JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 70 OF 2005

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LTD (Successors to Mutual Security Bank Limited)	APPELLANT
AND	K & B ENTERPRISES LIMITED	RESPONDENT

PROCEDURAL APPEAL

IN CHAMBERS

FOR CONSIDERATION BEFORE:

- THE HONOURABLE MR. JUSTICE K. HARRISON J.A

Written submissions filed by:

- Myers, Fletcher and Gordon, Attorneys at Law for the Appellant.
- Gifford, Thompson & Bright, Attorneys at Law for the Respondent

September 5, 2005

K. HARRISON J.A

Introduction

This is a procedural appeal against an order made by Rattray J., on the 10th day of May, 2005. The appeal raises procedural issues of some general importance with regard

to expert evidence, particularly in the light of the Civil Procedure Rules 2002 ("the CPR").

The background

The respondent brought an action in the Supreme Court on the 6th March, 1998 against the appellant for breach of contract. It is alleged that the appellant neglected and/or refused to perform its undertaking under a Letter of Commitment dated 26th May 1992, to the respondent, to grant certain credit facilities in respect of a marble mining venture. Damages are sought for breach of contract and alternatively damages for breach of the terms of the said Letter of Commitment.

A case management conference and pre-trial review hearing, have already taken place.

On the 9th August 2004, the respondent filed a notice of application and sought permission to have Mr. Dwight Orgill, a Chartered Accountant, called as an expert witness. For reasons not disclosed, the application was heard and disposed of on the 10th May 2005. Permission was granted for Mr. Orgill to be called as an expert witness and for him to file and serve the report on or before the 16th day of May, 2005. The learned judge found that the evidence of an accountant was capable of assisting the court on the quantum of damages that may be awarded and that the question, whether or not to accept the expert's evidence, must be left to the trial judge.

The appellant now seeks to set aside the order for the appointment of Mr. Orgill as an expert witness.

Written submissions were filed by the appellant and respondent, on the 19th May, and 26th May, 2005, respectively but the file was not sent to me until the 29th June, 2005.

Unfortunately, the appeal could not be dealt with before the term ended. I therefore used the opportunity during the legal vacation to prepare this judgment.

The reasons for judgment

At pages 4-5 of his judgment the learned judge stated as follows:

> "...Mr. Garcia raised no objection as regards Mr. Orgill's qualifications as an Accountant, and although he contended that there was no evidence before the Court that Accounting was a "recognized expertise governed by recognized standards and rules of conduct", he expressed in his written submissions his willingness to accept accounting is an appropriately recognized area of expertise".
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> His objection however, lay in his contention that no evidence was placed before the Court to show that the proposed expert witness' accounting expertise was capable of influencing the Court's decision on the issues before it. According to Counsel, it appeared that Mr. Orgill's evidence was required on the question of damages. The issue to be considered by the Court would be the future loss of profits from a project which had not commenced.
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> He further made this submission:
>
> > "While an Accountant would clearly be able to ascertain what profit was earned from a project actually carried out, there is no evidence that the accounting field involves projecting the profit to be earned from a particular type of operation (in this case, marble mining) which has not even commenced."
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> As intellectually attractive as it may appear, I do not accept as sound this submission of Counsel, Mr. Garcia. The function of an expert witness is to assist the Court by giving evidence of his opinion on the matters of specialized knowledge on which his assistance is sought.....This opinion must be based on the material placed before the expert witness."

The learned judge stated at pages 5-6 of his judgment as follows:

> "The mere fact that an expert witness has stated his opinion or has provided his expert report does not mean that it is automatically accepted by the court. His evidence may or may not be found to be credible by the trial judge.
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> A crucial consideration is that such evidence must be helpful to the Court in coming to its conclusion, whether on the issue of liability or on the question of the quantum of damages. At this stage of the proceedings, there is no report before this Court for such a criticism to be made. It may well be that once the expert's report is prepared, there are grounds for challenging the contents. I do not however agree with the reasons advanced for the Bank's objection to the calling of Mr. Orgill as an expert witness in his capacity as an Accountant.
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> The Civil Procedure Rules 2002 permits a party to put questions to the expert witness on his report, the answers to which are treated as part of the expert witness' report (see r32.8). If the circumstances are appropriate, a party may also seek and obtain, the leave of the court for their own expert to give evidence on the particular issue.
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> I am therefore of the view that the evidence of an Accountant is capable of assisting the Court on the quantum of damages that may be awarded in this matter. At the end of the day, the question of whether or not to accept that evidence and the weight to be given to such evidence must be left to the trial judge."

The learned judge also found that Mr. Orgill did not have the required expertise in mining operations, and, concluded that he would not be of any assistance to the court in that area.

Grounds of appeal (a) and (b)

> "(a) The learned judge erred when he concluded that the requirements for the appointment of an expert witness were met;

(b) The learned judge erred in finding that accounting expertise can assist the Court with regard to the quantum of damages that may be awarded without any evidence to support that finding".

It was submitted on behalf of the appellant that the criteria set out in **Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No 2)** [2001] 1 WLR 2337, for the appointment of an expert must be met. It was necessary for the judge hearing the application to be satisfied on the evidence that there was (a) a recognized expertise governed by recognized standards and rules of conduct and that (b) the recognized expertise was capable of influencing the Court's decision on any of the issues, which it had to decide.

The only evidence that the learned judge had before him in the instant matter, was that contained in the two affidavits of Lord Anthony Gifford Q.C. In the first affidavit he deposed as to a previous order of the court appointing Mr. Raphael Gordon as an expert and that due to a conflict of interest with the respondent, Mr. Gordon was unable to take up the appointment. The second affidavit refers to the experience of Mr. Orgill as an accountant for 24 years.

The appellant had no problem with Mr. Orgill's qualification as an accountant, or with the principle that accounting is a recognized expertise governed by recognized standards and rules of conduct. Counsel submitted however, that while an accountant would clearly be able to ascertain what profit was earned from a project actually carried out, or the loss sustained there from, no evidence was presented which could indicate to the court that the accounting field can also assist in projecting the profit to be earned from

marble mining which has not yet commenced. Counsel further submitted that the issue is not whether ultimately, an expert can show that his field of expertise can assist the court, but rather, the respondent is required to present evidence in support of the application before the judge in Chambers that accounting evidence can do so. Counsel argued that the court ought not, to be left to speculate, as to whether such evidence might be forthcoming when the witness gives his evidence or delivers his report.

Counsel for the respondent, submitted on the other hand, that the appellant's submissions were misconceived. It was submitted that the court would be assisted by the expert on issues that were set out in the written submissions of the 12th April 2005, filed on behalf of the respondent in the court below. These submissions do not form a part of the record of appeal and in any event, I am unable to see how a court could place a submission in the same category as evidence.

There is no doubt that accounting is a "recognized expertise governed by recognized standards and rules of conduct" but it is incumbent upon the respondent to present evidence before the judge in Chambers, to show that the accounting field could assist the court in projecting the type of profit to be earned or loss sustained, from a project that had not really commenced.

Under the former rules of court, it was not necessary for the applicant to identify the issues that really needed expert evidence and there was no restriction on the number of experts to be called. The CPR has made changes however, with regard to the appointment of experts. Part 32.2, provides that expert evidence should be restricted to that which is reasonably required to resolve the proceedings justly. In this regard, the parties have an explicit obligation to help the court to further the overriding objectives.

In my view, there is merit in grounds (a) and (b) and they succeed.

Ground of appeal (c)

I now turn to ground of appeal (c). It states as follows:

> "(c) The learned judge erred in finding that the question whether or not to accept the expert's evidence must be left to the trial judge in the absence of evidence sufficient for permission to be granted to rely on the report.

Counsel for the appellant while agreeing that it is the trial judge who will determine the weight to be given to the expert evidence, disagreed however, with the finding that it was the trial judge who should decide on the admissibility of the evidence. Counsel argued that the application for permission is the stage at which the Court determines whether the report is to be accepted. It was further submitted that in the absence of any evidence whatsoever, that an expert in accounting is capable of assisting the Court on the quantum of damages to be assessed, the learned judge ought not to have left the admissibility of the expert's evidence for the trial judge.

The respondent's Attorneys submitted on the other hand, that a witness is competent to give expert evidence only if in the opinion of the judge he is properly qualified in the subject calling for expertise. Furthermore, it was contended that pursuant to rule 32.8 of the CPR, there is opportunity for the appellant to put written questions on the contents of the expert's report to the expert within 28 days of service on the appellant. It was also argued that if the appellant has queries on the admissibility of the evidence, it may raise questions to clarify the report, challenge the expert on matters as to his methodology and reasons for his opinion. Counsel argued further, that the submissions by

the appellant on the question of admissibility, is of academic interest, but it is misplaced on the procedural aspects of the case.

I do agree with the submissions of Counsel for the appellant on this ground. There was no evidence before the learned judge whatsoever, that an expert in accounting was capable of assisting the Court on the quantum of damages to be assessed. In the circumstances, the learned judge ought not to have left the admissibility of the expert's evidence for the trial judge. See **Barings Plc and ANR v. Coopers & Lybrand and Ors [2001] EWHC Ch 17 (9th February, 2001).** Ground (c) therefore succeeds.

Before leaving this appeal, it maybe useful to practitioners in court's of first instance, if I say a few words, on the admissibility of experts' reports. Should admissibility of a report be left to the trial judge? In **Barings Plc and ANR v. Coopers & Lybrand and Ors [2001] EWHC Ch 17 (9th February, 2001)** Evans-Lombe J, expressed the view that in deciding whether a particular evidence was admissible as expert evidence, it should be decided in two stages. The first stage requires an examination of whether the evidence in question qualified as admissible expert evidence. The second stage was concerned with an inquiry whether, if it is admissible, it should actually be admitted as of assistance to the court.

Evans-Lombe J in delivering judgment in the Barings case said

> "It is for the party seeking to call expert evidence to satisfy the Court that expert evidence is available which would have a bearing on the issues which the Court has to decide and would be helpful to the Court in coming to a conclusion on those issues. The evidence of experts will always be exchanged and filed well in advance of the hearing. It clearly serves the purposes of effective case management that, as far as possible, issues relating to the admissibility of expert evidence be disposed of well before the trial

> starts so that significant costs can be saved".
> (emphasis supplied)

The court in Barings case relied upon **Woodford & Ackroyd (A Firm) v Burgess** [1999] EWCA Civ 620 (20 January 1999). In the latter case, it was argued that the judge had no jurisdiction to make a ruling as to the status of the expert's report. The judge rejected that submission. An appeal was lodged with respect to the ruling on the admissibility of the report. It was submitted on appeal that the only judge who would have jurisdiction to decide on the status of the alleged expert's report was the trial judge. Lord Justice Schiemann in delivering judgment in the Court of Appeal said:

> "Looking at the matter first apart from the authority, it is in my judgment clearly eminently desirable for the cheap and expeditious disposal of cases that there should be a power to rule prior to trial that evidence, be it expert or non-expert, is admissible or not admissible. If it is ruled not admissible then all the costs of rebuttal evidence will be saved and it may be that the party which wished to adduce the evidence which has been declared non-admissible will either abandon or compromise his case. If on the other hand the evidence is ruled admissible, the party who thought it could submit that it was inadmissible may be the more willing to compromise. There will, of course, be many cases where it would be inopportune to exercise any power, if it exists, prior to trial because the trial judge will often - and indeed one might almost say usually - be the best person to decide whether or not some evidence is admissible. Particularly that will generally be the case if one is not talking about excluding the totality of some evidence but merely a paragraph which is alleged to be inadmissible or something of that kind. But those considerations go to question of discretion rather than to the question whether the court has the jurisdiction to exercise such a power.
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> There are two separate questions to be resolved. First, is there a power in any part of the High Court to make such an order prior to trial? Second, a question can arise as to who can exercise that power on behalf of the

High Court. In particular a question might arise as to whether a master has that power or whether that power can only be exercised by a judge.

In my view, it is clear that the High Court does have the power to regulate its own procedure in the absence of statutory control. As the matter is put in volume 2 of the 1999 Supreme Court Practice at pages 1612 and 1613:

> "The inherent jurisdiction of the court has been defined as being the reserve or fund of powers, a residual source of powers which the court may call upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

The learned Lord Justice continued:

> "This particular pre-trial review appears to have been arranged, or at any rate appears very sensibly to have been used, precisely for the purpose of resolving the one outstanding issue between the parties, namely the admissibility or otherwise of the proposed expert evidence as evidence at the forthcoming trial. Good sense surely dictates that such an issue shall be resolved before trial and thereby without incurring the very considerable, and perhaps entirely unnecessary, expense of instructing experts, commissioning their reports, and securing their attendance at trial. I speak of experts in the plural, because it cannot be doubted that had the plaintiff procured such an expert's report, the defendants for their part would, without difficulty, have found an expert to express the contrary view. It would, to my mind, be most unfortunate if no machinery or opportunity existed for obtaining a ruling upon such an issue before trial. I believe, however, that it does. It does by following the very route followed here, namely holding a pre-trial review before the judge, rather than by way of an ordinary summons for directions. Even if no jurisdiction would exist to make such an

> order without the consent of the parties, I take the view that the parties here plainly did consent to such a ruling being made and thereby conferred upon the court such jurisdiction as would otherwise have been wanting."

Lord Justice Clarke stated inter alia:

> "I am confident that all commercial judges ..... would regard it as little short of absurd to hold that only the trial judge could determine questions of admissibility of expert evidence. It makes no sense to leave such questions to the trial. All parties should know long before the trial what expert evidence will be put before the trial judge and what will not".

The cases of **Barings Plc**(supra) and **Woodford & Ackroyd** (supra) are therefore useful authorities on the question of admissibility of an expert report. They establish that for the cheap and expeditious disposal of cases, it was desirable that there should be a power to rule prior to trial that evidence, be it expert or non-expert, is admissible or not admissible. This will quite likely avoid unnecessary expense of instructing experts, commissioning their reports, and securing their attendance at trial. Furthermore, the reasons underlying the new rules, require that expert evidence, needs to be prepared in a structured manner under the supervision of the Court. Judges sitting at first instance should therefore assert greater control over the preparation for the conduct of hearings than has hitherto been customary.

Conclusion

The learned judge was in error when he made the orders on the 10th May, 2005. The appeal is therefore allowed and the orders set aside. The appellant is entitled to its costs which are to be taxed if not agreed.