IN THE SUPREME COURT OF JUDICATURE OF JAMAICA Judgment Book

CLAIM NO. C.L. 1998/E. 095

BETWEEN	EAGLE MERCHANT BANK OF JAMAICA LTD.	1ST PLAINTIFF
AND	CROWN EAGLE LIFE INSURANCE CO. LTD	2ND PLAINTIFF
AND	PAUL CHEN-YOUNG	1ST DEFENDANT/ ANCILLARY CLAIMANT
AND	AJAX INVESTMENTS LIMITED	2ND DEFENDANT
AND	DOMVILLE LIMITED	4TH DEFENDANT
AND	DAISY M. COKE	ANCILLARY DEFENDANT
AND	OSWALD G. HARDING	ANCILLARY DEFENDANT
AND	BRIAN GOLDSON	ANCILLARY DEFENDANT
AND	GEOFFREY MESSADO	ANCILLARY DEFENDANT
AND	GEORGE BARRINGTON JOHNSON	ANCILLARY DEFENDANT
AND	DERRICK MILLING	ANCILLARY DEFENDANT
AND	STANLEY MOORE	ANCILLARY DEFENDANT
AND	PATRICK HYLTON	ANCILLARY DEFENDANT
AND	ROSEMARIE MORGAN	ANCILLARY DEFENDANT

Heard May 12, 13, 14, 15 and 19, 2003

Mr. Michael Hylton, Q.C., Ms. Debbie Fraser and Mrs. Michelle Champagnie instructed by the Director of State Proceedings for the Plaintiffs;

Mr. Abe Dabdoub, Mr. Conrad George and Mr. Roderick Gordon instructed by Mr. Roderick Gordon for the 1st Defendant/Ancillary Claimant;

Mr. Abe Dabdoub and Mr. Jalil Dabdoub instructed by Mr. Raymond Clough and Dabdoub, Dabdoub & Co., for 2nd Defendants;

Mr. Ransford Braham and Ms. Keri-Gaye Brown instructed by Livingston, Alexander & Levy for all Ancillary Defendants except Mr. Patrick Hylton and Mrs. Rosemary Morgan;
Ms. Julie Thompson and Ms. Nicola Brown instructed by the Director of State Proceedings for Ancillary Defendant Rosemarie Morgan

ANDERSON: J.

On May 19, 2003, after hearing submissions on applications to exclude the expert witness report of Edward Avey, prepared on the instructions of the claimants herein, I ruled that the report would not be excluded. I indicated at that time that I was putting my reasons in writing and would provide these in due course. In fulfillment of that undertaking, I now provide my written judgment in respect of the applications.

At a re-convened Pre-Trial Review held on May 2nd 2003, the Applicants in these applications, that is the first, second and fourth defendants in this action (hereafter referred to as "the Applicants") indicated that they may wish to apply for an order to exclude the Expert Witness Report which had been ordered pursuant to an application at the Case Management Conference held before Her Ladyship Mrs. Norma McIntosh J, on the 18th day of March 2003. At the Case Management Conference, the learned judge had granted an application that Mr. Edward Avey produce an expert witness report for the purposes of the trial. After considering the other matters to be settled at the Pre-Trial Review, I indicated that I would be prepared to hear such an application in Chambers on Monday May 5th 2003. The applicants also indicated that, at that time, they might wish to make an application that they be allowed to call an expert witness or for permission to have an expert witness report prepared on their

instructions. When the parties arrived on Monday May 5 2003, for the application, it became clear that the matter could not be dealt with on that day at a hearing commencing at 4:00 p.m. I then decided that I would hear the application on Monday May 12, 2003, the date upon which the substantive action was due to commence.

The application seeks the exclusion of the Expert Witness Report of Mr. Avey and also, in the application of the first defendant, seeks permission to "be allowed time to obtain and file Expert Witness Reports to be tendered for use at the trial, such Reports to be prepared by Mr. John Jackson and another Expert respectively".

The applications are in the following terms

1. That the Report of Edward Avey be excluded from being used in evidence at the trial
2. That the Applicant be allowed time to obtain and file Expert Witness Reports to be tendered for use at the trial, such Reports to be prepared by Mr. John Jackson and another Expert respectively.

The grounds upon which the applications are made are stated to be in the case of the first defendant/applicant

(a) Contrary to the principles that an exception to the hearsay rule is permitted in relation to expert evidence only to the extent that:

i. the expert purports to give evidence only of facts within his own knowledge or opinions on evidence given by others;

ii. expert opinions may be expressed only upon matters within the experts area of expertise;

iii. such opinions are to assist the court, and not to usurp its functions;

Mr. Avey's report:

iv. refers to and bases conclusions on documentation not put in evidence and proved by any of the witnesses of fact whose statements have been put in as evidence in chief, and to this extent amounts to inadmissible hearsay;

v. contains opinions and draws conclusions that are not within his area of expertise, and instead gives evidence on matters not within his personal knowledge;

vi. seeks to conclude the mixed issues of fact and law that are before the court, for it to decide, and therefore trespasses on the function of the Court, and to this extent cannot be regarded as expert evidence, as trial by expert is not permitted.

(b) The report from Mr. Avey fails to comply with Rule 32.3 of the CPR in that in breach of the duty of an expert to help the Court on matters within his expertise (such duty overriding any obligation to the person from whom he has received his instructions and by whom he is paid) in accordance with Rule 32.3 of the CPR:

(i) it seeks to pronounce upon matters of fact, of which Mr. Avey has no personal knowledge, and to draw from such matters of fact conclusions

adverse to the interest of the Defendants, without any entitlement in law to do so, and is therefore manifestly not impartial;

(ii) Mr. Avey is a partner in a firm of forensic accountants retained by FINSAC Limited and/or the Government of Jamaica to investigate entities and individuals in connection with the collapse of portions of the financial services sector of the Jamaican economy, with a view to instituting criminal and civil proceedings against such entities, for which they are paid substantially, so that Mr. Avey and his firm have a deep and overriding interest, financial and otherwise, in the outcome of these proceedings.

(iii) Mr. Avey's firm was party to raiding the offices of Peat Marwick with a view to finding evidence to use against the Defendants in proceedings, and Mr. Avey cannot be an impartial, dispassionate expert.

(c) The Report prepared by Edward Avey pursuant to the Order of This Honourable Court dated the 20th day of March, 2003 and delivered to the Registrar on the 14th day of April, 2003 fails to comply with the Supreme Court of Jamaica Civil Procedure Rules 2003 since:-

(i) the Report is not addressed to the Court in accordance with Rule 32.12 of the CPR;

(ii) the report does not contain a Statement of Truth

(iii) the report does not conclude with a statement that the Expert understands his duty and had complied with that duty in accordance with Rule 32.13(2)(a);

(iv) the report fails to disclose that it includes all matters within the witness's knowledge and area of expertise relevant to the issue on which the evidence is being given;

(v) the report fails to give details of any matters which might affect its validity;

(vi) the report fails to exhibit the substance of all material instructions whether written or oral as the basis on which it was written in summary or otherwise.

(d) The Report prepared by Edward Avey pursuant to the Order of This Honourable Court dated 20th March 2003 and delivered to the Registrar on the 14th April 2003 fails to comply with the Supreme Court of Jamaica Civil Procedure Rules 2002 since:-

(i) it fails to give details of the expert witness's qualifications.

(ii) it fails to give details of any literature or other material which the expert witness has used in making the report.

(iii) It fails to summarise the range of opinions and give reasons for his own opinion.

In the case of the second and fourth defendants/applicants, the grounds of the application are stated to be as follows:

1. A. the report fails to comply with Rule 32.3 of the CPR in that:

i. it is the duty of an expert to help the Court on matters within his expertise and this duty overrides any obligation to the person from whom he has received his instructions and by whom he is paid in accordance with Rule 32.3 of the CPR.

ii. The Report is not impartial.

iii. The report is not objective as the witness is a "hired gun" employed to the Government of Jamaica in various and sundry matters involving a wholly-owned Government entity FINSAC Limited and both Government and FINSAC Limited have a deep and overriding interest, financial and otherwise, in the outcome of these proceedings.

B. The Report prepared by Edward Avey pursuant to the Order of This Honourable Court dated the 20th day of March, 2003 and delivered to the Registrar on the 14th day of April, 2003 fails to comply with the Supreme Court of Jamaica Civil Procedure Rules 2003 since:-

(i) The Report is not addressed to the Court in accordance with Rule 32.12 of the CPR.

(ii) The report does not contain a Statement of Truth.

(iii) The report does not conclude with a statement that the Expert understands his duty and has complied with that duty in accordance with Rule 32.13(2)(a).

(iv) The report fails to disclose that it includes all matters within the witness knowledge and area of expertise relevant to the issue on which the evidence is being given.

(v) The report fails to give details of any matters which might affect the validity of the report.

C. The Report prepared by Edward Avey pursuant to the Order of This Honourable Court dated the 20th day of March 2003 and delivered to the Registrar on the 14th day of April 2003 fails to comply with the Supreme Court of Jamaica Civil Procedure Rules 2003 since:-

i. it fails to give details of the expert witness's qualifications.

ii. Give details of any literature or other material which the expert witness has used in making the report.

iii. Fails to summarise the range of opinions and give reasons for his own opinion.

D. It is the duty of an expert to help the Court on matters within his expertise and this duty overrides any obligation to the person from whom he has received his instructions and by whom he is paid.

E. That the report purports to draw conclusions on matters that are in issue between the parties and which issues involve a mixed question of law and fact for the Court to decide after the hearing of evidence and therefore trespasses on the functions of the Court and amounts to trial by experts which is not allowed by law.

F. That the report does not give an expert opinion upon matters within the expert's area of expertise but instead purports to introduce and give hearsay evidence on matters not within the personal knowledge of the expert.

2. That the Report of Edward Avey fails to place before the Court the fact that Kroll Lindquist Avey were employed by the Government of Jamaica and/or Finsac and did in fact carry out on behalf of the Government of Jamaica and Finsac Limited an investigation and audit which investigation and audit may have provided the basis for these proceedings.

It will be apparent that the grounds put forward in respect of the applications are similar and indeed, the submissions made by Mr. Abe Dabdoub and Mr. Conrad George, counsel for the applicants, were made on behalf of all applicants. At page 3 of their written submissions, the following paragraph, which sums up the position of the defendants, is set out.

> The Defendants are all of the view that the Report tendered by Edward Avey as an Expert Opinion Report does not meet the criteria, in law, which would qualify it as an Expert Opinion Report, nor does it meet the requirements of the Civil Procedure Rules 2002 and must therefore be excluded from being used in evidence at the trial.

In the written submissions, and oral arguments which extended over almost two (2) full days, the applicants put forward as submissions in support of the application to exclude the expert's report, the following:

1. **Hearsay**

The report of the expert witness is hearsay and accordingly not admissible. This proposition is supported by the following assertions taken from the written submissions of the defendants.

a. An expert witness's opinion cannot be used to establish the truth of facts that are in issue or to establish as a fact an allegation made in the claim if the evidence which the expert purports to give is not of his personal knowledge. In other words the expert witness cannot use underlying facts as the basis of his opinion and make those facts evidence in the case unless he happens to have personal knowledge of the transactions concerned. The submissions cite **English Exporters (London) Ltd. V Eldonwall Ltd. 1 All E.R. 725**. In particular, the applicants referred to the holding of Megarry J. in that case to the effect that an expert "may not give hearsay evidence stating the details of any transactions not within his personal knowledge in order to establish them as matters of fact".

b. The report purports to draw conclusions on matters that are in issue between the parties and which issues involve a mixed question of law and fact for the court to decide after hearing of evidence and therefore trespasses on the function of the Court and amounts to a trial by expert which is not allowable by law.

In the view of the Court, it is trite law that the testimony of any expert is subject to the same strictures as to hearsay as is the testimony of any other witness. Indeed, as Rule 32.7(1) and (2) provide:

(1) Expert evidence is to be given in a written report unless the court orders otherwise.

(2) This rule is subject to any enactment restricting the use of hearsay evidence.

In other words, the expert witness is not at liberty to give hearsay evidence of any matter not within his personal knowledge, and ask the court to accept it on the basis that he is an expert. What distinguishes the expert is that the court allows the expert to give his *opinion*, and that opinion may be based upon a set of assumed facts. Indeed, as stated in the leading text on expert witnesses, **"Expert Evidence: Law and Practice, by Tristram Hodgkinson"**, referred to below:

> "It is relevant to the question of expertise that an expert witness is usually called for the purpose of drawing inferences from given facts and expressing opinions about matters before the court, unlike lay witnesses. It is the ability of the witness to do this, within a particular specialist field, which justifies the distinction between expert and lay witnesses for evidential purposes."

That opinion remains no more than an opinion merely because it is stated to be a "conclusion" at which the expert has arrived in light of his research or investigations, and his analysis of his findings. The Court therefore does not even need to consider the validity of the expert's conclusion unless and until any "assumed facts" upon which the conclusion is based, have been proven by appropriate evidence of the requisite standard, to the satisfaction of the Court. Thus, if the conclusions which have been arrived at by the expert are based upon the presumption of a given set of circumstances, then it is clear that any person who purports to rely upon those conclusions must prove the facts upon which those conclusions are said to be based.

The submissions of the defendants give some sixteen (16) instances on which it is felt that the expert has drawn such conclusions. There may indeed be instances where the expert has

purported to state "details of transactions not within his personal knowledge". It seems to me that based upon the holding of Megarry J. referred to above, it is those details which may be struck from an expert's report, unless they are independently proven by those seeking to rely upon the expert's conclusions. It does not follow that the entire report ought to be excluded. What is clear is that any facts upon which the conclusions are purportedly based, must be the subject of independent evidentiary proof, exclusive of the views of the expert on the point. Let me use but one example in relation to this issue. The defendants submit that the question whether Dr. Chen Young was "the directing mind and controlled EMB and Ajax, is a question of fact easily determined by the Court after hearing the whole of the evidence and on which the Court does not require assistance". They say that for the expert to give an opinion, or to state a conclusion on this central issue, is to usurp the Court's function. It is true that the expert does opine upon this issue, and the attorneys for the claimants acknowledge that this issue, one of those articulated in their pre-trial memorandum, was in fact commented upon. They submit that this is, in any event, a mixed question of law and fact and I agree. I would, however, also point out that the Court would have to be satisfied as to the probity of the facts upon which the conclusion is based. What are those facts, and have they been established to the satisfaction of the Court? Only after establishment of those facts, must the Court then consider the opinion of the expert, i.e. the conclusion that he has reached in reliance thereon, and it is not bound to arrive at the same factual conclusion which has been reached by the expert. Thereafter, the court must decide whether, as a matter of law, there is "control" as the law would understand it.

2. **Failure of expert to give objective and unbiased opinion**

Another submission of the defendants is that the expert has failed to comply with the several duties and responsibilities including a duty to give "independent and unbiased evidence"; that the expert has failed in his duty of impartiality; {See **"National Justice Compania Naviera S.A. v The Prudential Assurance Company Ltd"** ("**The Ikarian Reefer**") **(1993) 2 Lloyds Report** 68} in support of this proposition; and a duty of objectivity "both as to substance as well as to form". The case, **Field v Leeds City Council (2000) The Times January 18**, is cited as authority for this. By way of highlighting the need for the expert to give independent unbiased evidence to assist the court, the submissions continue with the following propositions:-

a. "The expert evidence presented to the court should be and should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation". {See **Whitehouse v Jordan (1981) 1 WLR 246 per Lord Wilberforce at p 256**}.

b. "Independent assistance should be provided to the Court by way of objective and unbiased opinion regarding matters within the expertise of the expert". **{Polivitte Ltd. v Commercial Union Assurance Company (1987) 1 Lloyds Report 379**

This head of submissions is to be seen as closely allied to, or even part of, the next head set out at 3 below.

3. The Report is to be excluded because of bias or Apparent bias

The submission in relation to this head is in the following terms: "Where there is a relationship between the proposed expert and the party calling him which a reasonable observer might think capable of making the views of the expert unduly favourable to that party, his evidence

should not be admitted however unbiased his conclusion might probably be". {**Liverpool Roman Catholic Trustees v Goldberg (2001) 1 WLR 2337**} (per Evans-Lombe J. at page 2340 of that report). The applicants point to the fact, previously disclosed to Norma McIntosh J. at the case management conference at which approval was given for this expert to provide a report, that the author of the report, Edward Avey, had in the past been a principal in a firm, Kroll Lindquist Avey Company, which had previously been retained in or around July 1997 by FINSAC, (a Government of Jamaica owned company), "to review the activities of the EFN (Eagle Financial Network) including organizational structure, share capital transactions, related party transactions, and certain significant investments made by the EFN, in particular, Fort Belle".

It seems clear that in order to succeed on this submission, several different elements have to be proven. Thus there must be established, that there is a relationship between the expert and the party securing the report, and; a reasonable person would be led to believe that ***such a relationship would make the expert predisposed to be unduly favourable*** (my emphasis) to the party calling him. Put another way, the relationship would provide the "interest" upon which the presumption of bias would be founded. I believe that there is much merit in the submissions in opposition to this point, by the claimants' attorneys that it is now too late to take this point of the expert's prior engagement, as this had been fully disclosed previously. The applicants further submitted that the terms of the agreement under which the firm (KLA) had been retained should be made available to the Court so that the Court could make up its own mind as to the extent of any interest, and whether the expert witness' report should be treated as "the independent product of the expert witness, uninfluenced as to form and content by the demands of the litigation". It was submitted that since the expert had been a part of that

organization which had done considerable work for the Government, he himself "has an over-riding interest, financial and otherwise, in the outcome of the proceedings". It is worth noting that there was no evidence presented that the expert had any *present* "over-riding financial interest", or indeed any other interest, in the outcome of these proceedings. In any case, this all seems to me to be another aspect of the "interest/bias" argument being advanced by the applicants, and I shall explore this more fully when I consider the case of Helical Bar below.

4. Failure to comply with the provisions of Rule 32 of the CPR

This submission is directed at purported procedural shortcomings of the report itself. The applicants submit, in their written submissions:

> "Although the Court may give permission, as has been done in this case, that permission is not an acceptance of the Report itself or the contents of the Report. It does not mean that whatever is presented by the expert is accepted automatically. What it means is that in order for the report to qualify for use as evidence the report must comply with the Civil Procedure Rules 2002 and the law relating to the admissibility of evidence. If it does not so comply, the other party is at liberty to apply to have it excluded or the Court may exclude it for not complying with the CPR or for being contrary to the law of evidence in relation to expert opinions".

They say that the Report of the expert "fails to comply with the provisions of Rule 32", and in particular Rule 32.13(2) and (3). These provisions are in the following terms.

> At the end of an expert witness's report there must be a statement that the expert witness-
> (a) understands his or her duty to the court as set out in rules 32.3 and 32.4;
> (b) has complied with that rule;
> (c) has included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
> (d) has given details in the report of any matters which to his or her knowledge might affect the validity of the report.
>
> There must be also attached to an expert witness's report copies of –
> (a) all written instructions given to the expert witness;
> (b) any supplemental instructions given to the expert witness since the original instructions were given; and

(c) a note of any oral instructions given to the expert witness, and the expert witness must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert witness, the party's attorney-at-law or any other person acting on behalf of the party.

Counsel for the defendants said they found support for this submission in the case of **Stevens v Gullis (2000) 1 All E.R. 527** which they cited as authority for the proposition that where

(a) The expert witness' report is addressed, not to the court, but to the instructing party;

(b) The report does not contain a statement of truth; and

(c) The report does not conclude with a statement that the expert understands his duty to the court and has complied with that duty,

then, such a report must be excluded. It was also submitted that the alleged breaches of the Civil Procedure Rules were, in fact, not merely "procedural" but substantive, and fatal, though it was never explained why a breach of rules of procedure, should be elevated to a breach of substantive legal principles.

Let me before proceeding any further, firstly, dispose of one of the themes of the applications to exclude the expert witness' report, the proposition that there is a need to have a "Statement of Truth". It is to be noted that there is *no requirement in our CPR 2002* for the expert witness' report to have appended thereto a "Statement of Truth". Secondly, I should point out that **Stevens v Gullis** is not, in any event, authority for the proposition advanced here. In fact, a reading of that case makes it quite clear that the decision to exclude the expert's report there was *not* because the report did not contain the mandated provisions, but rather, because of a *failure or refusal on the part of the expert to comply with orders of the court* to set out the matters referred to in paragraph 1.2 of the English Practice Direction, supplementary to the

English CPR Part 35, (the equivalent of our Part 32). The provisions of the English Practice Direction are almost identical to the provisions of our Rules 32.13(1) and (2) set out above. However, in addition, the English Practice Direction provides in the material sections, as follows:

> An expert's report must:-
>
> - ❖ contain a statement that the expert understands his duty to the court and has complied with that duty (rule 35.10(2)), and
> - ❖ contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based (rule 35.10(3)).
> - ❖ An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 1.2 (7) and (8) above.
> - ❖ The form of the Statement of Truth is as follows:- "I believe that the facts that I have stated in this report are true and that the opinions I expressed are correct".

As noted in the headnote to this case:-

> "The matters referred to in paragraph 1.2 included a statement that the expert understood his duty to the court and had complied with that duty (paragraph 1.2 (7)) and a statement setting out the substance of all material instructions (paragraph 1.2(8)). SI (the proposed expert witness in question) *failed to provide the required information within the prescribed time limit,* (my emphasis) and the matters returned to the judge a month before the trial was due to start. The judge also came to the conclusion that the expert was not cooperating with the other experts in the case and barred the proposed expert from acting as an expert witness.
>
> **Held** – The requirements of the Practice Direction to CPR Pt 35 were intended to focus the expert's mind on his responsibilities so that the litigation might progress in accordance with the overriding principles contained in CPR Pt 1. In the instant case G's expert had demonstrated that he had no conception of those requirements, and the judge had had no alternative but to bar G from calling him as an expert witness in the third party proceedings".

It must be clear from the above-cited passage, that this case is not authority for the propositions advanced. Indeed, the ratio decidendi is considerably more circumscribed than suggested in the submissions.

Out of regard for the obvious diligence of the applicants' attorneys in support of their applications for the Orders to exclude, I would wish to mention some other submissions and authorities in support thereof, raised by them. It was submitted that the case **Derby & Co. Ltd & Others v Weldon & Others (No. 9) [1991] 1 W.L.R. 652** is authority for the submission that "if the opinion was not properly researched because it was considered that insufficient data was available then that has to be stated with an indication that the opinion is provisional". There is, of course, no obligation to so qualify the expert's report unless there is evidence of such "insufficient research". In the instant case there was no such evidence, and I hold that the failure to state such a qualification is immaterial in the absence of such evidence.

It was also submitted for the applicants and, if I may say so, correctly, that the rules governing the use of expert evidence, are designed to ensure that the evidence is independent and "not slanted or coloured by the stance of the instructing party". As was stated by Lord Justice Simon Brown in **Mutch v Allen (2001)EWCA Civ 76 (2001) The Independent 5 March, C.A.** cited by the applicants:

> "This new regime is designed to ensure that experts no longer serve the exclusive interests of those who retain them, but rather contribute to a just disposal of disputes by making their expertise available to all. The overriding objective requires that the court be provided with all relevant matter in the most cost effective and expeditious way. This policy is exemplified by provisions such as rule 35.11 which allows one party to use an expert's report disclosed by the other party even if that other party has decided not to rely on it himself."

The applicants argued from this proposition that the duty of impartiality owed to the court cannot be complied with by this witness as there is evidence that he is not an impartial

witness, having regard to his "interest" in the outcome of the litigation. In support of this, the written submissions point to the affidavit of Mr. Jalil Dabdoub which states, inter alia:

> "I was aware that Kroll Lindquist Avey were employed by the Government of Jamaica and /or FINSAC to conduct forensic investigation and audits into the Eagle Financial Network. That the Government of Jamaica and/or FINSAC have a deep and overriding interest financial and otherwise in the outcome of these proceedings".

In so far as this submission is concerned, I only need to say that it should be clear that the extract from the affidavit evidence given as support for the exclusion of the report on the basis of partiality, constitutes a patent *non sequitur,* and does not assist the submission.

Not surprisingly, the attorneys for the claimants strongly opposed the application and their point of departure was a consideration of the nature of the expert evidence being adduced in the particular circumstances of the instant case, and of the witness' special area of expertise. It was submitted that the witness is "a forensic and investigative accountant". They pointed out that the word "forensic" means, "of, used in court". The submission cited the University of Toronto website which, it claims, defines "forensic and investigative accounting" as "**the rigorous investigation into the financial aspects of a particular situation, usually with the objective of establishing evidence relating to possible or pending criminal or civil legal proceedings".** (Emphasis supplied) It is submitted further by the claimants' attorneys that, "the forensic and investigative accountant reviews documents and other evidence in commercial disagreements or where wrongdoing is suspected, and forms an opinion as to who did what and to whom. That is what Mr. Avey was appointed to do, and that is what he has done".

I am satisfied that "forensic and investigative accounting" is a field susceptible of expert testimony. Support for the proposition that once it is established that there is a recognized and discreet body of learning with identifiable rules and standards, an expert with that body of knowledge may be called to give expert evidence to assist the court, is found in the case *Barings plc (In Liquidation) and Another v Coopers and Lybrand (a Firm) and Others; Barings Futures (Singapore)(PTE) Ltd (In Liquidation) v Mattar and Others* Times Law Reports, March 7, 2001. In a report of that case, (also decided by Evans-Lombe J., extensively referred to below in relation to the case of **Liverpool Roman Catholic Trustees v Goldberg (2001) 1 WLR 2337**), the following extract is found:

> Expert evidence was admissible in any case where the court accepted that there existed a recognized expertise governed by recognized standards and rules of conduct capable of influencing the court's decision on any of the issues which it had to decide, if the witness to be called satisfied the court that he had the necessary expertise to give potentially helpful evidence.
> Evidence meeting that test could still be excluded if the court concluded that calling such evidence would not be helpful in resolving any issue in the case justly, for example where the issue to be decided was one of law or was one on which the court could reach a fully informed decision without the hearing of such evidence.

In response to the applicants' claim that the Report contained hearsay because it relied upon documents not in evidence, the claimants' submitted that, except for a few documents not presently in any bundles before the Court, but for which an application for permission to file a supplemental bundle is now made, all the documents referred to are in filed bundles. In this regard, the claimants note that paragraph 1(a) of an order of this Court dated December 18, 2002 required the parties to "file an agreed bundle of documents by March 14, 2003, failing which, either party was to file a bundle of the documents on which it intended to rely by March 21, 2003". The parties did not arrive at an agreement, and on March 18, 2003 the

Claimants filed 17 bundles which included all the documents disclosed by the parties pursuant to Order for Directions dated May 5, 1999. The written submissions of the claimants continue with the following:-

> Paragraph 1 of Order dated September 6, 1999, provided that:
> "Any objection to the inclusion of a document in an agreed bundle shall be made within 14 days of the expiration of the inspection period, and in the absence of such an objection the parties shall be deemed to have agreed to the document being included in such a bundle."
>
> No objections were filed within the time stated or at all. CPR 28.19 provides:
>
> 28.19 (1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this part unless that party serves notice that the document must be proved at trial.
> (2) A Notice to prove a document must be served not less than 42 days before the trial."
>
> None of the parties have (sic) served a notice pursuant to this rule. It is submitted, in the circumstances, that the documents must be admitted into evidence pursuant to this order and rule, and as such the Expert is entitled to refer to them and consider them in his report".

Ex hypothesi, it was submitted, the submission of the applicants, that the report is based on hearsay, and should not be accepted, (specifically insofar as it related to documents purportedly not in evidence) is without merit. It seems to me that, at least with respect to this basis of the applications, (i.e. the purported reliance upon documents not in evidence), the applicants herein have not made out a case for exclusion of the expert witness' report.

Another plank of the applicants' applications to have the expert's report excluded, was that it "contained opinions and draws conclusions that are in areas outside of his expertise". In response to this submission the claimants' attorneys say that there is no evidence in support of this allegation and, in any event they submit, if the judge is of the view that any particular

opinion of the expert is outside the expert's expertise, he is entitled to ignore it. As I understand that claimants' submission in opposition, it is to the effect that the inclusion of opinions said to be outside the competence of the particular expert, is a matter that ought properly to be left to the trial court, which can make the appropriate determination as to the weight, if any, to be given to such opinions. In this regard, claimants' counsel refer to "**EXPERT EVIDENCE: LAW AND PRACTICE"** by Hodgkinson. At page 12 of that work, the learned authors state:

> "Although the test of expertise in relation to a proposed witness involves an assessment of the qualities of the witness himself, it seems clear that the field of his expressed expertise is not wholly irrelevant to the question of competence to give expert evidence. Thus it can be inferred from the remarks of *Vaughn-Williams J. in R v Silverlock* that the field of practice of a witness may not have given him the opportunity to make judgments about the relevant subject matter. The practice of the courts, however, indicates that this is a question considered more fully at the weight than at the "admissibility" stage."

Indeed, the learned author makes the trenchant observation concerning how the expert works in the following passage, to which I have already adverted in another context:

> "It is relevant to the question of expertise that an expert witness is usually called for the purpose of drawing inferences from given facts and expressing opinions about matters before the court, unlike lay witnesses. It is the ability of the witness to do this, within a particular specialist field, which justifies the distinction between expert and lay witnesses for evidential purposes."

It should be no surprise that a significant part of the effort to challenge the inclusion of the expert report was grounded in canvassing the issue of whether the report was independent, as it was obliged to be, or "partial", or might be deemed to be so, because of any special "interest" the expert might have in the outcome of the litigation. It stands to reason that several authorities cited by the applicants dealt with the issue of apparent bias on the part of expert witnesses. These included the previously cited cases, The Ikarian Reefer; *Polivitte Ltd v*

Commercial Union Assurance Co. plc; Fields v Leeds; Liverpool Roman Catholic Trustees Incorporated v Goldberg and Whitehouse v Jordan. Indeed, the extract from Lord Wilberforce's judgment in this latter case forms the core of the submissions under heads 2 and 3 of what I have characterized in this judgment as the submissions on behalf of the applicants.

> "The expert evidence presented to the court should be and should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation".

With respect to this authority, attorneys for the claimants submit that the judgment of the Court of Appeal and particularly that of Lord Denning, provides a more fulsome account of the facts of the case than the House of Lords decision from which Lord Wilberforce's extract is taken. It was submitted that the real gravamen of the objection to the inclusion of the expert's report in that case was that it had been "settled" by counsel. As Lord Denning stated at page 655 of the judgment, the report suffered "from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually "settled" by counsel. In short it wears the colour of special pleading rather than an impartial report. Whenever counsel "settle" a document we know how it goes. A striking instance is the way in which Professor Tizard's report was "doctored". The lawyers blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence". It was submitted by the claimants' counsel herein, that there could be no serious contention that the Avey report suffered from such a malady, so as to require its exclusion.

The claimants' attorneys further submit that there is support for their position, (that the previous engagement of the expert's former firm by one the Government of Jamaica and its wholly-owned company FINSAC, does not automatically disqualify the expert from providing

a report for the Court in this case), in another of the cases cited and relied upon by the applicants to support their application, *Field v Leeds City Council.* In particular, claimants' attorneys point to the judgment of Waller, L.J. where he said the following.

> "The question of whether someone should be able to give expert evidence should depend upon whether: (i) it can be demonstrated that that person has the relevant expertise in an area in issue in the case; and (ii) it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence".

This proposition also receives further support in the judgment of May L.J. in the same case.

> "As to the questions of opinion and generally, I entirely agree with my Lord, the Master of the Rolls, that there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect the weight, but that is another matter".

Thus, from these citations, it would appear that even where the prospective expert may be, and *a fortiori,* may have been, employed by a party, this would not establish, *ipso facto*, a reason for excluding his report on the basis of a presumed interest and resultant bias.

The claimants' attorneys particularly take issue with **Liverpool Roman Catholic Trustees v Goldberg (2001) 1 WLR 2337,** another authority cited, and heavily relied upon, by applicants. In that case the court seemed to inveigh against the use of the expert testimony of a barrister on behalf of the defendant, a close personal friend and chamber-colleague of many years standing. It was submitted that the principles espoused by the judge therein, no longer represented the law. There, although the parties settled the substantive claim before the delivery of a decision, Evans-Lombe J., decided that he still needed to "deal with one question which arose in the course of the case and in respect of which I received submissions. The question concerns the admissibility as expert evidence of the evidence of Mr. Flesch QC, called on behalf of the defendant". The judge deferred his decision on that issue until the end

of the case, and indeed the witness was called and cross-examined. At the end of the trial the judge decided that while it was clear that Mr. Flesch was an expert, it would not be proper to allow the evidence to be used, in part because much of it related to points of law, and "where the question is one of law, expert evidence will be excluded because that is within the expertise of the court and expert evidence does not assist: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1979] Ch* 384". Secondly, he concluded that the test of "apparent bias" was to be extended to the expert witness who could be excluded on that ground alone. I accept the submission of the claimants' counsel that this no longer represents a proper statement of the law.

Indeed, counsel for the claimants, in submissions opposing the applications, cited the case, ***Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] 3 W.L.R.1104***. In that case the Court of Appeal "expressly considered not only the *Field v Leeds City Council* case (supra), but also the judgment of Evans-Lombe J. in the *Liverpool Roman Catholic Archdiocese Trustees Incorporated* case". In delivering the judgment of the Court of Appeal, Lord Phillips of Worth, MR, cited with approval the Field v Leeds case and particularly the sections of the judgments of Waller and May, LLJ. I cite with approval and adopt expressly, for the purposes of the judgment upon this application, the following section from the learned Master of the Rolls' judgment at pages 1126-1127 of the WLR.

> This decision is to be contrasted with observations made by *Evans-Lombe J. in Liverpool Roman Catholic Archdiocesan Trustees Inc. v Goldberg (No 3) (Practice Note) [2001] 1 WLR 2337*. That case involved a claim for professional negligence in relation to advice given by a Queen's Counsel specializing in tax law to the plaintiff about its tax affairs. The defendant called to give expert evidence, a Queen's Counsel who shared his chambers and was a personal friend of long standing. The question of whether, in these circumstances, the expert's evidence was admissible was raised at an

early stage of the trial. The judge decided not to deal with admissibility at that stage, but to deal with that question in the course of his judgment. The action then settled, but the judge felt it appropriate to deal with the admissibility of the expert's evidence. He held that the evidence was inadmissible on the grounds of the public policy that justice should not only be done but should be seen to be done. He put the matter thus:

> "I accept that neither section 3 of the [Civil Evidence Act 1972] not the authorities under it expressly exclude the expert evidence of a friend of one of the parties. However, in my judgment, where it is demonstrated that there exists a relationship between the proposed expert and the party calling him, which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party."

The learned Master of the Rolls continued:

> "This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. (*Emphasis mine*) It would inevitably exclude an employee from giving expert evidence on behalf on an employer. Expert evidence comes in many forms and in relation to many different types of issue. 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, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the Court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of {case management}. In considering that question the judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules."

In that case, the Court of Appeal held that if an expert held *a significant financial interest in the outcome of the case, by for example, giving evidence on a contingency basis*, (emphasis mine), such an interest was highly undesirable and only in a very rare case indeed would the court be prepared to consent to an expert being instructed under a contingency fee agreement. This was because in many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case.

Lord Phillips with respect to that issue, said:-

> "The public policy in play in the present case is that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that outcome."

In the instant application before me, I have formed the view that the expert, Mr. Avey, does not have "an interest in the outcome" of the litigation, within the contemplation of Lord Phillips. I also hold that the test of apparent bias advocated by Evans-Lombe in *Liverpool*, has been over-ruled 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.

The very recent case **Helical Bar plc and Another v Armchair Passenger Transport Limited** [2003] EHWC 367 (QB) ("Helical Bar") was indeed invaluable in assisting me to arrive at my decision herein. Although the decision was one by Nelson J. at first instance, the comprehensive nature of the review of the principles makes extensive quotation therefrom appropriate.

This case involved an appeal against an order of His Honour Judge Ryland made on the 16th August 2002 in which he set aside the order of His Honour Judge Zucker dated June 27, 2002 granting the defendant permission to rely upon the expert report of Colin McLean ("M") dated 20 June 2002. The evidence of M was excluded on the basis that he had been employed in 1999 as Chief Executive of a company that was involved in the action, that his evidence was therefore inappropriate as it was tainted by that connection and justice could not fairly be seen to be done if he were appointed expert in such circumstances. In setting aside Judge Zucker's order, Judge Ryland had relied expressly upon the Liverpool case. Nelson J. in the course of his Helical Bar judgment, pointed out that the Court of Appeal decision in Factortame, disapproving the observations of Evans-Lombe J. in Liverpool, came out after the conclusion of the hearing and, accordingly, he "permitted the parties to make further submissions in

writing as to the impact of that decision". The Helical Bar decision is therefore important as a definitive approval of the Factortame case and its disapproval of Liverpool and the test of apparent bias.

The facts in the case head note are set out below, *in extensu*.

> The defendant's bus collided with the first claimant's car when it was being driven by the second claimant. The first claimant hired a substitute vehicle from S Ltd. The first claimant brought proceedings in which it claimed, inter alia, the hire charges. The second claimant claimed damages for personal injury. The defendant denied negligence and challenged the claim for car hire. The defendant sought permission to rely upon an expert report of M on the basis that the report would provide factual comparable hire rates for consideration by the court. M. was a market researcher and consultant who specialized in surveys of the self-drive hire market, selling such surveys to spot hire companies. He had given evidence for both claimants and defendants in credit hire litigation. The judge gave the defendant permission to rely upon the report. The claimants applied successfully for the order to be set aside relying on the fact that M had previously been employed by S Ltd so that his evidence was not independent. The judge was of the opinion that it was not right that someone with a connection, even a past connection, to a party should give evidence as an expert and that justice would not be seen to be done if M was appointed. The defendant appealed submitting that the judge had applied too stringent a test. The appeal would be allowed.
>
> 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. Hence, once such an interest or connection was ascertained, a decision had to be made promptly as a matter of case management as to whether the expert's evidence was precluded or not. In the instant case the judge applied the wrong test and his decision would be set aside. There was no proper basis for concluding that M was unwilling to or would be unable to abide by his duty to the court. He had the relevant expertise to give evidence, he was aware of his duty to the Court and willing and able to fulfil that duty. It followed that the defendant would be granted permission to rely on M's report. {R (On the application of Factortame) v Secretary of State for Transport, Environment and the Regions (No 2) [2002] 4 All E.R. 97 applied}

The learned trial judge, Nelson J., carefully analysed, *inter alia*, the decision of Judge Ryland overturning Judge Zucker's allowance of M's expert report, showing how that decision was

grounded in the earlier decision of Evans-Lombe J., in Liverpool. Thus, at paragraph 12 of his judgment he had this to say.

> "During the course of argument, when he was being addressed by counsel on behalf the defendants, Judge Ryland said:-
>
> 'I think it is highly undesirable for someone with a connection, even a past connection to a party, should give evidence as an expert. I am not surprised at this application. I think that the Courts – even before that decision, on its special facts, of Mr. Justice Evans-Lombe – have looked to see whether or not the dictates of natural justice have been fulfilled. As long as I have been at the Bar and on the Bench, it has always been regarded as being highly undesirable to have an expert who had a connection with one of the parties.
>
> In his judgment, the Judge noted that Mr. McLean had been Chief Executive some two to three years ago 'of a company that is intimately involved in this matter'. He noted that the Claimant objected because justice could not possibly be seen to be done if he was going to be the expert whose statement was going to be put in'".

It is clear that Judge Ryland proceeded on the basis that the reasoning in Liverpool was correct. However, as is apparent from Nelson J's judgment, the decision in the later Factortame case showed that it was not. Nelson J's judgment contained a complete review of all the relevant authorities including Whitehouse v Jordan, the Ikarian Reefer, Field v Leeds, Liverpool v Goldberg and, the most recent, Factortame. The judge accepted that the starting point was Lord Wilberforce's dictum in Whitehouse v Jordan, that:

> "Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation"

Further he agreed with the principle enunciated in Ikarian Reefer to the effect that:

> The expert should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (See cite above).

Having reviewed the submissions and the law, Nelson J concluded with the following cite in paragraphs 47 *et seq*, which I also adopt for purposes of dealing with this application.

> The decision of the Court of Appeal in Factortame makes it clear that the test of apparent bias applicable to a court or tribunal is not the correct test in deciding whether the evidence of an expert witness should be excluded. The apparent bias test was, it appeared, the test which Mr. Justice Evans-Lombe had applied in Liverpool Roman Catholic Archdiocese Trustees Incorporated and hence his observations were disapproved. Such a test would, as Lord Phillips said in Factortame inevitably exclude an employee from giving expert evidence on behalf of an employer, a restriction on the calling of expert evidence which does not exist as was confirmed in Factortame.
>
> It is 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 determines whether an expert witness should be precluded from giving evidence. Hence, once such an interest or connection is ascertained a decision must be made promptly as a matter of {case management} as to whether the expert's evidence is precluded or not.

Given the submissions made in these proceedings concerning the potential interest of the expert in the outcome, I also consider the following comments of Nelson J. to be apt. I also make the observation unlike in the Helical Bar case, here the court has been invited and has taken the opportunity to review the expert's report.

> It is important to note from the submissions made by the parties before Judge Ryland, and from the Judge's judgment that no attempt was made to analyze Mr. McLean's report or say that it showed animus or bias toward Swift. This is in contrast to the submissions which have been made to me in the course of this appeal.
>
> I am satisfied that Judge Ryland decided to exclude Mr. McLean's evidence not upon the nature and extent of his connection and whether that rendered him insufficiently independent to be able to comply with the expert's duty to the court, but upon the basis that the fact of his connection with Swift alone meant that justice could not be done if his expert's report was submitted in evidence in the case.
> On the basis of the decisions in *Factortame* and *Field*, this is the wrong test. The judge's approach suggests that he would have excluded an employee from giving expert evidence on behalf of an employer for the same reasons, namely that justice could not be seen to be done if he were permitted to give such evidence. This approach is specifically disapproved in Factortame and Field.

Nelson J. said that after an examination of the several authorities, he gleaned the following principles, and I adopt and endorse the formulations as he has articulated them.

i. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.

ii. the existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.

iii. Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of {case management}.

iv. The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. *The test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence.*

v. The questions which have to be determined are whether (i) the person has relevant expertise and (ii) he or she is aware of their primary duty to the Court if they give expert evidence, and willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.

vi. The judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.

vii. If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.

Having dealt with the main planks of the applications, I mention briefly the submissions of the defendant/applicants to the effect that the procedural failures ought to give rise to exclusion of the expert's report. I believe that I have said enough to indicate that I am of the view that the court, in dealing with matters covered by the Civil Procedure Rules 2002, (CPR) has a wide discretion to allow for the correction of such failures. In this regard, I observe that the CPR, like the English Rules of 1998, gives the Court broad powers to control and limit evidence, including expert evidence. Thus, Rule 32.2 states that:

> Expert evidence must be restricted to that which is reasonably required to resolve the proceedings.

CPR 29.1 (2) enables the Court to exclude evidence that would otherwise be admissible, under the court's general power to control the evidence to be given at any trial. This must be taken to include evidence by way of expert witness reports. CPR 32.6(1) provides that no expert

evidence is admissible without the Court's permission whether in writing or oral. The expert's duty to the Court overrides any obligation to the person from whom he has received instructions or by whom he is paid (CPR 32.3 (1) and (2). The rules provide a number of conditions designed to ensure that the court has the benefit of independent expert advice in pursuit of the truth. In this regard, the failure of the expert, Mr. Avey to provide a statement attached to his report indicating that he understands his duty to the court as set out in rules 32.3 and 32.4, and has complied with that duty, while important is not fatal, and may be cured by the appropriate addendum. This, as noted above, has been applied for by claimants' attorneys.

On balance I consider that the procedural failures by the claimants' expert witness report do not justify excluding the expert evidence. Such procedural failures can be dealt with by way of court orders herein, or at the conclusion of the proceedings, if necessary, special cost orders.

I have taken the time to consider exhaustively the issue and the authorities because, as far as I am aware, this is the first time that an application of this nature, regarding expert evidence and its admissibility, has arisen since the implementation of the new CPR.

I find additional support for the determination I have arrived at, in dicta of Evans-Lombe J., (the judge in *Liverpool v Goldberg*, referred to above.) in a case in the Chancery Division, *Barings plc (In Liquidation) and Another v Coopers and Lybrand (a Firm) and Others; Barings Futures (Singapore)(PTE) Ltd (In Liquidation) v Mattar and Others* Times Law Reports, March 7, 2001. The learned judge there stated, in reference to expert evidence:

> "The modern view was to regulate such matters of evidence by weight rather than admissibility even where the evidence in question went to the ultimate issue in the case. A trial judge could safely and gratefully rely on such evidence provided that he did not lose sight of the fact that the final decision as

> to what was or was not negligence was for him alone: see *In re M and R (Minors)* [1996] T.L.R. 338 [1996] 4 All E.R. 239 at 253

In light of what I have set out above, the following Orders Are made.

1. Applications to exclude the report of the expert witness from use in these proceedings are denied.
2. Expert witness is given three (3) days to file and serve an addendum to the expert witness report consistent with CPR 32.13.
3. First, Second and Fourth defendants (Applicants) are given until May 26, 2003 to submit written questions on the report of Edward Avey.
4. Since this is a matter which ought properly to be dealt with at case management, costs will be costs in the claim.
5. Leave to appeal these orders, denied.