[2015] JMSC CIV. 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 03398 HCV 2009

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 S.A Civiles S.A.**	**4th Defendant**
And	**Stanley Consultants Inc.**	**5th Defendant**
And	**Frederick Rodriques & Associates Limited**	**6th Defendant**

Pretrial Review – Interlocutory Applications – Whether witness statements are evidence - Whether Issue of admissibility of evidence is to be dealt with at Pretrial Stage – Appointment of Expert by the Court - Directions.

Dr. Lloyd Barnett & Weiden Daley instructed by Hart Muirhead Fatta for Claimant.

Kevin Williams and Colin Alcott instructed by Williams Alcott Williams for 1st Defendant.

Carlene Larmond and Andrea Moulton instructed by the Director of State Proceedings for 2nd and 3rd Defendants

4th Defendant absent and unrepresented

Denise Kitson Q.C., Susan Risden-Foster and S. Mair instructed by Grant Stewart Phillips & Co. for 5th Defendant.

Charles Piper Q.C. and Tamika Bogle-Duhaney instructed by Charles Piper & Co. for 6th Defendant.

In Chambers

Heard: 26th January 2015, 27th January 2015.

Batts, J.

[1] On the 27th January 2015 I delivered this judgment orally in chambers. I considered the issues of sufficient import to justify my recording it in a permanent form.

[2] At the commencement of this matter the 8 bundles relevant to these applications were identified and numbered as follows:

Bundle #1	Judges Bundle filed 25th November 2014
Bundle #2	Judges Bundle filed 3rd December 2014
Bundle #3	Trial Bundle (Volume 1A) filed 23rd January 2015
Bundle #4	Supplemental Judges Bundle filed 23rd January, 2015
Bundle #5	Trial Bundle (Volume 2b) filed 23rd January, 2015
Bundle #6	Authorities in Support of Claimant's application
Bundle #7	First Defendants Bundle of Submissions and Authorities filed 16th January 2015
Bundle #8	Index to 5th Defendants Submission and Authorities filed 16th January, 2015

Also before me were 2 skeleton arguments, both filed by the Claimant on the 23rd December, 2014.

[3] There were 5 Applications for consideration at this pretrial review hearing. I will treat with them seriatim. It is to be noted that Mrs. Kitson QC indicated a change to the 5th Defendants' written submissions (Bundle #8). That is, the concession made at Para 9 (page 5 Bundle 8) was withdrawn. She therefore asked that the 1st Sentence of Para. 9 be deleted and this was done.

[4] **First Application**: Claimant's application for admission into evidence of certain documents (see Notice of Application Page 1 Bundle 1). Dr. Barnett submitted that the documentary evidence sought to be admitted fulfilled the requirements of the Evidence Act in particular Sections 31 G and H. He then referenced certain witness statements in support of that assertion (Pages 15 – 18 and 19 – 23 of Bundle #1).

[5] At this juncture Mr. Williams (for the 1st Defendant) objected on the ground that the witness statements were not evidence which could be relied on in these interlocutory proceedings. This position was also adopted by the other Defendants. Mrs. Denise Kitson Q.C. submitted that witness statements did not become evidence until a witness at trial adopted it. She further indicated that the Affidavit of Mr. Kay (page 6 Bundle 1) at paragraph 4 purports to incorporate by reference witness statements by persons other than himself. Mr. Charles Piper Q.C. submitted that incorporation by reference does not elevate a witness statement to the status of evidence. He submitted further that the entire application was premature because the question of whether or not evidence should be admitted, and in particular documentary evidence, was properly a matter for the trial judge. Mr. Piper be it noted had filed no written submissions in response to the applications. Neither indeed had the Crown, and Miss Larmond the Crown's representative, was content to adopt the submissions made.

[6] In response to those submissions Dr. Barnett referenced the Case Management Powers of the Court in Parts 25 and 26 of the Civil Procedure

Rules (CPR). He also relied on Rules 29.1 and 29.2. He submitted that applications to decide admissibility at this stage would assist with the expeditious delivery of justice.

[7] I invited all other Counsel to comment on this submission, in particular Rule 29. The predictable reply was that the Rules of Court cannot trump the provisions of the Evidence Act. In this regard Section 31L gives the court an overarching discretion to exclude evidence if its prejudicial effect outweighs its probative value. This discretion it was submitted is best reserved for the judge at trial. Mr. Piper additionally submitted that even if Section 29 did give a power to determine the admissibility of evidence, it is one which should be sparingly exercised. Furthermore he said the conjunctive "and" appears in Rule 29.2(2) and therefore two criteria must be satisfied: (a) There must be an express rule and (b) there must be an Order of the Court. I was also referred to the judgment of Sykes J, in ***Suit C. L. 1995/S1888, Sinclair et al v. Mason et al*** (unreported) delivered on 5th April 2009. (Bundle 7).

[8] Having considered the submissions made, the Rules and the authority cited it is my decision on this preliminary point that:

> a) The court does have jurisdiction to determine issues of admissibility at an interlocutory stage. To hold otherwise would be to construe the Rules in a manner which does not facilitate just dealing that is:
>
> a saving in expense and expeditious and fair hearings. (Order 1.1)
>
> b) In Rule 29 (2) "and" is used to indicate that the general rule [Stated in 29.2(1)] is subject to two

> exceptions. It certainly would be unnecessary to require an Order of the Court if there is already a "provision to the contrary in the Rules or elsewhere." Hence this is one case where the "and" is not conjunctive or cumulative. I so hold.

[9] The Court therefore in an appropriate case may make Orders and give directions as to admissible evidence. See in particular Rule 29(1) (c) and see Rules 25.1 (e) and 26.1(2) (o), (q), (v).

[10] In a case such as this there may be a great saving in time and costs if prior to trial, a determination is made as to whether there is evidence sufficient to admit hearsay or documentary evidence. This is because of the voluminous nature of the material. Where there is objection by prior Notice (under for example CPR Rule 28.19, or 28.20, or under the Evidence Act), a Claimant will seek to prove the document either by calling the maker or by satisfying the preconditions to admissibility of hearsay documents contained in Section 31 of the Evidence Act. If a Claimant elects the latter course at trial and, on the voire dire, the trial judge decides that the preconditions to admission are not met, the Claimant may need to prove the facts in that document by direct oral evidence. This may necessitate an application to adjourn. Furthermore the entire process of satisfying Sections 31 E, F, G and L can and will be very time consuming. In a case such as the present, where one is dealing with documentation which is said to be computer generated and to be in proof of damages, there may be every advantage in having the question, whether or not Section 31 requirements are satisfied, decided at an interlocutory stage, prior to trial.

[11] However in order to do so the appropriate material needs to be placed before the court. That is, the judge must be seized of the issues and

hence all relevant statements of case. Secondly there needs to be evidence, and in chambers the rules require affidavit evidence, sufficient to ground the application and establish the requirements of Section 31. This will afford other parties the opportunity to test by cross-examination the assertions made. Of course the court may decline to exercise the jurisdiction and may remit the issue for determination by the trial judge. However, where, as in this case, there can be a significant saving in trial time and hence costs, and where the intended documentation goes to damages only and not to liability, there is every reason to have the issue of admissibility decided at the pretrial stage.

[12] In this matter I accept the submissions of counsel for the Defendants, that the material before me is inadequate to allow for a consideration of the question whether the documents are to be admitted by virtue of the statutory exceptions to the Hearsay Rule. In the first place the statements of case are not included in any of the bundles. In the second place there is no evidence as to the source of the documents. The witness statements are not affidavits and indeed are not evidence. They cannot be "incorporated" by someone else who swears an affidavit. I therefore refuse the Claimant's application to admit documents into evidence (Notice of Application for court Orders filed 6th November 2014).

[13] Finally on this issue I make two observations. Firstly, this conundrum would have been wholly unnecessary had Parliament decided to abolish the hearsay rule in Civil Proceedings at the time the CPR was passed. This after all is what was done in the jurisdiction which inspired these "new" rules. Murphy on Evidence 7th edition page 306 et seq has a useful

and relevant discussion of the significance for Civil Proceedings of abolishing the hearsay rule. The second observation is that it is manifest, on a reading of the Claimant's application, that there was every intention to rely on the witness statements to ground that application. Dr. Barnett was, to my mind, understandably surprised that the Defendants (some of whom had filed written submissions) took objection at this hearing. There may have been a saving in time had an early indication been given of the objections to the use of witness statements.

[14] **Second and Third Applications**. These may be conveniently discussed together. The 5th Defendant applied for an Order to appoint an expert witness (Bundle 2 pg. 1) the Claimant applied for an Order to appoint another expert (Bundle 2 page 10). In each instance the expert evidence relates to damages and in particular to an analysis of data with a view to computing or assessing the quantum of loss.

[15] In the course of submissions I was assured by each of the applicants that its intended expert had not yet rendered an opinion on the matter. It was also made clear to me that each applicant contemplated the appointment of an expert by the court. However, Rule 32.6 is expressly referenced in each application. The appropriate rule is Rule 32.9, where the court appoints a single expert witness. Whatever be the intent of these applicants, it is my view that this is an appropriate case for the appointment of a single expert. In the first place his evidence is as to damages not liability. In the second, more important place, his evidence is largely one of computation and analysis of figures and statistics. The subjective element, in evidence of this nature, is diminished. As such one

expert in the area should, all other things being equal, be as good as another. Hence there should be no need for several experts to depone. I have therefore decided to appoint a single expert witness.

[16] Having considered the Affidavit evidence in respect of each applicant, it is clear that Mr. Anura Jayatillake has more impressive credentials. His tenure doing the type of work is also extensive. He has detailed his prior experience which includes valuations in and for the hotel industry. He is also a partner in a renowned firm of accountants.

[17] I heard interesting submissions as to costs and how the expert is to be appointed. I therefore give consequential directions as follows:

a) The instructing parties shall be the Claimant and the 5th Defendant.

b) The instructing parties are permitted to give joint instructions to the expert on or before the 13th March, 2015 or such date as may be ordered by the trial judge.

c) In the event joint instructions cannot be agreed then separate instructions are to be provided to the expert and exchanged on or before the 20th March, 2015.

d) Each instructing party is permitted to respond in writing addressed to the expert, to the written instructions of the other within 10 days. Such response is to be copied to the other instructing party.

e) The expert's fees and expenses are to be borne equally by the instructing parties. The parties shall jointly

negotiate such fees with the expert as well as the timing and mode of payment.

f) In the event of a failure to agree, an application may be made to the court.

g) This order does not affect any decision by the trial court as to the party to the action which is ultimately responsible to bear the costs of the expert.

h) Liberty to apply.

[18] **Fourth Application:** The fourth application concerned the date for attendance of Mr. Barry Walton (engineer) to give evidence (Bundle 2 page 32, Bundle 4 page 2); See Order dated 8th December 2014 by Haynes, J. Upon this application being mentioned Mr. Williams applied to vacate the 15 trial days commencing on the 9th February 2015. It was his view and he was supported by Mrs. Kitson and Mr. Piper, that the appointment of the expert by the court at this juncture would make it impossible to be ready for trial on the 9th February. It mattered not that the expert appointed by the Court would be speaking to the issue of damages. It was pointed out that my brother, Sykes J. had earlier refused an application to have liability and damages heard separately. To therefore decide that the expert give evidence in July, and to have the case commence before all expert reports were in the hands of the parties, would be to frustrate that earlier ruling. In effect it would be to try the issues separately.

[19] This aspect has caused me great concern. Not the least because the Claimant asserts they are ready to proceed and this regardless of my decision on the First Application. Two distinct periods for the trial process have already been fixed. One to commence in February and the other in

July. It is one trial. No injustice will result if the expert as to damages depones in July i.e. Mr. Anvra Jayatillake. Furthermore it may be convenient if the matter of admissible documentation is dealt with prior to his being asked to render an opinion. Otherwise one may find an opinion which is singularly unhelpful to the court as it is based upon information not proved to the satisfaction of the court.

[20] In this case therefore I order that the trial date of the 9th February 2015 should stand. I direct that those witnesses and the documentation relevant to damages be proved in the first 15 days of trial. The instructions to the expert witness will be by virtue of a timetable which will facilitate the court's expert giving evidence in July. On the matter of the timetabling I will hear further submissions.

[21] **Fifth Applications re:** These concerned dates for filing submissions and extensions of time for documents already filed: I propose in accordance with my earlier determination to set dates which will facilitate commencement of trial on the 9th February, 2015. I will also give liberty to file further submissions prior to the July date and after receipt of the report of the court appointed expert. Again I will be grateful for Counsel's input.

[23] I propose to make the cost of the applications costs in the Claim and to order that the Claimant file and serve one formal order.

David Batts
Puisne Judge