[2024] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00069

BETWEEN	**WINSTON COLEY**	**1ST APPELLANT**
AND	**PAM COLEY**	**2ND APPELLANT**
AND	**ROY TYRELL**	**RESPONDENT**

Written submissions filed by Nigel Jones & Company for the appellants

Written submissions filed by Frater Ennis & Gordon for the respondent

20 December 2024

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

Civil Procedure – expert evidence – whether judge erred in refusing to appoint proposed witness as an expert – whether judge erred in refusing to allow reliance on a report of the proposed expert witness – Civil Procedure Rules, Part 32, rules 32.2 and 32.6

MCDONALD-BISHOP P

[1] On 27 April 2021, Rattray J ('the learned judge') heard an application brought by Winston Coley and Pam Coley ('the appellants'), who were the claimants in the proceedings in the Supreme Court, where they were seeking in the main, the following orders:

> "1…
>
> 2…

> 3. That the parties be permitted to rely on any Supplemental Witness statement filed and served between the date of this Application and April 20, 2021.
>
> 4. That Mr. Michael Gainford Robinson be appointed Expert witness for the Claim;
>
> 5. That the [appellants] be permitted to rely on quantity surveyor report dated April 13, 2021 by Mr. Michael Gainford of Michael Robinson Associates, Chartered Quantity Surveyors, 12 Dumbarton Avenue, Kingston 10 in the parish of St. Andrew.
>
> …"

[2] On 14 June 2021, he made the following orders:

> "1. Permission is refused for the [appellants] to rely on the Supplemental Witness Statement of Pam Coley dated April 15, 2021.
>
> 2. The Report of Michael Robinson dated April 13, 2021 is not permitted to be relied on by the [appellants].
>
> 3. Leave to appeal is refused.
>
> 4. The Order is to be filed by the [appellants'] Attorneys-at-Law and served on the Defendant's Attorneys-at-Law.
>
> 5. Costs awarded to the Defendant."
>
> …"

[3] In this appeal, the appellants have primarily challenged the learned judge's order, refusing their application to rely on the report of Michael Robinson ('Mr Robinson') (order 2.) and his failure to make an order appointing Mr Robinson as an expert witness in the claim.

[4] There is no appeal against the learned judge's refusal to allow reliance on the supplemental witness statement.

The background

[5] In July 2013, the appellants entered into an oral contract with Roy Tyrell ('the respondent') for him to carry out repairs and modifications to the pool deck located at their residence in Tower Isle, Jamaica Beach, in the parish of Saint Mary. By way of a claim form and amended particulars of claim filed on 21 January 2015 and 14 March 2017, respectively, the appellants sought damages in the amount of $1,022,569.37 against the respondent for breach of contract. They allege in the particulars of claim that the respondent did not complete the work within the time agreed and that the work was not carried out to their satisfaction. They further allege that as a result of the respondent's breach of contract, they incurred expenses in relation to their pool deck.

[6] Following this, the appellants, on 14 April 2021, filed their notice of application for court orders seeking, *inter alia*, that Mr Robinson be appointed as an expert witness in respect of the claim and for them to be permitted to rely on the Quantity Surveyor's Report dated 13 April 2021. As indicated above, the learned judge refused the orders sought.

The appeal

[7] Following the learned judge's refusal of the orders sought, on 14 June 2021, the appellants, on 14 July 2021, filed an amended notice of application for leave to appeal. On 31 May 2022, the application for leave to appeal was heard before this court, and the appellants were granted leave to appeal. Notice and grounds of appeal were filed on 14 June 2022, advancing seven grounds of appeal.

[8] Considering the significantly overlapping grounds of appeal, it seems safe to state, in the interest of brevity, that the gravamen of the appellants' challenge in the appeal revolves around two broad issues, namely:

(i) whether the learned judge erred by not appointing Mr Robinson as an expert; and

(ii) whether the learned judge erred in law by not permitting the appellants to rely on the report.

The standard of review

[9] The learned judge's refusal to grant the application was an exercise of discretion. It is now firmly established that the standard of review to be applied by this court, in such a case, is authoritatively laid down in **Hadmor Productions Ltd and another v Hamilton and others** [1982] 1 All ER 1042 and adopted in paras. [19] and [20] of **Attorney General of Jamaica v John McKay** [2012] JMCA App 1. The governing principle is that the court ought not to set aside the decision of the learned judge which resulted from the exercise of his discretion unless it was based on a misunderstanding of the law, evidence or facts before him or on an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong, or that the decision is so aberrant that no judge being mindful of his duty to act judiciously would have made it.

[10] It is against the background of this applicable standard of review that the issues arising from the impugned decision of the learned judge have been evaluated for resolution. Those issues will now be addressed.

Issue (1) – Whether the learned judge erred by not appointing Mr Robinson as an expert witness (grounds a, c, e, g)

The appellants' submissions

[11] The appellants contended that the learned judge erred in exercising his discretion not to appoint Mr Robinson as an expert witness. They maintained that Mr Robinson's expertise was required to assist the court in determining the amount of damages owed to them for breach of the contract by the respondent concerning repairs to the appellants' pool deck. This is consistent with the role of an expert witness, which is to assist the court in achieving its overriding objective by giving objective evidence concerning matters within his/her expertise.

[12] The appellants contend further that they had sought to appoint Mr Robinson as an expert witness as he is a certified Quantity Surveyor and has been practising for over 10 years. They further argued that he obtained his qualifications from the University of Technology, Polytechnic of Wales, where he received a Bachelor of Science Degree in Quantity Surveying and the Royal Institute of Chartered Surveyors.

[13] The appellants complained that although Mr Robinson is qualified, by his training and experience, to give evidence in respect of the quantum of damages to which they are entitled, the learned judge refused to exercise his discretion to appoint him and, moreover, has provided no reason for refusing to do so. He had failed to consider that Mr Robinson had assessed the amount it would cost the appellants to repair/reinstate the pool deck. As a quantity surveyor, he has expert knowledge of construction costs and contracts. The learned judge, they submitted, failed to consider the facts of the case, which show that the appellants would require a quantity surveyor to assess the estimated costs of the repairs/reinstatement of the pool deck. This evidence of the assessed costs of repairs/reinstatement would be relevant to the issue of the amount of damages to be awarded, if it is found that they are entitled to damages.

[14] Reliance is placed on the Supreme Court case of **Nicola Lauder and Lydia Jones v Everett Brady** [2020] JMSC Civ 160, in which the court permitted the claimant to rely on a quantity surveyor's report to provide the estimated costs of remedying the defect in question in that case. The court, the appellants submitted, was assisted by the report in assessing the cost of "curing the defect".

The respondent's submissions

[15] The respondent's response on this issue is that a quantity surveyor is not qualified to give an opinion on the quality of work done but rather is qualified to proffer an opinion on estimations on the amount and cost of materials needed to build and to provide bills of quantities. There is nothing in Mr Robinson's list of qualifications which suggests that he is qualified to give an opinion on the matters of which a quantity surveyor is qualified to speak. Mr Robinson, according to counsel's submissions, has given an opinion outside

of his stated expertise, which justifies the learned judge's exclusion of his report. Furthermore, even if Mr Robinson is entitled to provide such an opinion, there is no nexus between the opinion given by Mr Robinson and the work allegedly done by the respondent. Therefore, the learned judge did not err when he refused to appoint him an expert witness.

[16] The respondent relies on the case of **Jhamiellah Gordon v Jevon Paul Chevannes** [2012] JMCA Civ 41 (**'Gordon v Chevannes'**), in which Panton JA (as he then was) speaks to the role of the court in restricting expert evidence. The salient portion of Panton JA's pronouncements relied on is that:

> "It may well be that although the witness qualifies as an expert, the material to be introduced into evidence is wholly irrelevant to the issues for determination at the trial. In such a situation, a party would be properly prevented from calling a witness who would merely be causing a lengthening of a trial, as well as the incurring of unnecessary costs."

Discussion and findings

[17] It is observed that the learned judge, at the outset of his analysis, identified as "the main issue" for his consideration whether the affidavit of Pam Coley and the supplemental witness statement could be properly admitted into evidence pursuant to rule 29.11. Rule 29.11 of the CPR deals with witness statements which are not served within the time provided by the court. It states:

> "(1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.
>
> (2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8."

[18] Having established what he perceived to be the main issue relative to rule 29.11, the learned judge then stated that "in addressing the court on this matter, Counsel for

the [appellants] referred to Rule 32.1 and identified the Court's power to restrict expert evidence". From there, the learned judge commenced his discussion on the application of the appellants to rely on Mr Robinson as an expert and to have his report admitted at the trial and the respondents' response. In his reasoning, he incomprehensibly conflated the application regarding the witness statement with the application concerning Mr Robinson and his report. In coming to his conclusion, he relied on the case of **Oneil Carter and others v Trevor South and others** [2020] JMCA Civ 54 ('**Carter v South**') regarding the need to seek relief from sanction to file supplemental witness statements. However, nothing was said about the appointment of Mr Robinson as an expert witness except the respondent's objection that the report has "little probative value". The learned judge did not indicate whether he upheld the respondent's objection. Still, the respondent's counsel has posited the argument that the learned judge may be taken to have so concluded.

[19] It is difficult to accept the respondent's position regarding the learned judge's reasons for not granting the order appointing Mr Robinson as an expert. Although it is difficult to appreciate the reasons for the decision on this matter, there is some indication of what might have prompted his refusal to appoint Mr Robinson as an expert. This is gleaned from para. [17] of his judgment, where he stated:

> "[17] The [appellants] are reapplying to **submit expert witness statement of Michael Robinson** under rule 29.4(6) which states that party [sic] may apply for permission to file supplemental witness statements." (Emphasis added)

[20] Although the learned judge did not mention the application to appoint Mr Robinson as an expert witness, he viewed the application for his report to be admitted into evidence as falling within rule 29.4(6) of the CPR. It seems he had considered Mr Robinson's report as one of or connected with the supplementary witness statements for which the application was being sought. This would explain his statement that the expert "witness statement" of Mr Robinson was submitted, as well as his identification of the "main issue" as relating to the supplemental witness statements. Therefore, for those reasons, he

treated with Mr Robinson's report within the ambit of Part 29. Consequently, he concluded on this premise that the "parties ought to have filed an application for relief from sanctions" and that "the [appellants]…by seeking to include additional affidavits after the date set by Harris M's order, would indeed require the [appellants] to apply for relief from sanctions, pursuant to rule 26.8 of the Civil Procedure Rules".

[21] It should be noted, however, that a perusal of the appellants' grounds in the notice of application has revealed that the learned judge was not correct in saying that the application regarding the appointment of Mr Robinson as an expert and the admission of his report as an expert report was grounded in rule 29.4(6). It is indisputable that the application to appoint Mr Robinson as an expert witness was grounded in rule 32.6(1).

[22] It seems reasonable to conclude that the learned judge had formed the view that relief from sanction was required to file additional statements, including Mr Robinson's purported expert report. Nothing else could explain his reason for omitting to deal with the appointment of Mr Robinson as an expert in his orders that were eventually made disposing of the application. It would have logically followed that if relief from sanction was required for the expert report to be relied on, then the same would have applied to appointing Mr Robinson as an expert. So in rejecting the reports on the basis he did, there was no need for him to consider the appointment of the expert. This is the only interpretation of the learned judge's reasoning that, to me, makes sense.

[23] The learned judge's conflation of the issues regarding Mr Robinson as an expert witness with the matters relating to the permission to file supplemental witness statements led him into grave error.

[24] The applicable law in treating with Mr Robinson as a purported expert witness falls under Part 32, not Part 29 of the CPR. The learned judge's treatment of the purported expert evidence under Part 29 is especially concerning given the appellants' effort in complying with the relevant requirements of rule 32.6 of the CPR for the admissibility of

that evidence. In so far as is materially relevant for present purposes, rule 32.6 provides that:

> "(1) No party may call an expert witness or put in an expert witness's report without the court's permission."
>
> (2) The general rule is that the court's permission is to be given at a case management conference.
>
> (3) When a party applies for permission under this rule –
>
> > (a) that party must name the expert witness and identify the nature of the expert witness's expertise; …
> >
> > (b) …
>
> (4) No oral or written expert witness's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give...".

[25] Clearly, the learned judge failed to demonstrate that he had taken into account a relevant consideration in the appellants' application, which was to consider whether Mr Robinson satisfied the requirements to be appointed as an expert under Part 32. By failing to address whether Mr Robinson was qualified to be appointed an expert witness, he fell into error, which would justify the court's intervention regarding the exercise of his discretion. He also gave no reason for not treating with that aspect of the application, which amounts to an impeachable failure on his part that would further justify this court's interference with his decision.

[26] I conclude that the appellants' challenge to the learned judge's treatment of the application for Mr Robinson to be approved as an expert witness is not without merit. Therefore, given the error of the learned judge, the question for this court is to determine afresh, by way of rehearing, whether Mr Robinson should have been appointed an expert witness. His qualification to be appointed an expert is intertwined with the contents of the report he submitted, so I have had regard to that report.

[27] I have closely perused the report to resolve the issue regarding Mr Robinson's appointment as an expert witness. It is prepared under the name of Michael Robinson Associates, Quantity Surveyor and Construction Cost Consultant. It then sets out Mr Robinson's qualifications, experience, certification of his recognised duty to the court, and the stated purpose of the report. It is noted that although he is a quantity surveyor by profession, he is qualified in construction technology with what he said to be "extensive knowledge and experience garnered over the past forty-five years within the building and construction industry". I am satisfied that nothing in Mr Robinson's report could have precluded him from being appointed as an expert witness to assist the court in its adjudication on some issue arising from the claim for breach of contract. His qualifications as a quantity surveyor and construction cost consultant do not disqualify him, as contended by the respondent.

[28] There may be aspects of his report that could well be challenged by the respondent or even found to be unacceptable by the court, but that does not mean he cannot be appointed as an expert. His appointment is essentially a question of law for the judge and not a question of the weight to be attributed to his report. Indeed, Mr Robinson's appointment as an expert does not mean that the court is duty-bound to accept his evidence in its totality or at all (**Cherry Dixon-Hall v Jamaica Grande** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 18/2007, judgment delivered 13 March 2008).

[29] Mr Robinson had also provided a previous report in 2017 and reinspected the pool deck in 2021 to provide an updated report. The weight to be attached to that report is a question of fact and has nothing to do with the legal requirements to have him appointed as an expert witness.

[30] **In Joan Allen and Louise Johnson v Rowan Mullings** [2013] JMCA App 22, this court had to consider whether a party could obtain an order during a trial to adduce expert evidence. The trial judge, in that case, refused such an application. In ruling on

the court's power to grant or withhold such permission, Phillips JA opined that the court should consider the following:

> "[46] … The questions are: does the witness have the expertise and is the witness aware of his primary duty to the court if he gives expert evidence? It has been held that the apparent bias test applicable to a court or tribunal, referred to by the trial judge, is not the correct test in deciding whether the evidence of the expert should be excluded, but the test is as stated above (see Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381). What must be recognised always, as stated by Harris JA in this court in **Cherry Dixon-Hall v Jamaica Grande Limited**, SCCA No 26/2007 delivered 21 November 2008, is that the role of the expert is to assist the trial judge, and he must put before the court all the material necessary for testing the accuracy of his findings and conclusions. It is also trite law that the findings of the expert are never binding on the judge and he can accept or reject the expert's opinion…
>
> [48] It must be stated, however, and it is important to this case, that the fact that evidence is late ought not to be the sole consideration in the exercise of the judge's discretion."

[31] Phillips JA, therefore, opined that the judge below had erred in considering the lateness of the application as the primary consideration in determining whether the expert evidence should have been permitted. Therefore, the court found that it was necessary to interfere with the exercise of the judge's decision. In that case, the application to appoint an expert was made during the trial of the matter, whereas in the instant case, the application to appoint Mr Robinson as an expert was made before trial. Therefore, in light of the learned judge's failure to provide valid reasons for deeming Mr Robinson's appointment and report inappropriate, this court cannot uphold his decision as a proper exercise of his discretion.

[32] In the premises, I would hold that the learned judge erred by failing to consider and appoint Mr Robinson as an expert witness having regard to rule 32.6 of the CPR, the circumstances of the case and the overriding objective.

Issue (2) – Whether the learned judge erred in law by not permitting the appellants to rely on the report (grounds b and d)

The appellants' submissions

[33] The appellants' position is that not only had they applied for permission to rely on the expert report of Mr Robinson, but they had also served the said report on the respondent's attorneys at law. They maintained that the report prepared by Mr Robinson complied with the requirements of rules 32.12 and 32.13 of the CPR regarding addressing the report to the Supreme Court as well as the content requirements of the report. The learned judge, therefore, erred in not considering that the report satisfied the requirements of the CPR.

[34] Furthermore, the appellants posited that the learned judge erred in applying the case of **Carter v South** in addressing the issue of whether Mr Robinson's report should have been allowed. Counsel maintained that the case did not apply to the application to appoint Mr Robinson as an expert and to rely on his report. Instead, it was specifically applicable to the case management powers of a judge to extend the time for the filing and exchange of witness statements pursuant to rule 29.11 of the CPR. Counsel maintained that the statement of principle in **Carter v South** is that where a party has failed to serve a witness statement within the time specified by the court, they must seek and obtain relief from sanctions under rule 26.8 of the CPR in order to call the witness at trial. Therefore, the learned judge erred in finding that the appellants would need to seek relief from sanctions in order to rely on Mr Robinson's report.

[35] Counsel for the appellants further advanced that the learned judge had provided no reason in his judgment for refusing to exercise his discretion to permit the appellants to rely on the report. Accordingly, the learned judge erred by refusing to grant the appellants permission to rely on the report.

The respondent's submissions

[36] On the other hand, the respondent contended that there was a proper basis for the court's refusal of permission for the appellants to rely on the expert report. In citing the case of **Gordon v Chevannes**, counsel for the respondent submitted that, pursuant to rules 32.2 and 32.6 of the CPR, the court has a general power to restrict expert evidence to that which is reasonably required to resolve the proceedings justly.

[37] Notably, the respondent acknowledged that it was not immediately apparent from the learned judge's written judgment what his reasons were for not allowing the appellants to rely on the expert report of Mr Robinson. However, that notwithstanding, it can be ascertained from the judgment what the learned judge considered in coming to his decision. The respondent cited the learned judge's statement in para. [21] of his judgment that "the basis for the [respondent's] objection to the expert report of Michael Robinson is that that report has little probative value".

[38] Counsel further cited the learned judge's notation that the date of inspection of Mr Robinson's report was seven years after the alleged breach occurred. Further, they advanced that a surveyor's report initially relied on by the appellants, which listed the date of the surveyor's visit as 5 August 2014, would have been more relevant. It would also have been open to the court to find this report more appropriate, considering that it could have spoken to the state of the appellants' pool deck in 2014, the same year the alleged breach of contract occurred.

Discussion and findings

[39] As already indicated in treating with the first issue above, it is apparent that the learned judge refused the application for the appellants to rely on the report of Mr Robinson because he took the view that the provisions of rule 29.4(6) and 29.11 apply to it as it does to ordinary witness statements. Hence, he concluded that relief from sanctions under rule 26.8 was required for permission to be granted to the appellants to rely on it. This is already established to be an error.

[40] An application for relief from sanctions did not arise in relation to this issue, contrary to the learned judge's conclusion, because - (i) Master Harris did not make the order requiring the exchange of expert reports, (ii) the appellants had fully complied with that order made by Master Orr on 17 March 2021, (iii) there is no automatic sanction imposed on the failure to file or serve an expert report, and (iv) there was no circumstance disclosed in the record to trigger an application for relief from sanctions under Part 32 of the CPR.

[41] Therefore, having considered the circumstances of the instant case within the context of the applicable law, I find that the learned judge erred by conflating the appellants' applications to rely on supplemental witness statements, appoint an expert, and rely on his report as an expert report. The report would be helpful in a trial judge's assessment of the damages owed to the appellants as it indicated an opinion on the costs associated with putting the appellants in the position they would have been in had the breach not occurred.

[42] I conclude that the learned judge's refusal to certify Mr Robinson as an expert and to permit the report to be relied on by the appellants was, regrettably, an improper exercise of his discretion as it was based on a misunderstanding of the law and the facts before him.

[43] The respondent is free to avail himself of the provisions of the CPR to put questions to Mr Robinson and/or to ask that he attend court for cross-examination. In light of the issues raised by the respondent regarding the report and the stage at which the proceedings had reached in the Supreme Court, I would not support an application for this court to grant an order at this time that Mr Robinson should not attend the trial. That is a matter to be determined by the Supreme Court upon the respondent's indication that he requires Mr Robinson's attendance for cross-examination.

Disposal of the appeal

[44] For the foregoing reasons, I would allow the appeal and set aside orders 2. and 5. of the orders of the learned judge refusing the application for the appellants to rely on the expert report and awarding the costs of the application to the respondent. I would also make consequential orders that (i) Mr Robinson is appointed an expert witness, and the appellants may rely on his report as an expert report; (ii) the respondent be permitted to put questions to the expert witness within 45 days of the date of this order to which the expert should respond within 28 days of receipt of the questions from the respondent; (iii) at least 30 days before the date fixed for trial, counsel for the respondent is to advise counsel for the appellants whether the expert witness is required to attend court for cross-examination; and (iv) the Registrar of the Supreme Court is to fix a date for the trial of the matter to be held as soon as is reasonably practicable, after consultation with counsel for the parties.

[45] On the issue of costs, the costs of the proceedings in this court and below should follow the event in keeping with the general rule. Given that the appellants ought to have been successful, in part, down below, the costs order has to be disturbed and a portion of the costs granted to them to reflect their partial success on the application. The more substantial aspect of the application relates to the expert evidence. Therefore, I would award the appellants 66% of the costs below.

[46] The appellants, being entirely successful on the appeal, are entitled to the full costs of these proceedings. I would so order.

D FRASER JA

[47] I have read, in draft, the judgment of McDonald-Bishop, P. I agree with her reasoning and conclusion and have nothing further to add.

LAING JA (AG)

[48] I, too, have read the draft judgment. I agree with the reasoning and conclusion which accord with my own views. Accordingly, I have nothing further to add.

MCDONALD-BISHOP P

ORDER

1. The appeal is allowed.

2. Orders 2. and 5. of the orders made by Rattray J on 14 June 2021 are set aside.

3. Michael Gainford Robinson of Michael Robinson Associates, Chartered Quantity Surveyors and Construction Cost Consultants, is appointed an expert witness to be called by the appellants.

4. The appellants may rely on the report of Mr Michael Gainford Robinson of Michael Robinson Associates, Chartered Quantity Surveyors, filed on 14 April 2021, as an expert report.

5. The respondent is permitted to ask the expert witness questions within 45 days of the date of this order, to which the expert should respond within 28 days of receipt of the questions from the respondent.

6. At least 30 days before the date fixed for trial, the respondent is to advise the appellants whether Mr Michael Gainford Robinson must attend court for cross-examination.

7. The Registrar of the Supreme Court is to fix a date for the trial of the matter to be held as soon as is reasonably practicable after consultation with counsel for the parties.

8. The appellants must have 66% of their costs below to be agreed or taxed.

9. Costs of the appeal to the appellants to be agreed or taxed.