



[2022] JMCC Comm 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA`

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00342

BETWEEN	SALLY FULTON	CLAIMANT
AND	JOHN RAMSON	1ST DEFENDANT
	SUSAN ELIZABETH SILVERA	2ND DEFENDANT
	CHRISTOPHER RAMSON	3RD DEFENDANT
	PHILLIP RAMSON	4TH DEFENDANT
	NOEL RAYMOND SILVERA	5TH DEFENDANT
	CHAS. E RAMSON LIMITED	6TH DEFENDANT

Civil Practice - Appointment of expert witnesses - Disclosure of documents - Whether expert has to be independent - Whether expert qualified by experience - Whether two experts to be permitted to give evidence on same issue - Whether real likelihood of bias - Whether documents requested directly relevant – Observations on meaning of “legal vacation”.

Michael Hylton QC Stephanie Ewbank and Jacob Phillips instructed by Myers Fletcher & Gordon for the Claimant.

Georgia Gibson Henlin QC and Stephanie Williams instructed by Henlin Gibson Henlin for the 1st to 5th Defendants.

Ransford Braham QC and Ann Marie Layne instructed by Braham Legal for the 6th Defendant.

Heard: 26th June and 2nd August, 2022

In Chambers

By Zoom

BATTS, J.

[1] There were three applications before me. One is the 1st to 5th Defendants' Notice of Application, filed on the 8th July 2022, seeking orders for the appointment of experts and matters related. Another is the Claimant's Notice of Application, filed on the 14th July 2022, seeking the appointment of experts and related matters. The third is the Claimant's Notice of Application, filed on the 14th July 2022, for specific disclosure. All three applications were heard at the same time. Each party filed extensive and detailed written submissions. Each was allotted equal time to make oral submissions. In the end I reserved to, and delivered my decision on, the 2nd August 2022. I promised then to give reasons at a later date. This judgment provides those reasons.

[2] I will treat firstly with the two applications to appoint experts. The Claimant's counsel indicated at the commencement of the hearing that, save for an objection to Mr. Anura Jayatillake, they had no objection to the 1st - 5th Defendant's application. An application the 6th Defendant supported. It means that both Mr. Gladstone Lewars and Mr. Richard L. Downer will be appointed expert witnesses without objection. It will be ordered also that their written reports should be provided on or before the 13th September, 2022. That application has a curious plea (#6) that:

"The fees for the expert witnesses shall be determined at the conclusion of the claim."

I do not have the jurisdiction to tell an expert what fees he should charge nor can I compel an expert to undertake an assignment. Messrs Lewars and Downer, as far as I know, are not experts who have already given reports or statements and who are being subpoenaed to attend. The court can however limit the amount to be paid, by for example fixing the maximum amount, if a single expert is to be appointed, see rule 32.10 (4) (a). The court may also determine who ultimately

bears the costs of an expert and what amount so ordered is to be paid by a party or parties (at taxation). There is, in any event, no evidence before me as to the likely fees to be charged or what is reasonable. I therefore permitted further submissions before giving directions in that regard.

- [3] The sole issue, on the 1st to 5th Defendant's application, is whether Mr. Anura Jayatillake (who I will reference as Mr. 'J' in the course of this judgment) should be appointed an expert and permitted to give evidence in this matter. His professional qualifications are not in dispute. He is a partner at Ernst & Young a well known firm of accountants. His areas of expertise are described as "*Business valuation, financial & economic analysis, share valuation. Fairness Opinion, Intangible Asset Valuation/Purchase Price Allocation, Costing, Financial Due Diligence, IPO Assistance, Liquidations and Receiverships, Merger/Acquisition assistance and, Divestment Assistance*", see exhibit AM 3 to the affidavit of Arianna Mills filed on the 8th July 2022 (page 26 Judges Bundle). There is no issue taken with the relevance of this type of evidence. His experience in the area is impressive, see the same exhibit referenced earlier.
- [4] The Claimant objects to Mr. J. because it is said, in previous litigation not unconnected to this matter, he submitted a flawed report. It was submitted that in a report, attached to an affidavit of C. Silvera of the 7th January, 2021, Mr. J referred to a letter which he did not disclose. Further that he referenced oral and written instructions he had not verified. Thirdly, that there was an offer in January 2020 which Mr. J had not disclosed because it had not been disclosed to him. The Claimant's counsel also indicated that, even if approved, Mr. J should not be the sole witness for the court and the Claimant wished to call her own expert.
- [5] On the matter of the suitability of Mr. J I agree with the Defendants' rebuttal. Mr. Braham QC, submitted that the matters complained of are of no real moment. They were actually brought to the attention of the court by Mr. J himself. In the impugned report he indicated the omission and invited a close scrutiny of his own conclusions. Furthermore, I do not see how it can be an indictment on an expert if

he had not been provided with particular information that was relevant. In that case the criticism must be of those instructing him. I will return later in this judgment to a further consideration of Mr J and whether he should be the sole expert to give evidence.

[6] The Claimant's application to appoint experts was opposed by all the Defendants. The Claimant wishes to have Mr. Eric Jason Abrahams and Mr. Christopher Fagan appointed expert witnesses. Their evidence is deemed necessary in the event a "buy out" order is made by the court. Mr. Abrahams is an investment banker and financial analyst. He will speak on "*issues arising in business and share valuations including the treatment of a company's real estate and brands in the share valuation process and the methodologies relevant to non-operating or non-core assets of a company*", see paragraph 5 of the affidavit of Amanda Montague filed on the 14th July 2022. Mr. Fagan is a chartered accountant "*highly experienced and qualified to speak on the applicable valuation methodology to be used in valuing the 6th Defendant's business and shares*", see paragraph 6 of the affidavit just referenced. When I enquired of counsel as to the difference between the reports each would be required to give the answer, as I understood it, was that Mr. Abrahams would provide an opinion supporting the methodology for the valuation as well as a valuation of shares while Mr. Fagan would do a more forensic type accounting and valuation of shares.

[7] The Defendants objected to Mr. Abrahams on the ground of bias. They point to an affidavit, dated 21st January 2016 and, filed in earlier proceedings between these parties in which he gave expert evidence. In that affidavit he gave evidence that was not of an expert nature but concerned a factual question in issue which is the use to which certain property was put. The exact words he used when giving that evidence are worthy of repetition, see exhibit JR 1 to the affidavit of John Ramson filed on the 21st July 2022:

“ 8. I was surprised to be advised by Levy Cheeks that Coconuts was not beneficially owned by John Ramson, but is

owned by a company in which SAF holds a 25% interest. Based on my observation over the years, Coconuts had always seem (sic) to be operated as the personal property of John Ramson. I cannot recall ever seeing Anne or Ian Fulton staying at Coconuts.

9. Over the years, I observed JR's family using Coconuts for recreational purposes on many occasions. I generally recall seeing JR and his family on the Strip for many of the standard vacations. Most of the villa owners use their villas during school vacations and public holidays, and there is a great deal of interaction between the villa owners and guests staying on the Strip

10....

11. I have never seen Coconuts used for any other purpose other than recreational purposes. Based on my observations when I was living permanently in Jamaica, I do not think it could reasonably be suggested that Coconuts was used principally for business purposes. On my less frequent visits to the Strip since my migration, I have never seen anything which changed this view."

[8] The Defendants submit as follows, see para 15 skeleton submissions of 6th Defendant filed on the 25th July 2022:

"15. We submit, that he would have formed a view as part of the Claimant's team, and it cannot now be reasonable to argue that he would be either independent or impartial.

16. Further, Mr. Abrahams participation as a part of the Claimant's team was not limited to his professional obligations. He was a witness of fact as to the use of Coconuts and particularly who used the Coconuts property, this is demonstrated particularly in paragraphs 4, 8, 9 and 11 of Mr. Abraham's affidavit. We submit that this represents a complete alliance with

the Claimant which cannot be cured by any mere statement to the contrary.

17. The matter as to whether Coconuts is a part of the 6th Defendant's core business or whether it is integral to the 6th Defendant's viability is an issue in the case. However, Mr. Abrahams has already determined this issue against the 1st – 5th Defendants based upon his alleged personal observations."

- [9] This court has an inherent power to determine the evidence lead in proceedings before it. The decision on admissibility as it is called, although discretionary, is exercised in accordance with established rules and norms. A primary consideration in this regard is relevance. Rules peculiar to the admissibility of expert evidence have evolved over the years. Nowadays parties can no longer call an expert to give evidence without the permission of the court. The court's permission is not required before an expert is consulted and his report or opinion obtained. However, before he is called to give evidence in civil proceedings, the court must be asked to give permission. The permission is a two stage process. The court must be satisfied that the expert is suitably qualified to render the particular opinion. Secondly the court must be satisfied that the opinion the expert is required to give is reasonably required to resolve the proceedings justly. Relevance is of course a necessary component of the latter, see rule 32.6 of the Civil Procedure Rules and ***National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Limited) v K & B Enterprises Limited*** SCCA 70 of 2005 unreported decision of K. Harrison JA (in Chambers) on the 5th September 2005. The rules also allow the court, when considering the admissibility of expert evidence, to limit the number of expert witnesses to be called, see Rules 32.9 and 32.10. In this regard the court is concerned to save costs and time at trial. The appointment of a single expert is suited, although not uniquely reserved for, situations in which the science or discipline involved is settled and the expert opinion is not highly subjective. In this case, where the issue is in reality a dispute between shareholders in one company, the court is acutely aware of the need to reduce to a minimum the expense of litigation which quite often is ultimately borne by the company. When directing that a single, rather than multiple experts be

called, the court will allow each party to provide instructions. The court has the power to limit the amount to be paid to an expert who is to be retained for this purpose.

[10] In this case I bear in mind that one factual issue relates to how and why the company's assets were used. The pleadings (now called statements of case) outline the issues to be determined. The claim is for relief pursuant to section 213A (2) of the Companies Act being the popularly called "oppression" remedy. By way of Counterclaim the Defendants seek orders for the purchase of shares. In response the Claimant, among other things, asserts that certain property was used for the benefit of the company's directors to her exclusion and was not acquired or used for the benefit of the company. In the light of these issues there is no doubt that an expert valuation and an accounting of a forensic nature will be of relevance and is reasonably required. Such a report will assist the court to determine whether there has been conduct to the Claimant's detriment and if so whether and how to compensate for such conduct.

[11] Whereas I agree with the Defendants, that the criticisms of Mr. J do not disqualify him from giving expert evidence, I am not prepared to order that he be the sole expert before the court. The rules contemplate that the court, where a single expert is to be appointed, would require lists to be submitted from which a selection is made. There is not, in my view, sufficient time for such a process to be properly followed and which would allow for the report to be prepared in time for trial. I will therefore allow the parties to instruct their respective experts in this area given the deep disagreement on the expert to be appointed.

[12] Similarly, I would not appoint Mr Jason Abrahams as the sole expert. I understand the discomfort of the Defendants when regard is had to the prior evidence he gave. In the absence of an agreement, that would rule him out for consideration as the sole expert. On the other hand, the mere possibility of bias does not necessarily preclude a party obtaining permission to call an expert witness, pursuant to rule 32.6 (1), in their own right. An expert witness, contrary to the Defendants'

submission, is not required to be “*independent*” of a party. There are many occasions in which the expert giving evidence is an employee or agent or otherwise connected to the person calling him, for example, a doctor rendering a medical opinion may have been that party’s physician for many years, see **Zuber Bux v The General Medical Council** [2021] EWHC 762(Admin) (unreported judgment of Mostyn J delivered on the 24th March 2021 at paragraph 33), **Toth v Jarman** [2006] AllER (D) 271 and, **Joan Allen et al v Rowan Mullings** [2013] JMCA App 22 unreported decision of the Court of Appeal delivered on the 31st July 2013 at paragraph 46. Experts often are not or cannot be independent, in the broad sense, because they may have come by the primary facts upon which they are asked to render an opinion in the course of legal or other duties owed to one of the parties, a forensic scientist at the scene of a crime for example. The law however requires that the expert’s opinion is honest and that it is the “*independent product of the expert witness*” uninfluenced by external factors. It must be his “*unbiased opinion*”, see rules 32.3 and,32.4 (1) & (2). So, even though the expert may not be independent, the opinion he or she expresses must be his/her own. An employee of a party giving evidence is required to arrive at an unbiased opinion which is his own and is not dictated to him. In this regard therefore if Mr. Abrahams were to be called by the Claimants it would be a question for the trial judge, as to the weight if any to be given to his evidence and, whether it was to be accepted in preference to other evidence. This is not to say that, at this pre-trial stage, an expert cannot be disqualified from giving expert evidence due to bias or the real likelihood of bias where that is proved. However this is not such a case. In the previous proceeding Mr Abrahams was called as an expert and also gave evidence of personal observations of a factual nature. It does not follow that his opinion, in this case as to the value to be placed on assets, is unlikely to be honestly held. Such an assessment is best done by the judge at trial who will see and hear all the evidence.

- [13] Mr. Abraham’s qualifications were also challenged because the nature of the degree he obtained from the University of Auckland New Zealand was not disclosed. This is not particularly relevant. That degree not having been disclosed

it can be safely assumed it has no relevance to the type of opinion he is being asked to render. Expertise is however had not only by long study but also by long practice and experience in a field of work. In this regard Mr. Abraham's credentials are impressive. He has had practical experience and has played a leading role in the valuation of shares and core businesses, see exhibit AM1 to the affidavit of Amanda Montague dated 14th July 2022. Therefore, had the only criticism been his qualifications as an expert, I would have granted permission to the Claimant to call him as an expert at their own expense in the first instance. However, there is another consideration.

[14] I must consider the time and expense of trial and whether he is reasonably required as an expert witness. The Claimant proposes to call another competent expert witness who has more impressive academic credentials. Mr. Christopher Fagan is a chartered accountant who now operates his own consulting firm. He has also had litigation related valuation experience in relation to "Lasco Foods Limited" (a matrimonial dispute), judicial note can be taken of the complexities of that matter. He has also already advised the Claimant about the value of her shareholding in relation to the company the subject of this case. His prior work for her would preclude him being appointed the sole expert of the court unless there was an agreement. However, that prior work and his familiarity with the issues may make the prospect of a timely report more likely. He is certified in business, entity and intangible valuations, see exhibit AM 2 to the affidavit of Amanda Montague dated the 14th July 2022. I will not therefore permit the Claimant to call both Mr Abrahams and Mr Fagan as expert witnesses as to the value of assets or shares. To do so will create an unnecessary potential expense to the company and will unnecessarily lengthen the trial. Either of the two experts will suffice.

[15] In summary therefore I will order that, Gladstone Lewars and Richard Downer be appointed experts pursuant to Rules 32.9 and, that the Claimant is permitted to call either Mr. Jason Abrahams or Mr. Christopher Fagan as expert valuers pursuant to Rule 32.6. The 1st -5th Defendants are permitted to call Mr. J as an expert valuer. On the date this decision was rendered I heard further submissions,

and thereafter gave detailed directions, in relation to the expert evidence, see paragraph 22 below.

[16] I now turn to consider the Claimant's application for specific and further disclosure. The request is rather detailed, see Notice of Application filed on the 14th July 2022 (page 46 of Judges Bundle filed 15th July 2022). The Defendants oppose the making of such an order on the basis that the requests are not "*directly relevant*" within the meaning of Rule 28.6(5) of the Civil Procedure Rules. They also rely on Rule 28.7 which provides:

"28.7 (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) It must have regard to-

(a) the likely benefits of specific disclosure

(b) the likely cost of specific disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3)"

Counsel cited Justice of Appeal McDonald-Bishop in the matter of **Attorney General v. BRL Limited and Village Resorts Limited** [2021] JMCA Civ. 14 (unreported judgment delivered on the 25th March 2021) who said, with reference to rules 28.1 (4), 28.4 and 28.6 (5):

"103. The fact that the documents "may" be relevant, or merely "relate" to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be "directly relevant" as defined by the CPR. I endorse the view of the court as expressed by F Williams JA in Miguel

Gonzales and Suzette Saunders v Leroy Edwards [2017] JMCA Civ 5 at paragraph [22], that:

[22] ... [A] prerequisite for disclosure is a finding that a document is, not just relevant in the usual layman's sense, but "directly relevant" within the meaning of the rule. The rule uses the phrase "only if" in delimiting matters to be considered in deciding whether a document satisfies the definition. This means that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule." (emphasis supplied).

[17] The Defendants submit that the required documents date from 2008 and predate the appointment of most of the Defendants as directors. The requests are "*wide and generalised*" which make it difficult to identify the documents to be disclosed. They suggest that the breadth of disclosure requested is an indication that the request is speculative. In effect it is a fishing exercise. The Defendants submit that not only have they given adequate disclosure but that they have "*set out the remuneration for the respective Directors which sets out the value of the particulars of travelling, cellular, telephone, utilities, subscriptions, domestic services*" paid by the company for each Defendant, see paragraph 28 of 1st to 5th Defendants submissions filed on the 25th July 2022. Therefore, the submission is, the request to disclose the documents in support is unnecessary. The Defendants further contend that, as it is not disputed the payments were made by the company, the only real question at trial is whether the basis on which the company made the payments was lawful. The Defendants complain that the application is late. The timing just at the start of the legal vacation and only 36 "*working*" days before the trial is to commence, is unfortunate. It is asserted that these requests ought to have been made in October 2020 when their accountant was appointed or at the latest in March 2022 when they received the Defendants' list of documents by way of disclosure.

[18] I do not agree. The Claimant cannot know the documents which would be disclosed until there was served a list of documents. This occurred in March 2022. It would have been preferable for an earlier application however a filing in July is not so late as to cause the court to refuse it. The Claimant's counsel points out that witness statements were only exchanged on the 11th July and presumably, until these were examined, a decision on specific discovery to be requested would have been imprudent. She contends that these documents had been requested of the Defendants since the year 2017.

[19] The fundamental point in my view is whether the documents are "*directly relevant*." It seems to me they are and therefore they ought to have been disclosed in the first instance. If the Defendants concede, as they seem to, that the quantum of the payments made by the company to them is relevant then the documentary proof of those payments is also relevant. The Defendants say they have admitted that the company paid them certain things and they have disclosed schedules in proof of such payments. A fortiori any documents, which support the fact of such payments, ought to be disclosed as otherwise the Claimant will be asked to accept on good faith the accuracy of the amounts stated. This case is brought because of an absence, or a breakdown, in trust and confidence among shareholders, directors and, family members in a family owned business. In that context how can a court ask the Claimant not to examine the documents which are the source of the data the Defendants put forward. If only to satisfy themselves of its accuracy.

[20] There are cases of this nature, oppression claims that is, in which the issue of liability is tried separately from the issue of the appropriate remedy. In that situation one can understand an argument that such specific disclosure is best left to the stage of assessment of damages. This is not such a case. The court will be deciding both liability and damages at the same time. The documents will either support the Defendants' case, as to the amounts paid and the purpose of payment, or not. In this regard it is in every case impossible to say that a document "*shall*" prove 'x' only that it "*may*" prove 'x' or 'y'. This is why discovery is required. If the

answer was known with certainty beforehand discovery would not be required. I will therefore order discovery as requested.

[21] With regard to the Defendants' counsel's plea that the period of the legal vacation should not be counted, I beg to differ. The rule, see rule 3.5 (1) , is specific that it is the time for service of statements of case, other than the claim form or particulars of claim served with it, which does not run. It does not mean that the period for other purposes is not considered. The legal vacation means only that many courts do not sit. It does not mean that judges and court staff are not at work. Judgments are being written and steps are being taken to prepare for the term to come. It is also a time when lawyers work. It is true that many plan their vacation in anticipation of a slowdown in operations, however, a court cannot make decisions premised on assumptions that no legal work is to be done during the 'legal vacation.'

[22] In the result therefore, and for the reasons stated, my orders made on the 2nd August 2022 were as follows:

1. Mr. Gladstone Lewars Economist and Chartered Accountant is appointed an expert for the purpose of providing a report on the employment benefits remuneration and compensation structure of the 6th Defendant.
2. Mr. Richard Downer a certified chartered accountant is appointed an expert for the purpose of providing a report on the properties identified as "Coconuts" in Discovery Bay and "Sharrow Drive" in Kingston and whether they are redundant and serve no useful purpose to the 6th Defendant.
3. The 1st to 5th Defendants are permitted to instruct and retain Mr. Anura Jayatillake chartered accountant to provide a report on the value of the shares of the 6th Defendant and the amount to be paid to the Claimant for the value of her shares.

4. The Claimant is permitted to instruct and retain either Mr Jason Abrahams investment banker and financial analyst or Mr. Christopher Fagan a certified chartered accountant to report on the value of the shares of the 6th Defendant and the amount to be paid to the Claimant for the value of her shares.
5. With respect to the experts at para (1) and (2) above the parties shall provide joint instructions and in the event of a failure to agree each party may provide instructions to the experts on or before the 12th August, 2022.
6. The experts at (1) and (2) above shall be paid in the first instance by the 6th Defendant with the ultimate bearer of the cost of these experts being determined by the judge at trial.
7. The amount payable to each of the said experts at (1) and (2) above shall not exceed US\$10,000 unless the amount is agreed by all parties to the litigation or there is a further order of the court.
8. The court directs that the experts retained by the parties pursuant to orders 3 and 4 above shall consult and if possible agree and prepare one joint report for the court.
9. In the event of an inability to agree each expert shall prepare and file a separate report and state the areas in which there is disagreement and why.
10. All expert reports are to be filed in in this court and served on or before the 13th September 2022 or as soon thereafter as is reasonably practicable.
11. Pre-Trial Review further adjourned to the 21st September 2022 at 9:00 a.m. for 1 hour.
12. The question of whether and which experts are to attend for cross examination reserved for Pre-Trial Review.
13. The Defendants shall on or before the 2nd September 2022 specifically disclose the following documents.

- a) Records of all trial expenses of the 1st to 5th Defendants and/or members of their families paid for by the 6th Defendant in the period January 2008 to present.
- b) Personal bills and/or records for expenses including but not limited to cellular bills, telephone bills, general utilities, personal subscriptions and membership fees for the 1st to 5th Defendants and/or members by their families paid for by the 6th Defendant for the period January 2008 to the present date.
- c) Records of payments made for personal domestic services provided to the 1st to 5th Defendants and/or members of their families paid for by the 6th Defendant for the period January 2008 to the present.
- d) Contracts and other business arrangements between the 6th Defendant and Caribbean Foods Limited for the period January 2008 to the present
- e) Records of income and expenditure related to Villa Coconuts from January 1, 2008 to the present.
- f) Service contracts that each of the 1st to 5th Defendants has with the 6th Defendant together with details of the remuneration package for each
- g) Records of all payments made by the 6th Defendant to Mary Ramson and corresponding reasons for said payments.

14. Costs in the Claim

15. Claimants attorney to prepare, file and serve formal order

16. Leave to Appeal is refused.

David Batts
Puisne Judge.