IN THE REVENUE COURT

REVENUE APPEAL NO: 1 OF 2005

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| BETWEEN | CIGARETTE COMPANY OF JAMAICA LIMITED | APPELLANT/RESPONDENT |
| AND | THE COMMISSIONER OF TAXPAYER AUDIT AND ASSESSMENT | RESPONDENT/APPLICANT |

Michael Hylton Q.C. and Ms. Thalia Francis instructed by the Director of State Proceedings for the Applicant; Dr. Lloyd Barnett, Mr. Noel Levy, Mrs. Michele Champagnie and Ms. T Green instructed by Myers, Fletcher & Gordon for the Respondent.

Heard In Chambers; March 21, 2006 and March 23, 2006

**Anderson J.**

By way of a Notice of Application for Court Orders, The Commissioner of Taxpayer Audit and Assessment, (the "Respondent") seeks the following Orders:

1. That permission is granted to the Applicant to rely on the Expert Report of Douglas Kalesnikoff, Forensic Accountant.
2. That the Expert Report of Douglas Kalesnikoff be filed and served on the Appellant within seven (7) days of the date of this Order.

The grounds on which the Applicant is seeking the Order are as follows :-

1. Pursuant to Rule 32.6 (1) of the Civil Procedure Rules 2002, the court's permission is required for reliance by any party on an Expert Report.
2. Although the general rule is that permission should be granted at the Case Management Conference, in all the circumstances of this matter, no prejudice will be done to the Appellant if permission is granted at this time.

3. As his résumé indicates, Douglas Kalesnikoff is a Chartered Accountant who specializes in Investigative and Forensic Accounting (CA-IFA), a Certified Fraud Examiner (C.F.E.) and a Certified Management Consultant. He has been involved in Forensic and Investigative Accounting for the past twenty (20) years and he has assisted the Courts in other jurisdiction as an expert witness in many cases.
4. The Expert Report of Douglas Kalesnikoff is reasonably required to assist the court to resolve the proceedings justly.

The application which is being opposed by the Appellant (the "Appellant") is supported by the Affidavit of Vinette Keene, the holder of the office of the Respondent and purports to set out the reasons why it is necessary for the Applicant to have the benefit of the report by Mr. Kalesnikoff in relation to the substantive matter to be heard in Revenue Appeal No. 1 of 2005.

The affidavit gives as the Respondent's view that given the nature of the issues to be determined, an expert witness with experience in forensic accounting would greatly assist the Court to resolve those issues justly. She depones as to the reason why the appropriate Order was not made at the Case Management Conference and the subsequent efforts and failure to secure the services of a locally based expert. She also indicates in her affidavit that, having forwarded the relevant documents filed by the parties herein, Mr. Kalesnikoff has indicated that he would be in a position to provide an expert report on the issues raised in the appeal. She says further, that the Appellant will not be prejudiced by the granting of this application, and she attaches to her affidavit, as an exhibit, the résumé of the Expert Witness.

In his submissions, the learned Solicitor General urged upon the Court that, pursuant to Rule 32 of the Civil Procedure Rules 2002, it should grant the application. He reviewed the requirements laid out in Rule 32 pursuant to which an expert may be appointed. In particular, he referred to the need to identify the nature of the expert witness' expertise, (Rule 32.6(3); and Rule 32.2 which requires that the expert evidence should be "reasonably required to resolve the proceedings justly". He submitted that the report of the expert in question was reasonably required to assist the Court to resolve justly, the issues raised in the proceedings.

Learned Queen's Counsel cited and adopted dicta from my earlier decision in **Eagle Merchant Bank of Jamaica Limited et al v Paul Chen Young et al Claim No C.L. E – 095 of 1998** on the issue of expert testimony. Firstly, it was submitted that, as stated on page 20 of that unreported decision, forensic and investigative accounting is a field susceptible of expert testimony. In support of that proposition, I had in the course of that judgment, referred to dicta of Evans-Lombe J. in **Barings plc (In Liquidation) and Another v Coopers and Lybrand (a firm) and Others; Barings Futures (Singapore)(PTE) Ltd. In Liquidation v Mattar and Others, Times Law Reports March 7, 2001**.

> Expert evidence was admissible in any case where the court accepted that there existed a recognized expertise governed by recognized standards and rules of conduct capable of influencing the court's decision on any of the issues which it had to decide, if the witness to be called satisfied the court that he had the necessary expertise to give potentially helpful evidence.
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> Evidence meeting that test could still be excluded if the court concluded that calling such evidence would not be helpful in resolving any issue in the case justly, for example where the issue to be decided was one of law or was one on which the court could reach a fully informed decision without the hearing of such evidence.

Counsel for the Respondent submitted secondly, that the **Eagle** case cited above was authority for the proposition that the modern approach to the use of expert evidence was to regulate such matters in terms of their weight rather than their admissibility. In that case I had cited other dictaof Evans-Lombe J. in the Barings case, to the following effect:

> The modern view was to regulate such regulate such matters by weight rather than admissibility even where the evidence went to the ultimate issue in the case. A trial judge could safely rely and gratefully rely on such evidence provided that he did not lose sight of the fact that the final decision as to what or was not negligence was for him alone.

Dr. Barnett for the Appellant, submitted that the application should be refused. He in turn, cited Rule 32.2. That rule states.

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

Dr. Barnett said that no proper basis had been advanced to show why the expert report is "reasonably required to resolve the proceedings justly", and that this was the standard

which had to be achieved to justify the expert report. The only indication of the satisfaction of this standard was the statement in the Grounds of the Application and the opinion of Mrs. Keene in her affidavit. So, for example, the Applicant had not indicated with what issues the expert would help the Court. I take the submission to be that no objective analysis of the issues had been put before the court to justify the conclusion that the nature of the issues had reached the threshold for Rule 32.2. It was submitted that the evidence of the parties having now been put before the court, in the statutory declarations and affidavits filed, there is "no challenge to the audited accounts and no allegation of fraud". Therefore, there is no assistance a forensic accountant can usefully give to the court. The submissions conclude with a statement of the issues raised in the Appellant's Second Further Amended Notice and Grounds of Appeal, and the Respondent in the Amended Statement of Case, as seen through the eyes of the Appellant.

I have determined that the application should be allowed and am prepared to consider any consequential applications. I have come to this conclusion for the following reasons. Even accepting the Appellant's views as to the restricted scope of Rule 32.2, it seems clear to me, and in this regard I accept Mr. Hylton's submissions in response, that the court in deciding whether the issues could benefit from the views of the expert, must be at liberty to look at all the case record which has been so far laid before it. The court is therefore able to look at the Statutory Declarations and the Affidavits of the parties which have been submitted. Indeed, it may be implicit in the Appellant's own summation of the issues in its submissions, that there need not be a formal analysis of the issues in the Respondent's affidavit as a basis for justifying the assertion that the report is "reasonably required to resolve the proceedings justly". It would also seem to me that, at least with respect to issue c in paragraph 5 of the Appellant's submissions, and here again I accept Mr. Hylton's submission in response, there is at least a mixed question of fact and law which may benefit from the report of the expert.

The other basis for ruling that the application should succeed, is that, as pointed out in the **Barings** case above, there is a requirement to attain the threshold of "a recognized

expertise governed by recognized standards and rules of conduct". Nevertheless, as Evans-Lombe J. stated:

> Evidence meeting that test could still be excluded if the court concluded that calling *such evidence would not be helpful in resolving any issue in the case justly*, for example where the issue to be decided was one of law or was one on which the court could reach a fully informed decision without the hearing of such evidence. (My emphasis)

I cite this passage again with approval because it seems from the part of the passage underlined, that such evidence ought not to be excluded if it helps to resolve *any issue in the case justly*. Once the court has identified even one such issue therefore, the better view is that it should allow the report in and regulate its import in terms of the weight to be ascribed to it. Nor is the absence of any allegation of fraud fatal to the use of a report by a forensic and investigative accountant. In this regard, I refer to the **Eagle case** above where I referred to the submissions on behalf of the Claimant. I said:

> They pointed out that the word "forensic" means "of, used in court". The submission cited the University of Toronto website which, it claims, defines "forensic and investigative accounting" as "the rigorous investigation into the financial aspects of a particular situation, usually with the objective of establishing evidence relating to possible or pending criminal or civil proceedings".

It seems to me that on any view of the issues in the instant matter, there are "financial aspects of a particular situation" which will be explored by the court, and thus is one area where the views of the expert *may* be useful. I put it no higher than that. In this regard, I adopt the views of Stuart Sime in "A Practical Approach to Civil Procedure" Seventh Edition, pages 312-313. Sime has this to say in relation to the three pre-conditions for the admission of expert evidence. The first is that the matter must call for expertise.

> Experts, like other witnesses may give evidence of primary facts within their knowledge. Thus, an expert surveyor called to give evidence of comparable rents in rent review proceedings may give oral evidence of the dimensions of the premises in question if those facts are known to the witness. However, the real purpose in calling an expert is for the expert to express an opinion on a matter in issue. An expert is permitted to do this only if the matter calls for expertise. This means that the matter must be outside the knowledge and expertise of the tribunal of fact. Typical examples are
> a) Medical evidence on the extent and prognosis of personal injuries;

b) Surveying evidence as to the state of an allegedly defective building;
c) Handwriting evidence as to the authorship of disputed writing; and
d) *Accountancy evidence on matters raised in accounts.* (My emphasis)

In light of the foregoing, my decision as noted above is that the application should be granted in the terms in which it was sought. I need hardly add that the CPR makes specific provision for the submission of questions to the expert by another party in Rule 32.8 within certain time parameters.

Since this is an application that could have been made at Case Management Conference, I would order that Costs be costs in the Claim