 26 April and that he should make it clear that he had decided that the CPR were to apply to the case. He indicated that he regarded the error in the order made on 26 March 1999 as immaterial. That position is accepted by Mr Keyser. The judge said that it seemed quite clear to him that Mr Isaac had not complied with the order, in particular with paragraphs 1.2(7) and 1.2(8). He drew attention to the last sentence in the letter that Mr Isaac had written but said: *"However, that comes nowhere near complying with paragraph 1.2(7)."*

16. With regard to paragraph 1.2(8) of the practice direction, the judge went on to say: *"....Mr Isaac has not set out the substance of his instructions. That is of particular concern in the present case because of the suspicions of the [Architect] that Mr Isaac is taking his instructions directly from the Defendant."*

17. Having set out those matters, the judge went on to say that the next issue to be considered was whether relief should be granted under the CPR Part 3.8. That Part enables a default order, such as was made in this case, to be set aside in specified circumstances. Part 3.8(1) says: *"Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from sanction."*

18. There was no application for relief under that Part before the judge, but the judge disregarded that lapse. He said that, having considered the merits and having also considered Part 3.9 and to the detailed matters there mentioned, he had come to the conclusion that Mr Isaac's evidence was likely to be crucial for the defendant. The judge explained that, as far as he was concerned, Mr Isaac's evidence was the only expert evidence which the defendant intended to adduce. He pointed out that that evidence was not directed to the issue of professional negligence, which is alleged against the architect, but deals with the technicality of the deficiencies in the building which underlie the allegation of professional negligence. The judge said: *"It is absolutely essential, if this case is going to be heard in a month's time, that there be full compliance by the expert witness for the Defendant with the requirements of the new rules, and with the requirement of paragraph 1 of the order."* (In relation to which Mr Isaac was in default)

19. He added: *"Is it right in the circumstances that the Defendant should be granted relief against the order, notwithstanding the non-compliance by Mr Isaac with the two paragraphs I have referred to?"*

20. He concluded: *"In my view it is in the interests of the administration of justice that Mr Isaac should not give his evidence in the circumstances which I have outlined. It is essential in a complicated case such as this that the court should have a competent expert dealing with the matters which are in issue between the Defendant and Third Party. Mr Isaac, not having apparently understood his duty to the court and not having set out in his report that he understands it, is in my view a person whose evidence I should not encourage in the administration of justice."*

21. He continued: *"I deduce from the letter of Mr Isaac that he does not quite appreciate what his functions are as an expert witness."*

22. The judge added, quoting from the requirement of the CPR Part 3.8, as to whether there is good explanation for the failure, that: *"There is no evidence that provided any excuse for failure of the compliance with the requirements of Part 3.8."*

23. He then proceeded to go through the requirements of Part 3.9: and added: *"It appears that Mr Isaac is not cooperating with the other experts in the case. He apparently came to the conclusion that, because he disagreed with their draft, no further steps needed to be taken and the appropriate step was merely not to sign it. The orders of the court have consequently been so much wasted paper because of Mr Isaac's non-compliance, I ought to take that into account under CPR 3.9(1)(e) in deciding whether or not to grant relief.*

In those circumstances I ought to make an order that Mr Isaac be debarred from acting as an expert witness in the case; so the Third Party succeeds."

24. Later, having made that order with regard to the third party proceedings, he made a similar order about Mr Isaac in regard to the proceedings between the claimant and the defendant.

25. Having given that judgment, the position between the defendant and the third party was that they had no expert evidence available in the proceedings against the architect. The judge therefore gave a separate judgment dismissing the third party proceedings.

THE BASIS OF THE APPEAL

26. In his notice of appeal the defendant advances two separate contentions with regard to the orders made in the proceedings against the architect. It is submitted, (i) that it was not appropriate in this case to disbar the defendant's then expert from giving evidence against the architect; and (ii) that, in any event, the judge was wrong to come to the conclusion that because Mr Isaac was debarred from giving evidence, the claim against the architect should not be allowed to continue.

RESPONSIBILITIES OF EXPERTS

27. Taking those two points in turn, I have come to the conclusion that there can be no doubt whatsoever in this case that the judge was perfectly entitled to make the orders which he did. First, with regard to Mr Isaac as an expert witness, he demonstrated by his conduct that he had no conception of the requirements placed upon an expert under the CPR. The CPR only came into force on 26 April 1999. But, as I have already indicated, in the order of 26 March 1999 reference had been made to the practice direction to Part 35 which was to come into force on 26 April 1999, the relevant part of which had specifically been drawn to the attention of the defendant by that order. The practice direction did no more than reflect the position as it had been well enunciated in the authorities prior to the CPR coming into force.

28. The position was made clear in numerous authorities but, in particular, in the decision of Cresswell J in the **Ikarian Reefer [**1993] 2 LLoyd's Rep 68. In different words Cresswell J summarised the duties of an expert. There can be no excuse, based upon the fact that the CPR only came into force on 26 April 1999, for the fact that Mr Isaac did not understand the requirements of the courts with regard to experts. Those requirements are underlined by the CPR. It is now clear from the rules that, in addition to the duty which an expert owes to a party, he is also under a duty to the court.

29. The series of orders made by the judge to which I have referred were designed to bring the present proceedings forward to a state where they could be conveniently tried at the proposed date in June 1999. If those order had been followed, it should have been possible to identify clearly and precisely what were the real issues between the parties. Because of the way which Mr Isaac responded to the experts' meeting, that was not possible. The requirements of the practice direction that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters set out in paragraph 1 of the practice direction, are intended to focus the mind of the expert on his responsibilities in order that the litigation may progress in accordance with the overriding principles contained in Part 1 of the CPR.

30. Mr Isaac had demonstrated that he had no conception of those requirements and I am quite satisfied that the judge had no alternative but to take the action which he did notwithstanding the fact that the CPR had only recently come into force and the consequences to the defendant of the course which was taken was draconian and could deprive him of a claim which he might otherwise have against the architect.

THE VIABILITY OF THE CLAIM AGAINST THE ARCHITECT

31. I was concerned as to whether, even without the benefit of Mr Isaac's evidence, the claim against the architect could still succeed, albeit that the claim was primarily one of professional negligence. However, if that was a possibility, then the subsequent history of these proceedings makes it clear that the judge's view that the proceedings against the architect should stop there and then was undoubtedly right.

32. The date which had been fixed for the hearing of the proceedings in June had to be vacated which, it may well be caused no inconvenience to the court. I therefore do not attach as much significance to that possibility as I normally would. It has become apparent, because of the defects in the schedule prepared by Mr Isaac and relied upon by the defendants, that the proceedings between the claimant and the defendant are almost inevitably going to have to be entirely recast. Although the defendant was appealing the judge's decision that Mr Isaac should not be entitled to give expert evidence in the proceedings between the builder and the defendant, wisely, he has consulted another expert. The other expert has produced a report which supports the defendant's contention that he has overpaid the builder and that there is a sum therefore due to him on his counterclaim. Instead of the sum being well in excess of £100,000, this expert takes a different view from that of Mr Isaac and puts the counterclaim in the sum of about £10,000.

33. The judge had given leave for Mr Isaac to give evidence as to fact. Clearly, Mr Isaac could not give evidence as to fact at the same time as the defendant was relying upon his new expert. Accordingly, the judge has allowed the defendant to have a period of grace, following the outcome of this appeal, to decide whether he wishes to rely upon the new expert or Mr Isaac's evidence as to fact in relation to the proceedings between the builder and the defendant.

34. While I understand the difficulty the judge had in dealing with the position of the new expert, I consider it was a mistake to regard Mr Isaac as being in a position to give evidence as to fact although he could not give evidence as an expert. In this connection I draw attention to the period that had elapsed before Mr Isaac first inspected the site of the building work and also draw attention to the fact that other work had been carried out at the building site after the claimant withdrew from the contract. In my judgment it would be extraordinarily difficult, if not impossible, for Mr Isaac to give evidence as to fact without giving evidence as an expert. In any event, Mr Isaac was so discredited that it would be pointless for his evidence to be included on the hearing of the claim between the builder and the defendant. The court now has power to control evidence, even evidence as to fact, which is to be given in the course of the proceedings. In my view, it would have been more appropriate for the judge to have refused permission for Mr Isaac to give evidence as to fact.

35. As to the claim against the architect, if that claim were to proceed now as a result of this court intervening and allowing the defendant's appeal in relation to that order of the judge, the position would be that the whole claim would have to be recast and reframed. Mr Moodie, on behalf of the architect, submits that the state of the proceedings against his client as such that it would be wholly inappropriate for the claim to be resurrected. I agree and, as to that part of the appeal, I would also dismiss the contentions of the defendant.

36. That leaves the appeal by the defendant to the order which was made by Judge Moseley debarring Mr Isaac giving evidence as an expert against the builder. The builder and the defendant have come to terms whereby they invite the court to make an order by consent that the decision of Judge Moseley should be allowed in these terms: *"1. That the Defendant be allowed to call Mr S J Isaac as an expert witness at the trial of the action between the Claimant and Defendant if and only if Mr Isaac by 4pm on 10/8/99 sets out in writing all the matters referred to in paragraph 1.2 of the practice direction supplemental to Part 35 of the Civil Procedure Rules and including in sub-paragraph 1.2(1) of the direction whether he has a B.Sc qualification and where he obtained that qualification and that in default of Mr S J Isaac complying with this order he be debarred from being called as an expert witness in the proceedings between the Claimant and the Defendant."*

THE PROPOSAL THAT THE APPEAL AGAINST THE BUILDERS BE ALLOWED BY CONSENT

37. Although the court has not required the builder to be represented on this appeal, I am quite satisfied that it would be wrong for the court to allow the appeal in accordance with the proposed consent order. I do not know whether or not Mr Isaac would provide the details proposed in the consent order by 10 August 1999. Whether he was prepared to do so or not, I consider that it would be wholly wrong to impose Mr Isaac as an expert upon the judge. The judge has very properly indicated his view that Mr Isaac is not an appropriate person to give expert evidence in a court having regard to his conduct to which I have referred. That being so, it would be quite wrong for this court, even by

consent, to interfere with the judge's judgment. Mr Isaac lacks the basic knowledge of the responsibilities which an expert has when giving evidence.

38. Under the CPR, the court has power, as I have indicated, to control the evidence which is to be placed before the court. It would be wholly wrong, where a judge has appropriately exercised his discretion in relation to that matter, for the parties to override that discretion merely because the parties are content to allow the matter, to be dealt with otherwise. The order of the judge in the proceedings between the claimant/builder and the defendant should stand and Mr Isaac should not be allowed to give expert evidence.

39. For the reasons I have indicated, I would vary the order of the judge to make it clear that Mr Isaac should not be allowed to give evidence of fact. Subject to that qualification, I would dismiss this appeal.

LORD JUSTICE BROOKE: I agree.

LORD JUSTICE ROBERT WALKER: I also agree.

Order: Appeal dismissed with costs.

MR A KEYSER (Instructed by Messrs Gatside Harding, Newport, NP9 1DJ) appeared on behalf of the Appellant
MR N MOODIE (Instructed by Messrs Cameron McKenna, London, WC2A 2LL) appeared on behalf of the Respondent