



[2013] JMSC Civ. 192

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

**CLAIM NO. 2009 HCV 03355**

**BETWEEN                      ISLAND HOPPERS HELICOPTER                      CLAIMANT**  
**TOURS LIMITED**

**A N D                              MBJ AIRPORTS LIMITED                              DEFENDANT**

Ms. Danielle Chai instructed by Samuda & Johnson for the claimant  
Mr. Maurice Manning and Miss Arlene Williams instructed by Nunes, Scholefield,  
DeLeon & Co. for the defendant

**HEARD:                      6<sup>th</sup> February 2013, 10<sup>th</sup> April 2013, 17<sup>th</sup> June 2013, 12<sup>th</sup> December 2013**  
**and 17<sup>th</sup> December 2013**

**Application for appointment of experts – Principles**  
**to Consider – Rules 32.9, 32.10, 32.11**

**BERTRAM-LINTON**  
**MASTER-IN-CHAMBERS (AG.)**

**BACKGROUND**

[1] On the 3<sup>rd</sup> July 2007 a helicopter owned by the claimant's company and parked in premises owned by the defendant was damaged. The claimant alleges that the defendant is responsible, while the defendant denies all liability.

[2] The matter proceeded along the normal course and Case Management Conference was first held and orders made on 12<sup>th</sup> June 2012. A further Case Management Conference was set for October 19, 2012 and trial scheduled for the 15<sup>th</sup> and 16<sup>th</sup> May 2013. Pre Trial Review was scheduled 5<sup>th</sup> April 2013 but the applications before this court have intervened as preliminary issues to be determined.

## THE CLAIMANT'S APPLICATION

[3] By notice of application filed on January 28, 2013 the claimant, sought to have orders:-

*"1. That Captain Gregory Fox of the Jamaica Civil Aviation Authority be appointed as a joint expert of the court and be permitted to give an expert report detailing the following:*

- a) His or her qualifications and experience in the aviation industry;*
- b) The requirements of the JCAA regulations, Schedule 21, Sub-Part D, r 21.150 dealing with Apron Management and r 21.155 dealing with Apron Safety Management;*
- c) The requirements and recommendations contained in Vol 1 of Annex 14 of the Chicago Convention and in particular s 3.3.12 and Vol 2, s 3.1.59 and s 3.1.60;*
- d) The function of the JCAA in approving the layout of parking and apron areas for licensed aerodromes;*
- e) Whether this approval at (d) warrants the safety of those approved parking areas;*
- f) The process that an aircraft pilot must follow on approach to landing;*
- g) The scope of responsibility of the JCAA's air traffic controllers as distinct from the airport operator's ground control as concerns:
  - a. The direction of aircraft to parking areas after landing;*
  - b. The safety of aircraft while parked in designated and approved parking areas; and*
  - c. The movement of aircraft, ground vehicles and people on the taxiway and the airside.**
- h) The susceptibility of parked aircraft to jet blast damage if parking areas are located too close to the holding bay.*

*2. That the report of Tim Kelley of Kelley Aviation Services and Pedro Mesa of Airclaims Inc. be accepted in evidence without the need to call the makers thereof as witnesses at the trial of this matter pursuant to s 31E of the Evidence (Amendment) Act 1995.*

*3. That specific disclosure of the Defendant's Operations Manual is given.*

*4. That the Claimant be permitted to amend his Claim Form and Particulars of Claim. Service of the amended documents to be done within 12 days of the date of this order."*

[4] On the 6<sup>th</sup> February, 2013 Claims 3 and 4 of the application were addressed as the following orders were made:

By Consent

- “1. *The claimant’s application to Amend Claim Form and Particulars of Claim is granted.*
2. *The claimant is permitted to file and serve amended documents on or before February 18, 2013.*
3. *The defendant’s application to amend defence is granted.*
4. *The defendant is permitted to file and serve the amended documents on or before February 28, 2013.*
5. *The claimant’s application for specific disclosure of the Defendant’s operations manual is granted on the claimant’s undertaking being given in writing to the Defendant’s attorneys on or before February 18, 2013.*
6. *Case Management Conference is adjourned to April 10, 2013 at 2pm for two hours.*
7. *Pre Trial Review set for April 5, 2013 is vacated.*
8. *Claimant’s attorney to prepare file and serve order herein.*
9. *Costs to be costs in the claim.”*

The issues in requests one (1) and two (2) were reserved for consideration on the 10<sup>th</sup> April 2013.

[5] On that date we entertained submissions on the applications to:

- a) appoint Captain Gregory Fox as a joint expert of the court ...
- b) admit the report of Tim Kelley of Kelley Aviation Services without the need to call him as a witness pursuant to S 31E of the Evidence (Amendment) Act 1995.
- c) admit the report of Pedro Mesa of Airclaims Inc into evidence without the need to call the makers thereof as witnesses at the trial of this matter pursuant to Section 31E of the Evidence (Amendment) Act 1995.

## TIM KELLY

[6] The document allegedly prepared by Mr. Tim Kelley is marked JM I and is an exhibit to an affidavit sworn to by a Mr. John Morris on the 24<sup>th</sup> January 2013 and filed on 28<sup>th</sup> January 2013.

[7] Mr. Morris a director of the claimant's company says that he hired Mr. Kelley to inspect the damage to the helicopter and to render a report. (Paragraph 3 Affidavit of John Morris in support of application for court orders filed on 28<sup>th</sup> January, 2013). He thereafter attaches a typed document with the name 'Timothy S. Kelley' typed at the end of the document, a company name Kelley Aviation Services Inc, a street address in Halifax, PA, an email address and a mobile phone number.

[8] The defendant's attorney took strong objection to this application being granted pointing out that the document is unsigned and does not meet the requirements laid down in Section 31E of the Evidence (Amendment) Act.

[9] These submissions were examined at length and a ruling made to refuse Mr. Kelly unsigned and undated report to be used, reasons were given in chambers on the 10<sup>th</sup> April 2013. It is not proposed to rehash all those today except to say that Mr. Kelley's refusal to attend court and to co-operate any further in the proceedings was very marked and quite noteworthy. John Morris' affidavit of the 28<sup>th</sup> January, 2013 at paragraph 5 disclosed that Mr. Kelley says in correspondence dated 27<sup>th</sup> November, 2012.

*"I will not endorse a letter to the court or anyone else. I sent a letter previously. ...I will not be a party to any court hearing, discussion or email any further about the helicopter...I have no interest it (sic) coming to Jamaica to attend court or to qualify as a witness in the case, my work was finished the day I left after looking at the helicopter. I wrote the report after the damages to the helicopter, submit (sic) the report, got paid. My work is done."*

The defendant and even the court would be left without vital recourse if the report were allowed in without more.

## **PEDRO MESA**

[10] The report prepared by Pedro Mesa was only challenged in so far as it referred to the Kelley's document and as such Mesa's report was accepted and that portion as marked by the court was excluded.

[11] This section is in the Area under the heading "*Damage Details*" on page 5. It begins with the word "*The*" and includes the next of that sentence to the word "*experience*".

[12] Then in the next paragraph it begins with the word "and" and continues to the words "*services Inc*". So that the sentence would now read, "*Based on our inspection during the survey, we can report the damage to the helicopter as briefly defined below.*"

## **CAPTIAN GREGORY FOX**

[13] Captain Fox's is said to be widely experience in the affairs of the aircraft and airline industry and his qualification are extensively outlined in Exhibit CLS – 1 to the Affidavit of Christopher Samuda filed in support of the application on January 28, 2013. The claimant says through Samuda that Mr. Fox is an impartial knowledgeable experienced voice from the Jamaica Civil Aviation Authority, the regulators of the industry who can assist the court "*in resolving these aviation – related issues.*"

[14] On the other hand the defendant says that Captain Fox's connection to the Civil Aviation Authority is potentially dangerous since that organization may be implicated in the examination of the issues and their outcome. They say as well that Fox's contribution is likely to usurp the role of the tribunal of fact and law as to how the damage was occasioned. **MIDLAND BANK TRUST CO. v HETT, STUBBS KEMP [1979] CH 384.**

## **THE LAW**

[15] Part 32 of the Civil Procedure Rules delineate the provision and facilitation of expert evidence to the court. It speaks to the experts' appointment, their duty and gives procedural guidelines for the introduction of such evidence. UK Practice Direction on

Experts and Assessors which supplement Part 35 of their Rules dealing with the appointment of Experts.

[16] In addition the Jamaican Court of Appeal has sanctioned a two (2) steps method to be used when taking a decision on the admissibility of expert evidence. **NATIONAL COMMERCIAL BANK JA. LTD, (SUCESSORS TO MUTUAL SECURITY BANK LTD) v K & B ENTERPRISES LTD [2005] JMCA CIV. 70**

Part 32.3

- “(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 her or she is instructed or paid.”*

[17] Similar provisions as to expert evidence exist in the United Kingdom PART 35 and in that jurisdiction the law is now settled that the fact of an expert’s affiliation to any of the parties or their interest in the result of the litigation is not an automatic bar to that person giving evidence or in fact being appointed. This was held in the case of **ARMCHAIR PASSENGER LIMITED v HELICAL [2003] EWHC 367**. What is important in those circumstances is the admissibility of and the weight to be given to the relevant evidence and this will be something to be explored during the course of the trial possibility through cross examinations.

**SOCIETY OF LLOYDIS v CLEMENTSON (NO 2)**

**The Times February 29, 1996**

[18] The Certification of the Expert as Walker LJ expresses it in **FIELD LEEDS CITY COUNCIL [1999] CPLR 833** at page 841 is dependent

*“...on whether (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence.”*

These United Kingdom cases were cited and approved locally in **EAGLE MERCHANT BANK OF JAMAICA LTD ET AL v PAUL CHEN YOUNG & ORS SC CLAIM # CL 1998/E095** and **WAYNE LEWIS v CONRAD DOUGLAS SC CLAIM # 2009HCV6538**.

[19] I find therefore that Captain Fox's extensive training and expertise as a practitioner, instructor, inspector and consultant regionally and internationally would be particularly useful to the court in its deliberation on the matters to be decided.

### **THE DEFENDANT'S APPLICATIONS**

[20] The defendant has two (2) applications before us. The first was filed on January 28, 2013 in which they have also introduced the services of an expert to be used by the court among other things – already determined in the proceedings. This is supported by the affidavit of Arlene Williams. The second application was filed on February 5, 2013 and takes objection to various passages in the witness statement of John Morris dated 11<sup>th</sup> January 2013 and filed in the court on January 18, 2013.

I will deal with the proposed expert since we are already in that area of discussion of the law.

### **MR. KEVIN MARAJH**

[21] Mr. Marajh is said to have carried out investigations sometime in or around July 2012 some five (5) years after the damage was sustained by the helicopter and taken photographs during the course of his investigations which the defendant says will be useful to the court in its deliberation.

[22] He is an accident reinstruction expert and has been a consultant practicing in various regions of the United State of America in relation to "*vehicle and building fires for cause and origin*". His extensive experience is detailed in a Curriculum Vitae attachment AWI to the affidavit of Arlene Williams.

[23] The defendant suggests that this is useful to the court as the claimant has raised the issue of the defendant's liability in relation to the physical layout and management of the facility where the helicopter was housed when the damage occurred. The Claimant

opposes this appointment since they say he is not an expert in this particular type of genre that is aircraft and aviation related issues.

[24] Further they contend that his investigation is flawed as he did not inspect the damage to the helicopter and photographs taken by him and sought to be admitted would not be relevant, as depicting the layout of the subject area at the time of the damage.

[25] The Affidavit of John Morris sworn to on February 4, 2013 and filed on February 6, 2013 says quite succinctly at paragraph 4

*“His qualifications and experience reside in motor vehicle accident reconstruction, he has no experience in aviation accident investigations, no experience with helicopters, which are far more complex than motor vehicles and heavy equipment and no experience with jet blast investigation.”*

[26] Here I find it particularly useful to refer to Stroud’s Judicial Dictionary of Words and Phrases 6<sup>th</sup> Edition **LONDON: SWEET & MAXWELL 2000 at page 880** on the question of ‘Who is an Expert Witness?’ It says

*“An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation; and he must have a particular and special knowledge of the subject.”*

Again in ‘A Practical Approach to Civil Procedure’ by Stuart Sime 5<sup>th</sup> Edition Oxford Press at page 316 in the section headed Qualifications the author says

*“A person is an expert if he or she is skilled in the field in question through qualifications or experience. A car mechanic may be an expert simply through experience in working with cars... Furthermore experts are only permitted to express an opinion within their field of expertise.”*

[27] I find therefore that based on the information before the court Mr. Marajh will not be able to assist the court in the area under consideration as he is not sufficiently versed in the aircraft and aeronautics engineering field. He will not be able to meet the criteria as laid down by Lord President Cooper in **DAVIE v EDINBURGH MAGISTRATES [1953] SC 34** at page 40 that is to



*“...furnish the judge ... with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge ...to form [his or her] own independent judgment by the application of these criteria to the facts proved in evidence.”* This also expressed in **MAKITA v SPROWLES [2001] NSWCA 305 case emanating out of NEW SOUTH WALES – AUSTRALIA COURT OF APPEAL** or as said in **LIVERPOOL ROMAN CATHOLIC ARCHDIOCESE TRUSTEES INCORPORATED v GOLDBERG (NO2) [2001] 1 WCR 2337** that the individual Marajh is *“capable of influencing the court’s decision on any of the issues which it is to decide.”*

## **APPLICATION TO STRIKE PORTIONS OF THE WITNESS STATEMENT OF JOHN MORRIS**

[28] As previously alluded to the defendant takes objection to various portions of the witness statement of John Morris. The affidavit in support of the Application is deponed to by Arlene Williams and raises a series of objections which if upheld would make the portions in admissible.

[29] They highlight as well the attachment to the statement various documents and reports and say these are inadmissible based on the rules of evidence CPR. Rule 29.5 speaks to witness statements and their approved contents as well as give the court the power to strike out portions which are inadmissible based on the criteria laid down.

CPR rule 29.5 says:

*“(1) A witness statement must –*

- (a) give the name, address and occupation of the witness;*
- (b) so far as reasonably practicable, be in the intended witness’s own words;*
- (c) sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the documents;*
- (d) not include any matters of information or belief which are not admissible and, where admissible, state the source of any matters of information or belief;*
- (e) be dated;*
- (f) be signed or otherwise authenticated by the intended witness, and*

- (g) *include a statement by the intended witness that the intended witness believes the statements of fact in it to be true.*
- (2) *The court may order that any inadmissible scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.”*

[30] The Claimant in response says in summary the information given by John Morris is intended to function “*like a Notice of Intention to Tender*” under the Evidence Act Provision as well as after Ms. Morris’ professional expert opinion on the issues.

[31] Extensive submissions were heard and read on this issue and for reasons already given in keeping with Rule 29.5 it is decided as follows:

The Defendant’s application dated and filed on 5<sup>th</sup> February 2013 is granted as prayed in terms of:

- Para 1(b) ie as to Tim Kelly’s report already discussed.
- 1(c) ie as it relates to the need for a Notice of Intention to Tender required under the Evidence Act.
- 1(d) ie as it relates to the introduction of the document pursuant to Rule 29.5(c).
- 1(e) ie as it relates to expert evidence and the requirements of the CPR rule 32.

It follows as well based on previous discussions that the following exhibits would also be inadmissible JM 6, JM 7, JM 11 and JM 12.

[32] The Claimant is ordered to file a witness statement of John Morris with the requisite amendments and without the documents that have been excluded in keeping with the order of the court herein and the document dated January 11, 2013 Witness Statement of John Morris is not permitted as eligible to be relied on at the trial of the matter.

[33] In respect of the issue of Expert Evidence the court Orders Pursuant to Rule 32.9(5) that Captain Gregory Fox is appointed as a joint expert and the single expert witness in this matter.

[34] The expert is to file and serve his report on or before 28<sup>th</sup> February 2014 and the instructing parties may file and serve their response and instructions on or before 31<sup>st</sup> March 2014.

[35] It is also necessary to convene a further Case Management Conference for the purpose of streamlining the way forward in this matter.

1. Case Management Conference is scheduled for 10<sup>th</sup> April 2014 at 10am for ½ hour.
2. Leave to appeal is granted to the defendant pursuant to its request made today.

[36] Claimant's attorney to prepare, file and serve these orders.

[37] Costs to be costs in the claim.