IN THE SUPREME COURT OF BELIZE A.D. 2021

CLAIM NO 91 OF 2020

BETWEEN

ISABEL GUADALUPE BENNETT **CLAIMANT**

AND

JAMES HENRY ALEXANDER WILLIAMS JR
dba JAMES BUS LINE **1ST DEFENDANT**
1ST ANCILLARY CLAIMANT

AND BETWEEN
OSCAR CAL **2ND DEFENDANT/**
2ND ANCILLARY CLAIMANT

LLOYD D FRIESEN **1ST ANCILLARY DEFENDNAT**
FREDDY VALDEZ **2ND ANCILLARY DEFENDANT**

Before: The Hon. Mr Justice Westmin R.A. James (Ag)
Date: 12th April, 2021
Appearances: Mr Brandon Usher for the Claimant
Ms Nazira Myles for the 1st and 2nd Defendant/1st and 2nd Ancillary Claimants
Mr Estavan Perera for the Ancillary Defendants

RULING ON APPLICATION FOR EXPERT EVIDENCE

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1. This is an application of the Claimant for permission to admit and rely on expert evidence. Both Respondents opposed the application on similar grounds. The first is that the application should be made at a CMC which has passed. The second objection was based on the lateness of the application, the trial being two days away would result in the trial being postponed. The third objection is based on the independence of the experts having been previously retained by the Claimant. It is noted that the Respondents did not file any affidavit in response to the application.

Expert Evidence

2. Part 32 of the CPR governs the use of experts before the court. Rule 32.6(1) is clear that a party cannot call an expert witness or put in an expert's report without the court's permission. Once the court has given this permission the expert's overriding duty is to the court since its duty is to help the court impartially on all matters relevant to his expertise and this duty overrides any obligations to the persons from whom he has received instructions (Rule 32.3).

3. The expert's report must set out the facts or assumptions upon which his opinion is based and must clearly indicate if any particular matter or issue falls outside his expertise (Rule 32.4). He can apply to the court for directions and it is the court that directs the date on which the report is due (Rule 32.5). The expert's report must be addressed to the court and not to any person from whom he received instructions (Rule 32.12). The contents of his report must give details of his qualifications, any literature or other material on which he has relied in the making of his report, indicate the persons who carried out any tests which he has used in his report, give details of the qualifications of those persons, summarise any range of opinions and give reasons for his opinion (Rule 32.13(1)).

4. At the end of the report there must be a statement indicating that he understands his duty under Rules 32.3 and 32.4, he has complied with that duty, that all matters are within his knowledge and are of expertise relevant to the issue and he has given details which may affect the validity of the report. (Rule 32.13(2)) More importantly, there must be attached to the expert's report copies of all written instructions given to the expert, supplemental instructions or a note of oral instructions (Rule 32.13(3)).

5. Part 32 therefore controls the volume, quality and impartiality of expert evidence restricting parties from calling how many and whoever experts they wanted to give evidence at trial.

6. In ***Civil Appeal 118/2011 Vanessa Garcia v North Central Regional Health Authority*** Archie C.J. commented on the distinction in procedure between the common law and the CPR where he said *"where you have a rule which requires an expert's evidence, you have something that has statutory reports that require an expert evidence to meet certain criteria, then if you admit that it is expert evidence, then it must meet those criteria, otherwise it is hearsay."*

7. In ***Civil Appeal No. P 277 of 2012 Kelsick v Kuruvilla*** Jamadar JA as he then was, sets out the utility of expert evidence. He provided the governing principles in the

case of expert evidence by the Court in granting an application under the CPR. He said:

> *"8. In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):*
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> *(i) How cogent the proposed expert evidence will be; and*
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> *(ii) How useful or helpful it will be to resolving the issues that arise for determination.*
>
> *(iii) In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:*
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> *(iv) The cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);*
>
> *(v) Depending on the particular circumstances of each case additional factors may also be relevant, as such:*
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> *(vi) Fairness;*
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> *(vii) Prejudice;*
>
> *(viii) Bona fides; and*
>
> (ix) *The due administration of justice.*

8. Therefore, a bare application as proposed by the Defendants has been held not to be sufficient as seen in ***Claim No. 2014-01413 Barker v Eastern Regional Health Authority et al***.

9. The Court when exercising its discretion to appoint an expert is also mandated to take into account all relevant circumstances which are set out in the overriding objective of the CPR to enable the Court to deal with a case justly. Dealing justly with the case includes ensuring so far as is practicable that the parties are on equal footing; saving expense; dealing with the cases in ways which are proportionate to the amount of money involved; importance of the case; complexity of the issues involved; financial position of each party; ensuring that the instant matter is dealt with expeditiously and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

Independence of Expert

10. The Defendant's challenged the independence of the experts proposed by the Claimant on the basis that the experts had a relationship with the Claimant's and so cannot give independent evidence to the Court.

11. The Court's permission is not generally required to instruct an expert, the Court's permission is required before an expert's report can be relied upon or an expert can be called to give oral evidence (CPR 32.6). In addressing the admissibility of expert reports in ***Civil Claim No. 2006/03842 Martin Phillip Revenales v Eric Charles*** Dean Armorer J heard arguments on whether Part 33.10 in Trinidad and Tobago applied to experts who were not court appointed but who were intended to testify in favour of a particular party. The Court held that *"all experts under the Civil Proceedings Rules have a duty to provide independent assistance to the Court. Moreover failure to provide information required by Part 33.10 of the Civil Proceedings Rules is fatal and would result in the Court's rejection of the expert report*."

12. Experts who were formerly instructed by one party are later instructed as an expert witness to prepare or give evidence in the proceedings does not of itself make that person unable to give independent advice to the court. A connection to a party, does not automatically disqualify an expert from giving evidence in a matter. As pointed out by the Court in ***Helical Bar plc & Anor. v Armchair Passenger Transport Ltd [2003] EWHC 367 (QB)*** the mere fact that an expert has a connection with a party whether as an employee or otherwise does not automatically disqualify him from giving evidence as an expert. It is a matter of fact and degree, and the test of apparent bias is not relevant. If the expert is deemed admissible, the court may consider the connection between the expert and the party in assessing the weight to be given to such evidence. The Court held that any connection between the Claimant and the doctors in that case is so tenuous that it could hardly be said to raise to the standard of being of such a fact and degree so as to render the evidence inadmissible as expert evidence.

13. In the Jamaican case of ***CL 1995/B-228 Financial Institutions Services Ltd v Panton (2004)*** the claimant sought an order of the court under Rule 32.6 in Jamaica for permission to rely on an expert report to be prepared by one EA, a forensic and investigative accountant. According to the claimant, the issues in the proceeding involved 'extremely complicated financial statements and other records of such a nature that the court would be assisted by the expert report of EA'. The defendants objected to the application, on the ground that EA could not be considered unbiased, impartial and independent, on account of the fact that EA had previously been retained as an expert by the Jamaican Government and was, in

effect, the 'hired gun' of the claimants. Rattray J concluded that the objection was unsustainable and that the claimant should be allowed to rely on the expert report of EA. He explained his ruling thus:

> *The perceived relationship . . . between EA and [the claimant] is not sufficient to disqualify EA from giving evidence as an expert witness. The headnote in Field v Leeds City Council reads: 'A properly qualified expert witness who understood that his primary duty was to the court was not disqualified from giving evidence by the fact that he was employed by one of the parties to the litigation.' [Counsel for the defendants] has relied on Liverpool Roman Catholic Archdiocesan Trustees v Goldberg (No 3), 10 the headnote of which reads: 'Where there is a relationship between a proposed expert witness and the party calling him which a reasonable observer might think is capable of making the views of the expert unduly favourable to that party, his evidence should not be admitted, however unbiased his conclusions might probably be.' This case, however, was disapproved by the English Court of Appeal in Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8). 11 There it was the view of the Court of Appeal that 'the test of apparent bias is not applicable to an expert witness as it is to a tribunal. Although it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, such disinterest is not automatically a precondition to the admissibility of his evidence'. I was greatly assisted by the unreported judgment of my brother Anderson J in Eagle Merchant Bank of Jamaica Ltd v Young.12 In that case, which coincidently dealt with an application to exclude the expert witness report of the same EA, the learned judge said: 'I also hold that the test of apparent bias advocated by Evans-Lombe J in Liverpool has been overruled by the Factortame case, and although I am not bound by it, I hold that it represents a correct analysis for the purposes of this application.' Anderson J also referred to the recent case of Helical Bar plc v Armchair Passenger Transport Ltd, a first instance decision of Nelson J. There the court found that 'it was settled that the test of apparent bias applicable to a court or tribunal was not the correct test in deciding whether the evidence of an expert witness should be excluded. It was not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determined whether an expert witness should be precluded from giving evidence.' I am of the view, therefore, that the mere fact that EA was previously contracted to [the claimants] does not prevent him being appointed an expert witness in this case.*

14. In the Eastern Caribbean case ***Claim No. ANUHCV2006/0234 Cornelius v Stevens & Stevens*** the Court stated:

"Once a person is appointed as an expert witness, he becomes the Court's expert. The expert's duty is to assist the Court in matters within his expertise. This duty overrides the duty or any obligation to the party who has instructed him. The expert evidence is usually admissible in order to enable the judge to reach a properly informed decision on a technical matter. There is no doubt that there are technical issues that arise in the case at bar, not least of which is whether the construction of the house was properly carried out; whether there are and were defects and the costs of remedying those defects.

…

As stated earlier, expert witnesses should be seen to be independent: see The Ikarian Reefer [1993] 2 Lloyd's Rep 68 at 81. The Court is cognisant of the fact that the expert is known either personally or professionally by the party who proposes to use his evidence does not, by itself, render the evidence inadmissible. On the face of the affidavits therefore, the Court has no basis for concluding, without more, that Mr. Zachariah is likely to be partisan."

15. I therefore hold that the connection between the Claimant and the expert is not sufficient in this case to make them not independent. It is routine for a party to visit a doctor in personal injury matters and obtain a medical report even before actually applying for them to declared an expert witness. Experts are professionals and so even payment to the expert for their time does not make that expert compromised once the expert recognizing their duty is to the Court and not the individual parties. Therefore, the retaining of an expert or the production of a report before being declared expert does not render that evidence biased but is a factor the Court can take into consideration when that evidence is admitted.

Can the application be made after the CMC?

16. The Court's permission for a party to call an expert witness in civil matters should generally be obtained at the case management conference. The Court will then give detailed directions relating to the expert evidence. This is of course the preferred route so the issues relating to the admissibility of expert evidence be dealt with in advance of trial.[1] Such permission at a later time is likely to cause delay sometimes in the trial. In providing guidance on this point, Harrison JA in ***National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Ltd) v K & B Enterprises Ltd*** [2005] JMCA Civ 70 stated:

[1] ***Barings Plc and ANR v. Coopers & Lybrand and Ors [2001] All ER (D) 110*** per Evans-Lombe, J. at para 22

"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."

17. In the case of ***CV2017-02082 Shawn Baboolal and Maraj Woodworking Est & Co Ltd*** while referring to the Court of Appeal transcript in another case held that permission to lead expert evidence can be done at any time and even in a case in which the evidence was filed without the permission of the Court and it was subsequently deemed expert by the Court after objection by the Defendant. This of course is not the preferred course a party should take as that evidence is not admissible as expert evidence.

18. In the case of ***Cornelius v Stevens & Stevens*** (supra) the application was made after the CMC at the Pre-Trial Review stage.

19. Although the general requirement is that the application should be made at the CMC, the Court may, in an appropriate case, appoint an expert at the pre-trial stage. A party must satisfy the court that there are compelling reasons why the application was not made at the CMC. I do hold that the reasons given by the Applicant was sufficient for this application being made at this time.

The delay in the trial

20. Further, while it is true that the court can grant permission at any time to allow an expert report, the question remains whether the Court should do so at this stage and would further the overriding objective in dealing with the case justly. I am of the view that it is not too late. In ***App. No. P30 of 2016. Claim No. Cv2010-01117. Between. Cristal Roberts. Isaiah Jabari Emmanuel Roberts (By his next of kin and next friend Ronald Roberts) v dr. Samantha Bhagan Medcorp Ltd*** the Court of Appeal of Trinidad and Tobago addressed this issue. The Court stated:

"This court is not unmindful of the difficulty a trial judge faces in managing a case as complex and voluminous as this one, and in finding an appropriate trial window to accommodate the time that this trial is likely to require. The judge having blocked an entire month for this trial, was understandably reluctant to grant the application in view of the possibility that the trial date might have to be vacated. In our view, while achieving trial date certainty is a most desirable goal, it is but one consideration which must be weighed in the balance together with all relevant matters in giving effect to the overriding objectives. One such matter, in this case, which carried significant weight was the need to ensure that the parties are on an equal footing. The withdrawal of the expert in the field of Life Care Planning, through no fault on the part of the appellants, placed the appellants at a severe disadvantage The judge had the discretion to restore the parties to an equal footing by giving the appellants the opportunity to call an expert witness in place of Ms. Giles. This she unfortunately refused to do.

In our view, the judge was plainly wrong in the exercise of her discretion. We will set aside her decision, and order that the appellants be permitted to call Ms. Callaghan as an expert witness in place of Ms. Giles."

21. In adopt the position of the Court of Appeal entirely that would exercise the discretion to vacate the trial dates in order that all the expert evidence is submitted to the Court.

Relevance of the experts

22. In determining whether this evidence is reasonably required to resolve the proceedings justly I have considered the pleaded case and the information which the expert proposes to give and find one of the proposed experts will be giving evidence on matters not part of the pleaded case of the Applicant. I will therefore grant permission for two of the experts proposed, i.e. Dr Andre Joel Cervantes, MD and Dr Miguel Magana MD, but permission will not be given to Dr Michael Medina, MD.

Costs

23. Costs are always in the discretion of the Court. The discretion must be exercised judicially and objectively. Part 1.2 of CPR 2000 directs the Court to act objectively when it seeks to exercise discretion. Accordingly, the Court will usually award costs to the successful party. Equally, there is discretion for a judge to make an order other than in accordance with the general rule that the unsuccessful party must pay the costs of the proceedings. The Court is of the view that this is an

appropriate case in which to award the costs of the application to the Defendants due primarily to the application being brought so late in the day. Further the application has the effect of delaying the trial of the matter.

24. The costs of the application I will fix at $2,000.00 for each Defendant for the two trial days lost.

/s/ W James
Westmin R.A. James
Justice of the Supreme Court (Ag)