IN THE COURT OF APPEAL OF BELIZE AD 2014
CIVIL APPEAL NO 8 OF 2012

BLUE SKY BELIZE LIMITED Appellant

v

BELIZE AQUACULTURE LIMITED Respondent

BEFORE
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Samuel Awich Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram Justice of Appeal

Rodwell Williams SC and Mrs J Ellis-Bradley for the appellant
Eamon Courtenay SC for the respondent

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30 October 2013 and 27 June 2014

MORRISON JA

Introduction

[1] This is an appeal from a judgment of Legall J given on 27 February 2012.

[2] In an action in which the appellant claimed against the respondent to recover the price of goods sold and delivered, plus interest, the respondent, while admitting receipt and use of the goods, counterclaimed for damages, on the basis that the goods did not

correspond with the agreed specifications and therefore did not serve the purpose for which they were purchased.

[3] After hearing evidence on both sides, the learned judge found that neither the claim nor the counterclaim had been satisfactorily proved. In the result, he dismissed the claim and the counterclaim, and made no order as to costs.

[4] Hardly surprisingly, neither party was satisfied by this result. Accordingly, the appellant's notice of appeal against the dismissal of its claim, filed on 5 April 2012, was followed in short order by the respondent's notice, dated 19 April 2012, contending for a variation of the learned judge's judgment to allow its counterclaim.

[5] The notice of appeal and the respondent's notice therefore call, potentially, for a full review of all the material that was before the judge. However, the parties have quite sensibly come to a partial accommodation, which has considerably lightened the court's task in this regard. But I go ahead of myself, since I must first give an outline of the basic facts of the case, the pleadings and Legall J's judgment.

The factual background

[6] The summary which follows has been adapted from the detailed account of the evidence provided by Legall J. I am grateful to the judge for his comprehensive effort in this regard.

[7] The appellant and the respondent are both registered companies. The appellant owns and operates a crude oil separation and blending facility at Iguana Creek in the Cayo District. From that facility, the appellant supplies a product known as blended fuel oil ('BFO') to customers in Belize.

[8] The respondent owns and operates a fish and shrimp farm at Blair Athol, in the Stann Creek District. Among the items of equipment utilized by it for the purposes of its business at the material time was a Wartsila Power Plant ('the power plant'), which was

fuelled by BFO purchased from the appellant. Included in the power plant was a fuel purification system, the function of which was to convert BFO into the clean fuel required by the operation. A key component of this system was the fuel separator, which separated water and particles from the BFO, on the one hand, and produced clean fuel on the other.

[9] The appellant began supplying BFO to the respondent in around January 2009, initially pursuant to an oral agreement, which was subsequently formalised by a written agreement dated 1 May 2009. Although by its terms this agreement was limited to a period of six months, there is no dispute between the parties that it continued to govern their contractual relations after this period had expired. It was a term of the agreement that the respondent would pay the appellant for BFO supplied to it in each month on the 15th of the succeeding month. By specifications set out in an appendix to the agreement, the BFO supplied by the appellant was required to meet certain standards relating to its viscosity, density, sulphur content, sediment potential and ash and water content.

[10] It appears that the arrangements between the parties for the supply and payment of BFO worked uneventfully for the first year of their relationship. But, early in 2010, a problem arose. This is how Legall J described it (at para 4 of his judgment):

> "Between 28th January 2010 and 10th February 2010 the claimant delivered about thirteen truck loads of BFO to the defendant. In early February, 2010, the defendant alleged that it experienced problems with the fuel separator in that it was operating abnormally and shutting down intermittently. The water and particles, according to the defendant, expelled by the fuel separator were viscous and in unusually large amounts causing mechanical and labour problems. The waste particles expelled by the fuel separator were black sludge in large amounts, which amounted to evidence, according to the defendant, that the fuel separator or the fuel purification system was not functioning properly. As a result, according to the defendant, the whole process of purifying the BFO had to cease on 10th February, 2010, due to severe damage to the fuel separator."

[11] The respondent advised the appellant of the problem on 10 February 2010. Both parties took steps, more or less immediately, to ascertain whether the damage

complained of by the respondent was the result of an issue with the quality of the BFO or some other cause. Each side was sufficiently encouraged by the advice it received as to the possible causes of the problem to allow it to adopt an adversarial stance in relation to the other.

[12] Over the period December 2009 to February 2010, the respondent had taken delivery from the appellant of a total of 123,700 gallons of BFO. Of this quantity, the respondent had used about 90,000 gallons. However, after the problem arose in February 2010, the respondent did not use the approximately 25,000 gallons of BFO which remained in its storage tanks, because, it maintained, of the severe damage which the BFO had caused to the fuel separator. The respondent therefore refused to pay for the 123,700 gallons delivered to it until its own claim for damage to its equipment was addressed. On 22 October 2010, efforts on both sides to reach a resolution of the matter having failed, the appellant filed a claim form to recover the outstanding price of the BFO delivered to the respondent.

The pleaded cases

[13] In its statement of case filed on 20 October 2010, the appellant, after identifying the parties, pleaded the following:

> "3. Between 12th January, 2009 and 2nd November, 2009 the Claimant sold and delivered to the Defendant blended fuel oil ("BFO") pursuant to an oral agreement between them both which was later reduced to a written contract "Sales and Purchase Agreement" ("the Agreement"), though not signed [sic], governed the terms of their agreement and their contractual relations. The Defendant accepted delivery of the BFO pursuant to the Agreement and the Claimant invoiced the Defendant for the BFO. Particulars of invoices and statement are annexed hereto as ANNEX 1.
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> 4. It was a term of the Agreement between the Claimant and the Defendant that the Defendant was to pay for the BFO supplied to them on the 15th of each month, for BFO delivered the preceding month.
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> 5. It was also a term of the Agreement between the Claimant and the Defendant that a surcharge (interest) was to be levied on amounts

invoiced and outstanding at 1.75% of value of payment due commencing after the 15th of the following month after each billing cycle. The surcharge due up to the date of filing this claim (22nd October, 2010) is $66,437.49. The surcharge continues to accrue.

6. The Claimant has since June 2010 demanded payment of outstanding sum [sic], and in breach of the written contract, the Defendant has refused to pay the same plus the surcharge.

7. In the premises, the Claimant claims the purchase price of BZD 490,202.22 which is due and owing by the Defendant to the Claimant and BZD66,437.49 being surcharge due as of 22nd October, 2010, and accruing daily."

[14] By its defence and counterclaim dated 2 December 2010, the respondent stated that (i) the appellant actually delivered BFO to it from January 2009 to February 2010; (ii) it was a term of the agreement that the respondent was to pay for the BFO supplied to it each month on the 15th day of the succeeding month; and (iii) it was a term of the agreement that a surcharge (interest) was to be levied on amounts invoiced and outstanding at 1.75% of the value of payments due after the 15th of the month following each billing cycle.

[15] However, the respondent maintained that the amounts claimed, both for the purchase price of $490,202.22 and the surcharge of $66,437.49, were not owed to the appellant, "since the fuel delivered to the [respondent] was not of the type and specification ordered by the [respondent] pursuant to the contract" (paragraph 5). Further, as regards the surcharge, the respondent averred that the appellant "has never demanded or collected interest from the [respondent] in respect of late payments made by the [respondent]". The respondent then laid the basis for its counterclaim as follows:

"6. The Defendant further says that at the time the contract was entered into, the Defendant expressly made known to the Claimant or the Claimant knew the specifications for and the purpose for which the fuel was being ordered. The Defendant also relied on the professional skill and judgment of the Claimant in the preparation and delivery of the blended fuel.

7. It was therefore an express and implied condition of the contract that the fuel would correspond to the purpose and to the specifications required by the Defendant.

8. In breach of the said condition, the fuel did not correspond with the specifications nor did it serve the purpose for which it was ordered.

PARTICULARS OF BREACH

(1) Delivering fuel to the Claimant which failed to meet the specifications required

(2) Delivering fuel of poor and unusable quality to the Defendant in a fuel tanker

(3) Failing to deliver fuel which would be reasonably fit for the Defendant's stated purpose

(4) Failing to deliver fuel with the appropriate quality or fitness required by the Defendant

9. By reason of the aforesaid, the Defendant was entitled to reject the fuel and communicated its rejection of the fuel to the Claimant.

10. Paragraphs 6 and 7 are denied. The Defendants [sic] aver that the sums claimed were not at any material time due and owing to the Claimant by reason of the facts and matters previously set out.

11, In the circumstances it is denied that the Claimant is entitled to the relief claimed or any relief for the reasons alleged or at all.

COUNTERCLAIM

12. The Defendant repeats paragraphs 1 to 11 of its Defence herein.

13. The quality of the fuel ordered from the Claimant was measured against approximately 20 to 25 parameters including the fuel's viscosity, density, sulfur content, sediment potential, ash content and water content.

14. The delivery of fuel by the Claimant with the particular specifications requested by the Defendant was necessary to ensure that the fuel could be properly purified prior to usage in the Defendant's fuel treatment equipment ('Fuel Separator') for further use in the Defendant's power plant to provide electricity to the Defendant's Shrimp Farm and also to Belize Electricity Limited pursuant to a Power Purchasing Agreement.

15. During deliveries in January and early February, 2010 the Defendant's Fuel Separators were unable to properly treat and separate the fuel delivered due to excessive sludge formation in the fuel.

16. On 12th February, 2010 operations at the Defendant's Power Plant halted due to severe damage to the Fuel Separator equipment caused by the poor fuel quality delivered by the Claimant to the Defendant and which was out of specifications.

17. The Defendant still has 24,000 gallons of the Claimant's fuel in its fuel tank which it will not and has not used due to the inability of the Fuel Separator to treat the fuel delivered since the said fuel is not of the type or specification ordered.

18. As a result of the Claimant's breach, the Defendant therefore suffered loss and damages."

[16] The respondent then provided particulars of its special damages in respect of repairs to the fuel separator, in the sum of $347,965.96. Finally, the respondent claimed (at paragraph 20) to be entitled "to set-off the sum of $347,965.96 (and any general damages awarded by the Court) in the amount of $490,000.00 claimed in the Statement of Claim".

[17] In its reply and defence to counterclaim, the appellant averred (at para 2) that the BFO sold and delivered by it to the respondent "was of the type and specifications of the contract as ordered by the [respondent]", and (at para 5) that it "did serve the purpose for which it was intended". Further (at para 8), that the respondent "was not entitled to reject the fuel nor did it communicate any alleged rejection to the [appellant] … [and the respondent] did retain and kept all the fuel sold, delivered and accepted by it". And further still (at para 7), that the respondent, through a representative, had acknowledged that the respondent "did owe the amount claimed to the [appellant] for blended fuel sold and delivered by the [appellant] to the [respondent]").

[18] With specific reference to the counterclaim, the appellant averred as follows:

"8. The Claimant repeats its claim and Paragraph [sic] 1 through 7 of the reply herein.

> 9. The Claimant avers that it would deliver fuel into the Defendant [sic] fuel tank then the Defendant would send the fuel from its tank through its fuel separator for use in the [sic] its power plant, but sludge developed in the Defendant's fuel storage tank due to the Defendant's own failure and omission to clean and regularly maintain its fuel storage tank.
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> 10. As to paragraph 15 of the Counterclaim the Claimant says there was no sludge in the fuel delivered to the Defendant in January and early February, 2010, and if, which it not admitted, the Defendant's fuel separator were [sic] unable to properly treat and separate fuel delivered to it, this may be as a result of sludge developing in the Defendant's fuel storage tank which it fail [sic] and omit [sic] to regularly and properly clean and maintain."

[19] The upshot of the pleadings was therefore that the respondent admitted that the appellant had sold and delivered BFO to it. But the respondent claimed to be entitled to a set-off and/or to counterclaim against the appellant for its losses incurred as a result of the non-conformity of the BFO supplied with the agreed specifications and/or being fit for the purpose for which it was intended. As a result, the respondent counterclaimed the cost of repairing the fuel separator, while the appellant denied that the damage was caused by the BFO supplied by it to the respondent.

The trial

[20] The trial was dominated by argument on the admissibility of the expert evidence sought to be tendered on both sides. The first casualty, so the speak, was the evidence produced on behalf of the appellant by Mr Albert Moore, who sought to tender a product quality investigation report dated 10 February 2010, prepared by Ms Elizabeth Harvey, a former employee of the appellant. Legall J ruled the evidence inadmissible (at para 8), on the ground that Mr Moore was "seeking to tender, as to the truth of it, evidence of a scientific nature based on what he was informed by a person who was not called as a witness in the case".

[21] Next on the appellant's case was the evidence of Mr Thomas Wellborn, a Chemical Engineer and a member of the American Chemical Society. Mr Wellborn's

evidence, although apparently not formally ruled inadmissible, was substantially discounted by the judge on the ground that his conclusions were largely based on the testing of a sample of the BFO carried out by Ms Harvey, evidence of which had already been ruled inadmissible as hearsay, and other samples, the provenance of which he had not verified. Further, some of his opinions were, the judge considered, based on unsupported assumptions.

[22] And finally, there was evidence of the respondent's expert, Dr Rudolph Kassinger. Dr Kassinger, who was also a member of the American Chemical Society, was a consultant on heavy fuel oils and other petroleum products for DNV Petroleum Services ('DNVPS') of Mahwah, New Jersey, United States of America ('USA'). As at the date of his first affidavit on 8 August 2011, Dr Kassinger had had over 52 years' experience in the petroleum industry and, because of its central importance to the respondent's case, it is necessary to dwell on the evidence which he proposed to give in somewhat greater detail.

[23] On 28 January 2010, two samples of BFO being delivered to the respondent were taken from one of the appellant's trucks by a representative of the respondent. On 9 February 2010, one of these samples was sent to the DNVPS laboratory in Texas, USA, where it was subjected to testing and analysis by employees of DNVPS. The results of this exercise were submitted to Dr Kassinger, who in due course produced a report dated 8 August 2011, for use in the litigation. The conclusion of that report was that the BFO supplied by the appellant was not in compliance with the agreed specifications.

[24] When he was called to give evidence at the trial for the purpose of tendering the report, Dr Kassinger stated in examination-in-chief that, in preparing the report, he had relied on the several documents which were appended to the report as attachments 1 - 14. When objection was taken on behalf of the appellant to the admission in evidence of attachment 3, Dr Kassinger was questioned with a view to laying the foundation for its admissibility. Describing the process by which the sample was analysed, Dr Kassinger said this:

> "Now, as to how a sample gets analyzed, DNVPS, our laboratory in Houston, to put this in perspective, we analyze on a typical weekday about 120 samples a day. 120 samples a day means that we produce about 2500 different tests results, about 20 per analysis. No one person gets a sample and does the whole analysis. We have 13 lab Technicians. Those lab Technicians are assigned to particular tests routines. They rotate once a week so that all lab technicians are able to run all tests and it is done on a rotating basis. So during a day a result that has 20 results on it is run by a number of different people, each individually. After they do the test result the information is electronically transferred to a central data base and at the end of the day the lab manager examines all the results, approves the results, says these meet my criteria. Those results are then forwarded to a technical expert to produce a report. And that is the report that gets sent to the client. So the man that writes the report has not done all the analysis. I mean in a sense it is sort of like a heart surgeon or an MD. He gets an EKG. He does not run the EKG. Some little girl in a back office puts the little electrodes on, presses the button and produces the EKG. It is the same in our system. We have lab Technicians that are qualified to run the tests and report the results."

[25] Therefore, as it turned out, attachment 3 contained the actual test results, compiled by the lab technicians in accordance with the procedure described by Dr Kassinger. On this basis, the learned judge upheld the objection to the admission of attachment 3, on the ground that it was inadmissible hearsay evidence. Cross-examined briefly after the judge had ruled, Dr Kassinger confirmed that, without attachment 3 (which he described as the "fuel analysis"), he would not be able to form a view as to whether the sample of BFO that had been tested was "out of specification".

The outcome

[26] Legall J considered (at para 38) that the appellant ("on whom the burden of proof lies") was obliged to prove "that it delivered BFO to the [respondent] in accordance with the specifications stated in the agreement and that the BFO was suitable in accordance with the agreement and for the intended purpose". This it had failed to do, having relied for this purpose on the evidence of Messrs Moore and Wellborn, which was in both cases derived from inadmissible hearsay evidence. Accordingly, the learned judge concluded that he was not satisfied on a balance of probabilities that the appellant "has

proven that the BFO was in accordance with the agreed specifications and suitable for its intended purpose".

[27] The judge further considered that the respondent also had a duty to prove its counterclaim on a balance of probabilities; that is, "that the BFO supplied by the [appellant] was not in accordance with the specifications agreed to in the agreement". This, by its reliance on Dr Kassinger's inadmissible hearsay evidence based on attachment 3, the respondent had failed to do and the counterclaim therefore failed as well.

[28] On the subject of expert opinion evidence based on hearsay, the learned judge allowed himself a final comment (at para 40):

> "I would think that experts are required to have some practical knowledge in addition to the theoretical knowledge of the subject matter of the case on which they intend to give expert evidence, or on which they intend to express an expert opinion. I do not believe that expert witnesses can lawfully rely on the practical findings of unknown and unidentified persons, not called as witnesses, and whose skill and training and expertise in the relevant field are also unknown, as the basis for their expert reports or opinions. This does not necessarily mean that expert witnesses are not allowed to consult and consider theoretical and academic works of others in their field, including other experts, for purposes of their expert reports. The experts in this case ought to have visited the facilities of the claimants and the defendants, observe [sic] the operations and carry [sic] out such tests as were required for their report. If they are not minded to carry out the tests personally then cause them to be done by others skilled and qualified in the same field to do so, and lead evidence to this effect; or cause those persons to be called to give evidence of the tests and thereby lay the foundation for the subsequent expert opinion."

[29] The learned judge also dealt briefly with – and rejected – the appellant's argument, based on section 37 of the Sale of Goods Act, that the respondent, having received the BFO and not having intimated rejection of it, should be deemed to have accepted it. On the facts of this case, the judge observed (at para 45), "the parties agreed to BFO with specific specifications and there ought not to be an intimation of

acceptance of the BFO without evidence that the BFO met the specifications contained in the contract".

[30] In the result, Legall J pronounced judgment, in the terms already indicated, essentially adjudging the contest between the parties to be a scoreless draw.

Both sides appeal

[31] In its notice of appeal filed on 5 April 2012, the appellant relied on six grounds:

> "1. The Learned Trial Judge erred in law and misdirected himself in that he failed to appreciate, consider or properly treat with the Appellant's claim based on the evidence before him.
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> 2. Having ruled certain evidence as inadmissible on one hand the Learned Trial Judge erred in law and misdirected himself on the other hand in taking into account the inadmissible evidence and considering it in arriving at his decision.
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> 3. The Learned Trial Judge erred in law and misapprehended the facts in holding that the Respondent incurred costs of repairs to its equipment and therefore inferred that the equipment was damaged in the absence of any finding or evidence that such cost was incurred or that the equipment was in fact damaged by out of specification fuel or at all.
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> 4. The learned Judge erred in law and misdirected himself in imposing a burden on the Appellant to disprove the Respondent's assertion that the goods were not of the required specifications contrary to the principle that 'he who alleged must prove'.
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> 5. The Learned Judge erred in law and or misdirected himself on the facts in holding that the goods sold and delivered to the Respondent were not accepted and that property in the goods did not pass to the Respondent.
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> 5. That the decision of the Learned Trial Judge was unreasonable and against the weight of the evidence."

[32] In its respondent's notice filed on 19 April 2012, the respondent sought a variation of Legall's judgment so as to reflect a judgment in its favour in the sum of $348,016.40, with costs. The respondent relied on the following grounds:

"(1) The decision of the Learned Trial Judge insofar as the counterclaim is concerned is against the weight of the evidence and the Learned Trial Judge failed to place proper weight on the evidence of the Respondent;

(2) The Learned Trial Judge erred in law and misdirected himself in finding that the Respondent failed to prove that the BFO sold was not of merchantable quality, fit for the purpose or reasonably capable of being used for the purpose for which it was required 'due to the inadmissible hearsay evidence of Dr. Kassinger' or to the absence of admissible expert evidence."

An intimation from the respondent

[33] When the appeal came on for hearing on 30 October 2013, Mr Courtenay SC for the respondent sought and was granted permission to address the court first. Mr Courtenay told the court that, having reviewed the matter carefully, he could find no basis in law upon which to mount an argument in opposition to the appeal (bearing in mind in particular the provisions of section 37 of the Sale of Goods Act). Therefore, though not conceding, he had come to the view that the appellant was entitled to succeed in its appeal.

[34] However, Mr Courtenay directed our attention to ground two of the respondent's notice, which challenges the judge's ruling on the admissibility of the evidence sought to be given by Dr Kassinger, and indicated that the respondent wished to have this issue, which is directly relevant to its counterclaim, determined by the court. Accordingly, a timetable for the filing of further submissions on the issue of the admissibility of Dr Kassinger's evidence was established by consent and it was agreed by the parties that the appeal would thereafter be considered and determined by the court on paper, without the need for any further hearing.

Disposing of the appellant's appeal

[35] I should say at once that I am in full agreement with Mr Courtenay's very helpful and completely realistic stance on the appeal. As Mr Williams SC pointed out in his

written submissions on behalf of the appellant, the respondent made admissions on the pleadings as to having received the BFO, the amount claimed for its price and the fact that it was owed to the appellant. Not only did the respondent accept delivery of the BFO and offload it into its storage tanks over the three month period, but it used 75% of it in its operations, while retaining the rest of it in the storage tanks.

[36] Section 37 of the Sale of Goods Act provides that:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

[37] It seems to me that the respondent's use for its own purposes of over 75% of the BFO delivered to it over the relevant period was plainly an act inconsistent with the appellant's ownership of the BFO. The respondent must therefore be deemed to have accepted the BFO, with the result that any right which it may have had to reject the BFO for failure to comply with the agreement was lost and it was thereafter confined to a claim for damages (see **E & S Ruben Limited v Faire Brothers & Company Ltd [1949] 1 KB 254**).

[38] I accordingly consider that, in the particular circumstances of this case, the learned judge ought to have treated the appellant's claim for the price of the BFO as proven on the respondent's own admissions. Having done so, he would then have been in a position to consider the respondent's counterclaim and whether it was established by the evidence tendered in support of it.

[39] In my view, therefore, it is clear that Mr Courtenay's early intimation was well made and that the appeal must be allowed.

The respondent's notice: the admissibility of Dr Kassinger's evidence

[40] So I turn now to the only remaining issue in the case. Mr Courtenay based his submission that Dr Kassinger's evidence was admissible on four broad propositions.

> (1) While the general rule at common law is that an expert cannot make the facts underlying his opinion evidence in the case unless those facts are independently proved, this does not mean that an expert cannot base his opinion on material or data which may in fact be hearsay or inadmissible. Thus an expert's reliance on the work of other scientists within his own organisation does not necessarily infringe the rule against hearsay.
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> (2) Expert evidence is admissible once the court accepts that there exists a recognised body of expertise governed by recognised standards and rules of conduct capable of influencing the court's decision on any of the issues which it has to decide and the witness to be called satisfies the court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of these issues.
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> (3) Even where the evidence of an expert is admissible in the manner provided above, this does not mean that the evidence will be admitted unless the court finds it relevant to any of the issues which it has to decide; relevance means that the evidence has to be 'helpful' to the court in arriving at its conclusion.
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> (4) The modern view is to regulate such matters of evidence by weight rather than admissibility even where the evidence in question goes to the ultimate issue in the case.

[41] Mr Courtenay therefore submitted that Dr Kassinger's evidence was relevant, admissible and reliable, particularly given his qualifications and experience. Unlike Mr. Moore, an accountant, who had sought to tender the analysis and opinion evidence of Ms Harvey on scientific matters, Mr Courtenay submitted finally, Dr Kassinger "…is the expert and seeks to provide expert analysis of test results produced in his place of employment to which he has direct access".

[42] In his written response dated 8 November 2013, Mr Williams pointed out at the outset that (i) expert evidence is as equally subject to the rule against hearsay as other evidence; and (ii) in Belize, the common law rule remains unaffected in civil proceedings

by any statutory provisions similar to the English Civil Evidence Act 1972. Thus, it was submitted, where, as in this case, the purpose of tendering evidence of the fuel analysis in attachment 3 through Dr Kassinger was to prove the truth of its contents, the evidence was hearsay. Further, while an expert may give his opinion on the basis of hearsay information, it must relate to specific matters of which he either has personal knowledge or in respect of which admissible evidence will be given by another witness. Mr Williams submitted finally that, based on the authorities to which he also referred us, where a document is being tendered as proof of the truth of its contents the maker must be called and, on that basis, attachment 3 had been rightly excluded by the learned judge at trial.

[43] In a brief written reply dated 18 November 2013, Mr Courtenay emphasised that even if an expert bases his opinion on material or data which may in fact be hearsay, that material or data is not "strictly evidence" and it is the expert's opinion which amounts to evidence for the purposes of the matter.

[44] Both counsel supported their submissions by reference to a number of authorities, which will deal with in chronological order. Mr Williams naturally placed great reliance on **Myers v Director of Public Proceedings** **[1965] AC 1001**, the acknowledged foundation stone of the rule against hearsay in the modern law. What was at issue in that case was proof of the fact that the engines of certain cars, which were alleged to be stolen, bore a particular indelible block stamp imprinted by the manufacturer of the cars. The prosecution sought to prove this fact by the production of cards recording the block numbers of the cars compiled during their manufacture. The cards in question had not been compiled by the witnesses who produced it in evidence, although they were able to explain the system which resulted in their compilation. This evidence was held to infringe the rule against hearsay, on the ground that the witnesses who produced the cards had no personal knowledge of the accuracy of their contents. This is how Lord Morris characterised the problem posed by the evidence (at page 1025):

> "The card has no probative value unless it is used to prove that what it records is true. It can be said that the representative who produces it may say: 'Looking at our records I would expect that a motor car that we made

> which has this engine number and this chassis number will be found to have this cylinder block number.' That may be so. But it is a matter of no consequence what the representative would expect. The sole purpose in introducing the card would be to prove that a particular motor car, when manufactured, did in truth have certain stated particular numbers attached to it. However alluringly the language of introduction may be phrased the card is only introduced into the case so that the truth of the statements that it records may be accepted. There is, in my view, no escape from the conclusion that, if the cards are admitted, unsworn written assertions or statements made by unknown, untraced and unidentified persons (who may or may not be alive) are being put forward as proof of the truth of those statements. Unless we can adjust the existing law, it seems to me to be clear that such hearsay evidence is not admissible."

(In England, **Myers v Director of Public Prosecutions** was swiftly followed by the Criminal Evidence Act 1965, section 1 of which provided for the admissibility in evidence, as an exception to the rule against hearsay, of certain trade or business records. To generally similar, though not identical effect, see also sections 84-85 of the Evidence Act, Cap. 95 of the Laws of Belize. But there has never been any doubt that the venerable principle of the common law which the case reaffirmed has remained intact – see, for instance, the later decision of the House of Lords in **R v Kearley [1992] 2 All ER 345**.)

[45] In **English Exporters (London) Ltd v Eldonwall Ltd [1975] Ch 415**, one issue in the case was the true status of the evidence of expert valuers, who provided opinions on the value of premises for the purpose of fixing the reserved rent under the provisions of landlord and tenant litigation. After observing (at page 420) that "two of the heads under which the valuers' evidence may be ranged are opinion evidence and factual evidence", Megarry J elucidated the distinction between the two by saying, firstly (at pages 420-421) that:

> "As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learned much from transactions in which he has himself been engaged, and of which he could give first-hand evidence. But he will also have learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports of auctions and other dealings, and information obtained from his professional brethren and others, some related to particular

> transactions and some more general and indefinite, will all have contributed their share. Doubtless much, or most, of this will be accurate, though some will not; and even what is accurate so far as it goes may be incomplete, in that nothing may have been said of some special element which affects values. Nevertheless, the opinion that the expert expresses is none the worse because it is in part derived from the matters of which he could give no direct evidence. Even if some of the extraneous information which he acquires in this way is inaccurate or incomplete, the errors and omissions will often tend to cancel each other out; and the valuer, after all, is an expert in this field, so that the less reliable the knowledge that he has about the details of some reported transaction, the more his experience will tell him that he should be ready to make some discount from the weight that he gives it in contributing to his overall sense of values. Some aberrant transactions may stand so far out of line that he will give them little or no weight.
>
> No question of giving hearsay evidence arises in such cases, the witness states his opinion from his general experience."

[46] But secondly, the learned judge added this (at page 422):

> "It…seems to me that details of comparable transactions upon which a valuer intends to rely in his evidence must, if they are to be put before the court, be confined to those details which have been, or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts…[and]…I can see no compelling reasons of policy why they should be able to do this."

[47] In **R v Abadom [1983] 1 All ER 364**, an English Court of Appeal decision in which both Mr Courtenay and Mr Williams found comfort, **Myers v Director of Public Prosecutions** was distinguished and **English Exporters (London) Ltd v Eldonwall Ltd** was applied. The appellant in that case was charged with robbery, the prosecution's case being that he was one of four masked men, armed with cudgels, who had entered an office, broken an internal window pane and demanded money from the occupants. At the trial, a principal scientific officer testified that he had analysed fragments of glass from a pair of shoes belonging to the appellant and glass from the office window. He found that all the fragments of glass had the same refractive index. It was the practice of the House Office Central Research Establishment to collate statistics of the refractive index of broken glass which had been analysed in forensic laboratories and, having consulted those statistics, the principal scientific officer found that only 4% of samples had the same refractive index as the glass which he had analysed. He expressed the

opinion that the fragments of glass on the appellant's shoes had come from the broken window pane and the appellant was convicted.

[48] The appellant's appeal on the ground that the principal scientific officer (a Mr Cooke) had been allowed to refer to inadmissible hearsay evidence was dismissed. This is how Kerr LJ stated the position (at pages 130-131):

> "…it was submitted that the present case was indistinguishable from the decision in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 since Mr. Cooke had not been personally responsible for the compilation of the Home Office statistics on which he relied, so that the inferences which he drew from them must be inadmissible because they were based on hearsay. In our view this conclusion does not follow, either as a matter of principle or on the basis of authority. We are here concerned with the cogency or otherwise of an opinion expressed by an expert in giving expert evidence. In that regard it seems to us that the process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence. So far as the question of principle is concerned, we have already explained our reasons for this conclusion. So far as the authorities are concerned, the position can be summarized as follows.
>
> First, where an expert relies on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved by admissible evidence…Thus, it would no doubt have been inadmissible if Mr. Cooke had said in the present case that he had been told by someone else that the refractive index of the fragments of glass and of the control sample was identical, and any opinion expressed by him on this basis would then have been based on hearsay. It he had not himself determined the refractive index, it would have been necessary to call the person who had done so before Mr. Cooke could have expressed any opinion based on this determination. In this connection it is to be noted that Mr. Smalldon was rightly called to prove the chemical analysis made by him which Mr. Cooke was asked to take into account. Secondly, where the existence or non-existence of some fact is in issue, a report made by an expert who is not called as a witness is not admissible as evidence of that fact merely by the production of the report, even though it was made by an expert…
>
> These, however, are in our judgment the limits of the hearsay rule in relation to evidence of opinion given by experts, both in principle and on the authorities. In other respects their evidence is not subject to the rule against hearsay in the same way as that of witnesses of fact...Once the primary facts on which their opinion is based have been proved by

> admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusion."

[49] Mr Courtenay relied in particular on the judgments of Butler-Sloss LJ, Evans Lombe J and Brooks J in **Re M and R (minors) (sexual abuse: expert evidence) [1996] 4 All ER 239**, **Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others [2001] EWHC Ch 17**, and **Falmouth Resorts Ltd v International Hotels of Jamaica [2003] JMSC 18** respectively.

[50] In **Re M and R (minors) (sexual abuse: expert evidence)**, in the context of a discussion on the impact of section 3(1) of the Civil Evidence Act, 1972 ("…where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence…"), Butler-Sloss LJ referred (at pages 253-254) to the need for the judge to keep sight of "certain truths", namely –

> "…that the ultimate decision is for him, and that all questions of relevance and weight are for him. If the expert's opinion is clearly irrelevant, he will say so. But, if arguably relevant but in his view ultimately unhelpful, he can generally prevent its reception by indicating that the expert's answer to the question would carry little weight with him. The modern view is to regulate such matters by way of weight, rather than admissibility.
>
> But when the judge is of the opinion that the witness's expertise is still required to assist him to answer the ultimate questions (including, where appropriate, credibility), then the judge can safely and gratefully rely on such evidence, while never losing sight of the fact that the final decision is for him."

[51] **Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others** was also a case concerned with the admissibility of expert evidence. The case was, as Mr Williams pointed out, primarily concerned with whether the statutory criterion established for the admission of such evidence by section 3(1) of the Civil Evidence Act, 1972 had been met. But criticisms were also made of some of the passages in the expert's report on the ground that his sources were biased. Evans-Lombe J

nevertheless declined to strike out the offending portions of the expert's report on this ground (at para 57):

> "Mr Aldous' contentions as to the sources upon which Mr Giannotti based his description of the background facts were not accepted by the Defendants. It does not seem to me to be necessary for me to come to a conclusion as to whether they were justified or not. It is frequently the case that experts are instructed to give their opinion based on a statement of the relevant facts prepared by their instructing solicitor without reference to any sources. When experts come to give their evidence they may be cross-examined and in the course of that cross-examination their description of the background facts may be challenged, and if successfully challenged, the authority of their conclusions undermined. It must be borne in mind that the experts will normally be giving evidence after the conclusion of all the factual evidence in the case. The expert evidence in this case will not depart from that norm. I cannot accept these objections as justifying my striking out any part of Mr Giannotti's expert report."

[52] And, in **Falmouth Resorts Ltd v International Hotels of Jamaica [2003] JMSC 18**, objection was taken to the admissibility of an expert's report on the grounds of non-compliance with the provisions of the Civil Procedure Rules 2002 and that it was based on hearsay evidence. The learned trial judge held that "where an expert witness fails to set out the substance of his instructions and in other respects fails to comply with the relevant rule, the judge has a discretion as to whether to allow the expert to give evidence". In this context, the learned judge went on to quote with approval Butler-Sloss LJ's statement in **Re M and R (minors) (sexual abuse: expert evidence)** of the "modern view".

[53] Lastly, I will mention for completeness the decision of Arnold J in **Interflora Inc and another v Marks and Spencer plc [2013] EWHC 936 (Ch)**, to which Mr Courtenay also drew our attention in his reply. That was a case concerning the efficacy of a 'Civil Evidence Act Notice', served pursuant to section 2 of the Civil Evidence Act 1995. Interesting as it is, I fear that it can, unfortunately, be of no assistance to the present enquiry, since section 1 of that Act states clearly that, in civil proceedings, "evidence shall not be excluded on the ground that it is hearsay".

[54] Turning now to what the text writers say, Phipson (Phipson on Evidence 12th edn, para. 1207) states the common law rule in this way:

> "Where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge, must be proved independently. An expert's evidence is necessarily founded on his training and experience, both of which involve the acceptance of hearsay information. It is, however, permissible for him to give an opinion on the basis of such hearsay, provided that it relates to specific matters on which he does have personal knowledge, or of which admissible evidence will be given by another witness. He may not, however, give details of a particular transaction unless he himself has personal knowledge of it."

[55] To similar effect, Cross and Tapper on Evidence (12th edn, page 533) state that "[a]n opinion is generally admissible only if based upon facts that will be proved by admissible evidence, or have been admitted". And in The Modern Law of Evidence (9th edn, page 541), Professor Adrian Keane makes much the same point, observing that "[t]he facts upon which the expert's opinion is based, sometimes referred to as 'primary facts', must be proved by admissible evidence". But Professor Keane also goes on to point out (at pages 542-543) that –

> "…the expert may justify his opinion by referring not only to any relevant research, texts, or experiments which he has personally carried out, whether or not for the purposes of the case, but also to works of authority, learned articles, research papers, letters, and other similar material written by others and comprising part of the general body of knowledge falling within the field of expertise of the expert in question."

[56] In reaching for conclusions from this brief survey of the authorities, I should first deal with the trio of authorities cited by Mr Courtenay to contend for a wider test of admissibility in relation to expert evidence. In both **Re M and R (minors) (sexual abuse: expert evidence)** and **Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others**, the court was considering, as Mr Williams pointed out, the application of the English Civil Evidence Act, 1972. In the former case, what Butler-Sloss LJ was particularly concerned to explain was that one of the explicit aims of section 3 of that Act was to abolish the old – and much disliked – common law rule, whereby an expert witness could not be asked or permitted to give an opinion on an

issue that was determinative of the case (the 'ultimate issue' rule, as to which, see **<u>Haynes v Doman</u> [1899) 2 Ch 13**). This context is all-important. For it seems to me that it was the fact that the expert was now permitted by statute to give "his opinion on any relevant matter" that obviated the need for any prior ruling on the admissibility of the evidence in both cases, once it related to some relevant matter. Thus, in such cases, it could be left to the judge "to regulate such matters by way of weight, rather than admissibility". And to the extent that, in **<u>Falmouth Resorts Ltd v International Hotels of Jamaica</u>**, the trial judge was content to quote Butler-Sloss LJ's dictum to this effect, it also seems to me, naturally with the greatest of respect, that the judgment adds nothing to the analysis.

[57] Putting these cases on one side, therefore, the authorities appear to support two – complementary - propositions on the issue of the admissibility of expert opinion evidence based on hearsay. The first is that, where the opinion of an expert is based on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion, that fact must be proved independently by admissible evidence, either given by the expert himself if it is within his own knowledge, or by some other witness. But secondly, once the primary facts on which the expert's opinion is based have been proved by such evidence, the expert may draw on the general body of knowledge in the particular area of expertise comprised in the work of others

[58] In this case, the material relied on by Dr Kassinger fell cleanly, in my view, into the category of evidence covered by the first, rather than the second, of these propositions. Attachment 3, which was the compilation of data ("the fuel analysis") collected and analysed by others not called as witnesses, was the basis upon which Dr Kassinger formed an opinion for the purposes of his report. If the contents of attachment 3 had been the subject of independent proof, then no issue could have arisen had Dr Kassinger then found it necessary to consult scientific work of a general nature in order to assist him in arriving at an opinion. But this was plainly not what happened in this case and, as Dr Kassinger himself frankly admitted in the brief cross-examination that followed the exclusion of attachment 3, his opinion was valueless without it.

[59] In his judgment in this matter, Legall J covered much of the same material that I have attempted to consider on this point. In relation to **R v Abadom**, the learned judge observed (at para 18) that in that case, when Kerr LJ pointed out that an expert might sometimes need to consult "the work of others in the same field" in coming to an opinion, he must have had in mind published material or literature of persons qualified as experts in the same field:

> "I do not think his Lordship had in mind a situation where scientific tests were conducted in a lab by unknown persons whose skill, experience and qualifications in [the] field of Dr Kassinger are unknown. Experts are entitled to consider written material by other experts or by persons qualified in their field, if those experts or persons' expertise and qualifications are evidence in court. In this case before me, DNVPS had a staff of thirteen technicians, and there is no evidence of the identity or skill or experience or qualifications of these technicians. I do not know which of them prepared the tests in attachment 3 and I do not know whether the tests in attachment 3 were produced by persons qualified skilled and experienced in the same field in which Dr Kassinger's experience lies."

[60] I think it is clear from this passage (as well as from the judge's final remark on the point, which I have already set out at para [28] above) that the learned judge fully appreciated the distinction inherent in the two propositions which I have distilled from the authorities. That is, the distinction between, on the one hand, the need for an expert's opinion to be based on facts proved by admissible evidence and, on the other hand, the freedom of the expert to consult, in the formation of his opinion, the work of others in the same field of expertise. It follows from this that I do not think that the judge can be faulted for his conclusion (at para 25) that "the test results contained in attachment 3 are inadmissible hearsay evidence, because the cogency of the evidence depends on what [an] unidentified person or persons said in the attachment 3 who were not called to give evidence". In my view, therefore, the respondent's notice must be dismissed.

Disposal of the case

[61] I would therefore propose that the court should make the following orders:

(i) The appeal is allowed and the judgment of Legall J given on 16 March 2012 is set aside.

(ii) Judgment is entered for the appellant on the claim and against the respondent on the counterclaim.

[62] I would invite the parties to make written submissions within 21 days of the date of this judgment as regards (i) the actual amount which the appellant is entitled to recover under the judgment, given in particular the claim for interest "at 1.75% per month, calculated as at 22nd October 2010", and "interest accruing until payment in full"; and (ii) the costs in this court and the court below. Thereafter, I would propose that these matters should be dealt with by the court on paper, without the need for any further hearing.

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MORRISON JA

AWICH JA

[63] I concur in the judgment of Morrison JA and I adopt the orders proposed by him.

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AWICH JA

HAFIZ-BERTRAM JA

[64] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Morrison JA, which I have read in draft.

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HAFIZ-BERTRAM JA