



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2008 HCV 05455**

<b>BETWEEN</b>	<b>FELICITAS LIMITED</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>FIESTA JAMAICA LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>RIU JAMAICOTEL LIMITED</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>PALMYRA RESORT &amp; SPA LIMITED</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>BEDROCK BUILDING AND AGGREGATES LIMITED</b>	<b>4<sup>TH</sup> DEFENDANT</b>

Mr. B. St. Michael Hylton, Q.C. and Mr. Kevin Powell instructed by Michael Hylton & Associates for the Claimant.

Ms. Carol Davis the First Defendant.

Mr. John Vassell, Q.C. and Ms. Cindy Lightbourne for the Second Defendant.

The Fourth Defendant in person by its representative Mr. Devon Sterling

**Heard: June 10<sup>th</sup> and 13<sup>th</sup> 2011**

**SIMMONS, J. (Ag.)**

[1] By applications filed on the 2<sup>nd</sup> day of June 2011 by the first and second defendants, the first defendant seeks to appoint Dr. Troy Scott and the second defendant Professor Simon Mitchell as expert

witnesses. No issue has been taken with respect to the qualifications or suitability of the proposed experts. There has also been no suggestion that the evidence that the proposed experts may give to the Court is likely to be irrelevant. The issue to be resolved is whether the orders should be granted in light of the fact that the trial of the matter is scheduled to begin on the 4<sup>th</sup> of July, 2011.

### **The second defendant's application**

[2] The second defendant's application is supported by the affidavit of Hyacinth Lightbourne and the second affidavit of Hyacinth Lightbourne sworn to on the 1<sup>st</sup> and 2<sup>nd</sup> June 2011 respectively.

[3] The first affidavit states that the matter is concerned with the theft of sand from the claimant's property at Coral Springs in the parish of Trelawny. The deponent also states that the expert reports relied on by the claimant support a conclusion that it is likely that samples of sand taken from the second defendant's property originated from the claimant's property.

[4] In her second affidavit Miss Lightbourne indicates that scientific analyses have been done by experts on behalf of the claimant and the second and third defendants which have resulted in different conclusions. She also states that the reports of Sandy Nettles dated

March 11, 2011, Dr. Parris Lyew-Ayee dated March 10, 2011 and Dr. Ravidya Burrows dated April 11, 2011 were served on April 29, 2011 along with a supplemental report of Dr. Ravidya Burrows. It is stated that in light of the "acute differences" which exist between those reports and that of Professor Kenneth Pye who was appointed at the request of the second defendant, Professor Mitchell was consulted. The reports of Dr. Ravidya Burrows and Marcia Dunbar along with other documents were sent to him on February 2, 2011. Miss Lightbourne states that he has reviewed all of the expert reports and has reached conclusions which are relevant to the resolution of the issues in the case. Specific mention was made of the report of Ocean Earth Technologies/ N.S. Nettles and Associates Inc. who it is said conducted a pebble study. She also says that Professor Mitchell is available to attend at the trial.

### **First defendant's application**

[5] This application is supported by the affidavit of Carol Davis sworn to on the 2<sup>nd</sup> June 2011. In that affidavit it is stated that the first defendant did not file an expert's report because in the opinion of its attorney-at-law it was unnecessary until the claimant filed a further report on the 29<sup>th</sup> April 2011. It is also stated that the main purpose of

Dr. Scott's report is to comment on and analyze the other experts' reports which have been filed. This report it is said can be available in seven days and he can be available for the trial date.

### **Second defendant's submissions**

[6] Mr. Vassell, Q.C. submitted that in light of the second defendant's denial that it has any relationship with the fourth defendant and its assertion that it has never received sand from that defendant or from the claimant's property, the conclusion arrived at in relation to the pebble studies is critical to the court's determination of the matter.

[7] With respect to the timing of the application it was submitted that this would not jeopardize the trial date as no new tests would be conducted as the same data already put before the court would be used by the proposed expert in conducting his analysis. In addition it was stated that up to April 13, 2011 when the matter was first listed for a Pre Trial Review, the reports had not been served on the second defendant. Specific reference was made to that obtained from Sandy Nettles of Ocean Earth Technologies. He also indicated that the report could be ready in one week.

[8] With respect to the 28 days period prescribed in **Part 32.8 (2) (c)** of the **Civil Procedure Rules, 2002 (CPR)** for a party to put questions to an expert it was submitted that the court had the power to shorten the time and that an order to that effect would be appropriate in these circumstances. It was argued that the parties could also agree to a shorter time and the fact that the witness would be available for cross examination would negative any prejudice to the claimant.

[9] Mr. Vassell indicated that he was not opposed to the first defendant's application.

#### **Claimant's submissions**

[10] Mr. Hylton, Q.C. opposed both applications on the basis that they have been made too close to the trial date and as such the claimant would be deprived of his right to put questions to the expert within the time allowed by the **CPR**. He referred the court to **Part 32.6** which deals with the appointment of expert witnesses and **Part 32.7** which states that experts' reports are to be in writing. He stated that one of the reports in the matter has been available since 2009 and the other in 2010 and that the Case Management Conference was held in June 2010. Mr. Hylton, Q.C. argued that the application ought

to be refused especially in light of the fact that the proposed experts which the first and second defendants wish to call have not conducted any testing and are merely commenting on the other reports. It was submitted that the **Part 32** of the **CPR** prescribes the procedure by which expert evidence may be challenged and it includes the right to put questions to the witness and to cross examine that witness. It was also argued that the rules do not contemplate a situation in which the purpose of the experts report is to comment on another report. He also made the point that it is the role of the court and not that of an expert to resolve the issues that are in dispute.

### **First defendant's submissions**

[11] Miss Davis indicated that the first defendant's application was prompted by the further report of Dr. Burrows which was served on the 29<sup>th</sup> April 2011. She referred the court to ***Sime, A Practical Approach to Civil Procedure, 5<sup>th</sup> ed. Paragraph 28.1*** in which the author states that the three preconditions for the admission of expert evidence are:-

- i) the matter must call for expertise;
- ii) the area must be an established field of expertise; and

## **Defendant's Submissions**

[10] Mr. Steer on behalf of the defendant submitted that the court has the jurisdiction to amend the order in the terms sought, as the proposed amendments would not affect the share that each party has in the property. He argued that the amendments are necessary to clarify the basis on which the accounting is to be undertaken and does not affect the substance of the order. Counsel stated that the property in question was being run as a commercial enterprise and as a result any money spent on improvements ought to be considered in the accounting exercise. It was also submitted that repairs had to be effected from time to time by the claimant especially because the property was rented and that the expenses incurred by her ought to be deducted. In essence Mr. Steer submitted that the accounting ordered by the court should not be interpreted as referring to the gross amount of rent that was collected but must include sums that were spent on the maintenance of the property.

[11] Mr. Steer argued that the case of ***Leigh and another v. Dickeson*** [1884] 15 QBD 60 which was cited by Miss Minto can be distinguished on the basis that the subject property was not the family home.

## **Claimant's submissions**

been a change in circumstances since the order was granted or the judge who made the order was misled. It must also be considered whether the proposed changes affect the substance of the order or are an attempt to facilitate the working out of the said order.

### **The affidavit evidence**

[8] The defendant's evidence is that it was her understanding that the sum which was to be paid to the claimant after the accounting exercise would represent one half of the net rental. That is, the amount due after the deduction of operating expenses. She has also stated that the requirement for interest to be paid on that sum is oppressive as she has no other source of income and needs the rent to survive.

[9] A Notice was filed by the claimant's attorneys on January 20, 2011 to indicate that they intend to rely on the claimant's affidavit sworn to on the 3<sup>rd</sup> day of May 2010. In that affidavit the claimant states that the defendant has only accounted for the rent collected by her up to May 2009. He also states that she has only paid \$135,000.00 out of a total of \$2,867,950.00 which is due to him (exclusive of interest) as at November 2009. The claimant also states that the defendant has not paid one half of the rent due to him from December 2009.

iii) the witness must be suitably qualified.

Counsel also referred to **paragraph 28.5.2.5** which deals with the situation in which the resolution of the case is dependent on expert evidence and there is only one joint expert.

[12] It was submitted that the claim is a substantial one and the evidence required to prove the claimant's case is mainly scientific. In those circumstances counsel argued that Dr. Scott's expertise will be required for comment and further analysis of the data.

[13] Counsel also referred to **National Commercial Bank v. K & B Enterprises Limited** Supreme Court Civil Appeal no. 70 of 2005, delivered September 5, 2005. In that case Mr. Justice Harrison set out the criteria for the appointment of experts. In essence, their evidence must be qualified as admissible expert evidence which is likely to be of assistance to the Court. Harrison J. A. also made the point, that the parties involved in the action have "*an explicit obligation to help the Court to further the overriding objective*". The expert evidence which they seek to adduce should be "*reasonably required to resolve the proceedings justly.*" Miss Davis submitted that the instant case is one in which the trial judge will have the task of interpreting scientific evidence and that it would be beneficial for the

court to hear evidence from all parties as to how the scientific data is to be interpreted. She indicated that the report can be ready in three days and that it would be unfair for the first defendant to be denied the opportunity to present its evidence to the court because of the time constraints.

[14] Ms. Davis also indicated to the court that she supported the second defendant's application.

#### **The fourth defendant**

[15] The fourth defendant indicated to the court that he supported the applications made by the first and second defendants.

#### **The law**

[16] The issue to be determined is whether the Court should exercise its discretion by allowing the first and second defendants to appoint an expert witness at this stage of the litigation.

[17] It is accepted that the function of an expert is to assist the court. This is reinforced in **Parts 32.3** and **32.4 (1) and (2) of the CPR. Part 32.3** provides as follows:-

*“(1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.*

*(2) This duty overrides any obligations to the person by*

*whom he or she is instructed or paid.”*

**Parts 32.4 (1) and (2)** state:-

*“(1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation.*

*(2) An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness’s expertise.”*

[18] The **CPR** provides that an expert witness may not be called to give evidence or an expert’s report put in evidence without the Court’s permission. That permission according to **Part 32.6 (2)** should be given at a case management conference. Once permission is given and the report served on the other party, that party has twenty eight days in which to put questions to the expert. **Part 32.8 (2)** states that the written questions “*must*” be put within that time unless the Court permits or the other party agrees to an alteration of that timeframe. This rule, in my view seeks to protect the rights of the party served by giving them enough time to put questions to the expert in order to assist the court. Whilst it appears that the Court has

the power to either increase or to reduce the stipulated time for compliance with this rule, it is my view, that it is the circumstances of each case which will determine the proper course of action. This is even more critical where a reduction of the time in which a party is permitted to put questions to the expert is being contemplated. In such circumstances it is arguable that the Court has very little discretion or power. In any event, it is my view that the discretion to reduce the time afforded to a party by this section should be exercised cautiously and in limited circumstances.

[19] As stated previously, the applications which fall to be determined appear to have been triggered by the report of Dr. Burrows which was served on the 29<sup>th</sup> April 2011. As far as I am aware neither one of the applicants have sought to invoke its rights under **Part 32** by putting questions to him. These questions would then form a part of the report.

[20] In addition, I have also noted that the applicants did not seek to appoint any expert at the case management conference or the first pre trial review. Only the first defendant has provided the Court with its reason for not doing so. In my view, the parties should have contemplated that it was possible for the experts appointed by the

Court on the claimant's application to have arrived at a position which may be adverse to the defendants' interests.

[21] I must also consider the effect that the inclusion of the evidence of the proposed experts vis-a-vis its exclusion may have on the trial. Is it likely that the fairness of the trial be jeopardized in any way? In other words, what is the possible effect that the grant or refusal of the order may have on the quality of the evidence presented to the Court?

[22] In this matter, the Court is required to make its determination largely on the basis of very technical scientific evidence. Only three weeks remain before the trial. There is no question the claimant will not have the benefit of the twenty eight days in which to put questions to the experts if the applications are granted. I am of the view that in light of the nature of the evidence in this case the Court should not exercise its discretion to reduce the time available to the claimant to put questions to the expert.

[23] In the event that the orders sought are not granted it is quite possible that the Court may have been deprived of the opportunity of hearing fulsome evidence from all the parties.

## **Conclusion**

[24] I have considered the fact that two weeks have been scheduled for the trial of this matter. However, I have also addressed my mind to the conduct of the course of the litigation thus far and have formed the view that save for these applications there has been no undue delay by the parties in ensuring that the matter is ready for trial. I have also noted that Dr. Burrows' report was served on the 29<sup>th</sup> April 2011 and the applications made on the 2<sup>nd</sup> June 2011. Whilst it is true that the applications could have been made at the case management conference, it is absolutely important that in a matter of such a technical nature the Court has the benefit of the best evidence that is available.

[25] Having considered the submissions made in this matter I am minded to grant the applications sought. In the circumstances it is ordered as follows:-

- i. Professor Simon Mitchell, Professor of Sedimentary Geology at the University of the West Indies be appointed as an expert witness pursuant to Part 32 of the Civil Procedure Rules.

- ii. Dr. Troy Scott be appointed as an expert witness pursuant to Part 32 of the Civil Procedure Rules.
- iii. That the expert reports of Professor Simon Mitchell and Dr. Troy Scott be served on all parties within five days of the date of this order.
- iv. Both experts are to attend at the trial for cross examination.
- v. Costs to be costs in the claim.