IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2009 HCV 03398

BETWEEN	**VRL OPERATORS LIMITED**	**CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**
AND	**THE NATIONAL WORKS AGENCY**	**3RD DEFENDANT**
AND	**JOSE CARTELLONE CONSTRUCCIONES CIVILES S.A**	**4TH DEFENDANT**
AND	**STANLEY CONSULTANTS INC.**	**5TH DEFENDANT**
AND	**FREDERICK RODRIQUES & ASSOCIATES LIMITED**	**6TH DEFENDANT**

IN OPEN COURT

Mr. Walter Scott QC, Dr. Lloyd Barnett, Mr. Weiden Daley instructed by Hart Muirhead Fatta, Attorneys-at-Law for the Claimant.

Mr. Kevin Williams, Mr. Collin Alcott instructed by Williams Alcott Williams for the 1st Defendant.

Ms. Carlene Larmond, Mr. Andre Moulton instructed by the Director of State Proceedings for the 2nd and 3rd Defendants.

Mrs. Denise Kitson QC, Mrs. Suzanne Risden-Foster, Ms.Shanon Mair instructed by Grant Stewart Phillips for the 5th Defendant.

Mr. Charles Piper QC, Ms.Tamika Cogle-Duhaney instructed by Charles E. Piper & Associates for the 6th Defendant.

Heard on the 9th, 10th, 11th, 12th and 13th February 2015.

Preliminary Ruling-Evidence- Whether computer generated evidence admissible-whether business records admissible-Sections 31 DEFG&H of Evidence Act- Whether necessary to call person who input the data onto computer system – meaning of "Subject To".

Cor: BATTS J,

[1] On the 27th January 2015 at a hearing in Chambers, I ruled among other things that:

> *"The Claimant's application to admit evidence is deferred for consideration at the trial."*

[2] As fate would have it, the matter appeared on my trial list for the 9th February 2015. The Registrar assured me that the parties had no objection to my undertaking the trial, notwithstanding the fact that I had made certain Pre-trial Orders.

[3] Upon commencement of trial Dr. Barnett for the Claimant called as his first witness Mr. Peter Williams. The evidence in chief of this witness related to the admissibility of certain documents being the Price Waterhouse Coopers audit letters and attached financial statements *[page 317 to 816 of the Judges Bundle filed on the 25th November 2014]*. The witness was allowed to produce and identify his filed copies and after cross examination an application was made to admit those documents as Exhibit 1. Having heard submissions I admitted the documents and promised to state my reasons as a part of the final judgment in this matter. I made it clear however that the audit letters were opinion evidence and the attachments, the documents on which the opinion was given. It would still be necessary for that substratum of fact to be proved.

[4] The Claimant's next witness was Mr. John Issa. The witness statement *[Bundle 2 H]* on which the Claimant intended to rely related only to the financial statements attached to the auditors (PWC) reports earlier alluded to. At this juncture Mr. Charles Piper QC queried whether the trial on substantive issues had commenced or whether the court was treating with the application to admit evidence as a discrete issue. This was a point also raised by Mrs. Kitson QC. Dr. Barnett indicated that Mr. Issa at this juncture was being called in respect of the application to adduce evidence. After some interchange, it became clear to me that although the trial had commenced the parties all were of the view that the application to adduce evidence was being dealt with discreetly, so that some

witnesses were likely to be recalled to give other evidence and some for further cross examination dependent on which documents were adduced.

[5] I must admit that this was not my anticipation when I ordered that the application to adduce be made at the trial. However, upon revisiting the terms in which it was stated, I fully understand why the parties would have adopted this approach. In the result therefore, the application was eventually heard as a trial within a trial. It is for this reason; evidence having been lead and there having been cross examination, re examination and evidence in rebuttal, I at this stage decided to state my decision and the reasons therefore.

[6] The Claimant also called evidence of Messrs. Anthony Cheng, John Issa, Lenworth Lobban, David Kay and Antoinette Lyn. Dr. Patrick Dallas was called by the 5th Defendant as a rebuttal witness. The parties then made extensive submissions on the matter of the admissibility of the various documents. I will not restate the evidence or the submissions, but will reference them only to the extent necessary to explain my decision. The parties are to rest assured that I found them all very insightful and certainly mean no disrespect by adopting this approach. However, the exigency of time and space makes it convenient to do so.

[7] The documents were helpfully categorized in groups: ***A, B, C*** and ***D*** *[see Claimant's Notice of Intention to tender in Evidence Hearsay Statements made in documents filed on the 14th October 2014, page 28 Judges Bundle filed 25th November 2014]*.

> ***Category A****: These were monthly revenue analysis and occupancy statistics as well as various statistics and reports related to room revenues. It was contended that these were computer generated.*
>
> ***Category B****: These were the relevant certificates of competence and professional training for Mr. Anthony Cheng.*
>
> ***Category C****: These were the Jamaica Tourist Board Annual Travel Statistics for 2005 and 2008.*
>
> ***Category D****: These were the auditors reports and financial Statements and supplementary financial statements for VRL Operators Ltd. and International Hotels Ltd and VRL Management Ltd for various years.*

I will indicate my decision and reasons with respect to each category.

[8]. The ***Category D*** documents were admitted as **Exhibit 1**. The opinion letter for the auditors was deponed to by Mr. Peter Williams, a partner of Price Waterhouse Coopers. The accompanying financial statements were signed by Mr. John Issa who identified them as the financials of companies of which he was chairman. I did not understand the Defendants, all this evidence having been lead, to be pursuing seriously the objection to this category of documents. I will note them as **Exhibits 1 (a) -1(m)**.

[9] ***Category B*** documents. The objection to these was not pursued. I therefore will admit these as **Exhibit 2 (a) – (i).**

[10] ***Category A*** documents. These are to be found at *pages 32- 85* of the Judges Bundle filed on the 25th November 2014. They are unsigned computer generated tables and data related to room occupancy and revenues over a period of time. Mr. Anthony Cheng, an Information Technologist gave evidence with respect to the Claimant's "*System Applications and Products in Data Processing"* or *SAP* systems. This witness was responsible for the maintenance of the computer system hardware. The hardware consisted of computer servers and network devices. He explained among other things that the system had "redundancies". By which he meant it would continue operating at all times even if one part was down, even if at a reduced capacity. He deponed that at all material times between May 2004 to October 2004 the system operated properly, there was no alteration which would have affected the accuracy or validity of the content of the documents. The computer was properly programmed to execute the appropriate programme.

[11] The cross examination elicited from Mr. Cheng that he was not present when the data was inputted. Further, that human input was necessary. He acknowledged that this was so at the very inception of the process, however the majority was electronic. The data was inputted by persons all over and at varying locations, be they hotel, front desk or travel agents overseas. He stated that the access identification was departmental rather than individual. In terms of the ability to enter and change information the witness said very few people could, only the chairman and a few others. The system would indicate that there had been a change.

[12] He also explained that the *SAP* system took information from computers at each hotel. It is "networked" from hotel to the *SAP*. That is, from the Property Management System to the *SAP*. This is what he refers to as the "interfacing" with local computers. He indicated that the data entry could be done by hotel staff or even by the guest himself online. He also explained the maintenance regimes for the system.

[13] Also called in respect of this category of documents was Mr. Lenworth Lobban. His witness statement dated 10th October 2014 stood as his evidence in chief. He is an auditor and details his qualifications and experience. In the period 1996-2012 he worked for SuperClubs and was responsible to ensure that accounting information was accurate, complete and conformed with SuperClub's policies. He described the software he used to do this and stated that he was responsible for its maintenance. He was a member of the management team that developed and customized the *"SAP"* system. He described the process by which the spreadsheets were generated and said the system had not malfunctioned in the period. He identified the documents as having been generated by the *SAP*.

[14] When cross-examined he stated that as far as the software for the *SAP* was concerned he could fix a malfunction if it was a "customization" problem. The hardware was not his forte. He admitted that he did not personally input data. He could not remember who inputs data. He said he could recall no occasion on which the computers had malfunctioned at the Runaway Bay property. He stated at the outset of the *SAP* project the computers were all new. He explained that the information which went to the *SAP* was uploaded from various hotels and this was electronically done. He would be unable to say if the data inputted was incorrect.

[15] Mr. David Kay, the Vice President of Corporate Finance of the Claimant Company was also called to give evidence. His witness statement dated 6th February 2015 stood as his evidence in chief. He stated with respect to the subject documents that,

> "the persons who inputted the data contained in those documents are not identifiable because different persons at different times and at different locations, including foreign locations are responsible for carrying out those functions, and having examined the records I have ascertained that it is not possible to identify the particular individual such as employees of travel agents, accounting persons and front desk persons at hotels who at any particular time performed the function."

[16] Cross examination did not significantly change that assertion. The witness admitted that his job involved neither maintenance of hardware nor software. The following exchange occurred:

> *Q: If data was inputted incorrectly you could not say who did?*

A: It could be identified from the system.

Q: You knew Mr. Anthony Cheng?

A: I do

Q: He was in charge of hardware side of SAP system?

A: Yes

Q: He knows exactly how it would work?

A: The hardware yes

Q: Would you be surprised to know he advised us that system is such that he would not know who could know, could know the department but not the person?

A: Not really because he deals with hardware. On software side every entry you can track the user or the interface. If for example, we paid a contractor to set up a purchase order of $1000.00 and he should only pay $500.00 we can see who reports $1000.00 cost. It would be marked in the data field.

Q: On the SAP or Property Management System?

A: The SAP

The witness also explained how the system of bookings and cancellation functioned. In answer to Mr. Walter Scott QC in re examination, the witness explained in detail the controls he had earlier alluded to.

[17] Dr. Dallas then gave rebuttal evidence. His affidavit dated 26th January 2015 was, without objection, allowed to stand as his evidence in chief. I disclosed to the parties my close association with Dr. Dallas. This as it turned out was not unique to me in the courtroom and all parties indicated they had no objection to my continuing to hear the matter.

[18] Dr. Dallas is a consultant in Information and Communications Technologies, Chemical Engineering and Process Control and process Control Engineering. His impressive credentials were stated. He indicated that he had been asked to *"review and provide my professional opinion as to the content"* of the witness statement of David Kay, Anthony Cheng and Ludlow Lobban. He was specifically

asked to advise on the operation of the *SAP* software system and whether data entered therein can be adjusted or altered by its users.

[19] Dr. Dallas pointed out that alteration to stored data did not require an alteration to the hardware system. He states at paragraph 8:

> "SAP is an application software system designed to record data and provide reports aimed at enhancing the organizations planning and management functions. Like any system of this type, output information from the system, (comprising reports, results of analyses, etc) is always going to be generated from data within the system and more dependent on the source data inputted into the system."

[20] The witness concedes in paragraph 9 that *SAP* does have systems to *"ensure that edit/change/update functions are subject to very stringent control".* He states however that in an organization such as the Claimant various personnel would have access thereto for that purpose. He concludes that the system is subject to human intervention.

[21] When cross examined he explained his qualifications and expertise. He had no specific qualifications/experience in the *SAP* system nor had he examined it. He admitted he could therefore make no negative comment on the robustness of the *SAP* hardware. He relied upon the adage "garbage in, garbage out" and stated clearly that:

> *"I don't think hardware affects the accuracy of the Information coming out. Hardware prints."*

[22] Such was the evidence on this category of documents. It is fair to say that Dr. Dallas' evidence did not contradict in any significant way the totality of the evidence of the Claimant's witnesses. In particular, as to whether the system was functional and efficient. He underscored that which was already implicit in the evidence, that is, human input occurred at the stage of input or in the event corrections had to be made. He did however agree that there were controls in that regard.

[23] Having considered the evidence and the law, to which I will advert shortly, I have decided to admit into evidence the documents at *Category A* as **Exhibit 3 (a)-(i)**.

[24] These documents I admit as business documents under **section 31 F** and as computer generated documents under **section 31 G**. It is clear to me that these documents were *"created or received"* in the course of trade *[section 31F2(a)]*

and the information supplied was whether directly or indirectly, by persons who may reasonably be supposed to have had personal knowledge of the matters dealt with *[section 31F 2(b)]*. In other words the assorted persons, possibly in the hundreds at tour desks, front desks in the hotels, and even customers online, would have personal knowledge of the bookings they were making and would have done so in the course of business or trade. Furthermore, a notice and an objection having been filed, the Claimant has led evidence sufficient to demonstrate that,

> *"the person who made the statement cannot be found or indentified after all reasonable steps have been taken to identify him."*

[25] The Defendants all contend that there is an onus under this subsection to identify the persons who provided the information that was inputted and/or who inputted the data. Further, if such persons cannot be identified then it is necessary to show reasonable steps were taken to do so. This it is submitted the Claimant failed to do. I with respect believe such a construction would create a rather ludicrous situation. If the person cannot be identified of what utility is a reasonable step to identify or locate him? That is, no amount of reasonable care can achieve an impossibility. This is the effect of Mr. Kay's evidence in chief. Furthermore, the section imports reasonableness. The facts of this case almost speak for themselves. Hundreds if not thousands of persons have inputted the data, some overseas, some at travel agents, some from home computers. Even if each can be identified, would it be reasonable so to do? Their presence to give evidence would not enhance the reliability of the data as very few would genuinely be able to say *"I recall that such and such entry was made by me and it was correct and accurate".* The statutory purpose as it relates to business records is to obviate the need, in situations such as this, to call witnesses where it would be unreasonable so to do. These documents in any event record data, not statements in the classical sense. Mr. Kay's evidence as it related to the software's ability to identify the person inputting the data does not detract from this position. This is because of the practical impossibility and I dare say unreasonably expensive process which would have to be undertaken to identify every person who entered data which has found itself into these reports generated by the *SAP* system in the course of the Claimant's business.

[26] The authorities citied have not addressed **section 31 F** in the context of business related documents. The standard in a criminal trial or one involving fraud, is different to that in a civil case. In this matter, and on a balance of probabilities, I find that it would be impossible and impossibly practical and hence most

unreasonable to locate the persons who input all the data to be found in the documents at *Category A*.

[27] I also find that the requirements of **section 31 G** were satisfied. In this regard the Defendants submitted that the sections must be read together. Dr. Barnett on the other hand said they were discrete. I am persuaded that the words "subject to" in sections 31 E and section 31 F, mean exactly what they say. That is the rules as they are stated for "a statement made" must be read in light of, or with due deference to the specific provisions of section 31 G. Section 31 G therefore allows a statement in a document produced by a computer " which contains hearsay" to be admissible if it is proved among other things that, "there is no reasonable cause to believe that there was any error in the preparation of the data from which the document was produced".

[28] This latter requirement would be unnecessary and otiose if it were necessary to call the persons who input the data or to prove that such persons could not be found. In short it seems, with respect, that it would make nonsense of the existence of **section 31 G**, to place that further onus on the party seeking to rely on computer generated evidence. If the input persons have to be called then there is no advantage in having the document produced by the computer tendered. Each inputter will give evidence of the data he or she was responsible for. The modern tool, the computer, would then reflect neither a saving in time nor money if, in order to put the document it produces into evidence, one must first show that the several persons who ever input data are dead or otherwise unavailable. That could not have been the intention of Parliament and the words of the statute *"subject to"* far from compelling such a conclusion, suggests the precise opposite.

[29] The Defendants relied on several authorities. One of which was the criminal case of ***R v Spiby (1990)91 Cr. App R 186.*** The decision in that case was that the computer generated information was physical evidence. It was not a statement or data inputted by humans and hence was not hearsay. There was in effect no need to apply the English equivalent of our **sections 31 E** or **31 G**. I use the word equivalent loosely because the English provisions are markedly different from our own. I do not find the English cases particularly helpful. Nor is ***Desmond Robinson & The Attorney General of Jamaica v Brenton Henry and Sarah (Butt) Henry [2014] JMCA Civ 17*** particularly relevant. It seems to me that the *section 31 G* application failed because the trial judge found the supporting evidence unreliable. Indeed, the statement of principle by Panton JA(as he then was) is instructive:

> "section 31 G of the Evidence Act forbids the admission in any proceedings as evidence of fact, any statement contained in a document produced by a computer which constitutes hearsay, unless certain conditions are fulfilled".

> Mr. Lyttle's submission which the court ultimately accepted was that the witness "Naylor" gave evidence gleaned "from a computer in England that neither the court nor counsel for the respondents was privy to".

The conditions precedent to admissibility of the hearsay statements contained in a document produced by a computer were summarized by Panton JA. These be it noted did not include the **section 31 E or 31 F** particulars nor a need to account for the maker of the statement. The reference *(paragraph 26)* to Mr. Naylor's inability to identify the person who input the information is made only to explain why it was reasonable for the learned trial judge to treat with the evidence under **section 31 G** and not elsewhere. That is, the statement could only have been admitted if it satisfied the criterion for computer generated evidence and not otherwise. The learned trial judge therefore correctly rejected the evidence as not having established the preconditions to admissibility of computer generated evidence set out in **section 31 G**.

[30] As for the submission that the document is only admissible if it is proved there is no human input, I again find otherwise. **Section 31H** would be unnecessary if **section 31G** documents were only admissible if there were no human input. This is because **section 31H** treats with a statement contained in a document produced by a computer which *"does not constitute hearsay"*. That as the case of ***R v Spiby*** demonstrates, includes documents in which there has been no human input. **Section 31H** says it is still necessary to treat with the preconditions in **section 31G**.

[31] Finally therefore, it appears that on a true construction of the Evidence Act and having accepted the evidence and found as a fact that the preconditions in **section 31 G (a)-(d)** have all been met, the documents in *Category A* are admissible. I am fortified in this approach to the construction, by the approach taken by the Jamaican Court of Appeal in ***Suzette Mc Namee v R JMCA Crim Appeal no.18/2007*** The court cited with approval the following words;

> "The law of evidence must be adapted to the realities of contemporary business practice. Maintenance computers, mini computers and micro computers play a pervasive role in our society.

> Often the only record of a transaction, which nobody can be expected to remember, will be in the memory of a computer. The versatility, power and frequency of use of computers will increase. If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) will in practice be immune from prosecution"

per Steyn J, ***R v Minors, R v Harper [1989] 2 ALL ER 208*** at page 210.

I would add that the presentation of commercial matters will become impracticable if not impossible if the law of evidence is not adapted to the realities of contemporary business practice.

[32] Mrs. Kitson QC correctly submitted that the law is a shackle. That may be so but the common law, which developed the laws of evidence, has more often than not represented a liberating force. As the society develops the law must expand for if it does not, the shackles will give way and then we will have anarchy.

[33] ***Category C*** documents. These are to be found at pages 96- 316 of the Judges Bundle filed on the 25th November 2014. Dr. Barnett submitted and I agree, that the documents were in the nature of public documents and admissible as an exception to the hearsay rule. The Defendants objected to their admission because it was contended they were not made by a public body which had a duty to monitor or regulate. Reliance was placed on passages in *Cross on Evidence 7th edition* pages 573 and 577 which emphasize the duty to keep the record. I am however satisfied, when regard is had to the Tourist Board Act that the preparation of these very comprehensive reports is a part of the duty of the Tourist Board. I believe the ordinary Jamaican, or for that matter, ordinary hotelier, would be astounded to hear it suggested that as part of its remit the Tourist Board was not obligated to have up to date statistics on visitor arrival and such the like. It would be impossible for the Board to carry out its several functions (*detailed at section 11 of the Act)* without such data and information, to inform its decisions. I accept the evidence of Mrs. Antoinette Lyn, the manager, Research and Intelligence Unit that the information is not only collected but also cross referenced with data from the Immigration Section.

[34] I am fortified in my approach by the landmark decision of the English Court of Appeal in ***R v Halpin [1975] QB 907*** which extended the nature of the "public document" exception to the hearsay rule, to documents prepared by private persons but filed with the company registry. The submission of counsel in that

case was that as the Registrar's role was administrative there was no duty to inquire into the accuracy of the documents filed, and hence they were not public documents. In rejecting the submissions Lord Lane stated,

> "But the common law should move with the times and should recognise the fact that the official charged with recording matters of public import can no longer in this highly complicated world, as like as not, have personal knowledge of their accuracy".

[35] In this case I hold the common law rules are sufficient to allow for the documents' admission. I find as a fact and on a true construction of the Tourist Board Act that the Jamaica Tourist Board does have a duty to collate and collect data. Further, that it sometimes supplements that data with information from the immigration authorities. There is therefore reasonable reliability in the records kept which are always available for public inspection.

[36] The documents in *Category C* are therefore admitted as **Exhibits 4 (a**) and **(b)**.

David Batts
Puisne Judge