[2014] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 1/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CAC 2000 LTD**	**APPELLANT**
AND	**X-RAY & DIAGNOSTIC ULTRASOUND CONSULTANTS LTD**	**RESPONDENT**

Patrick Foster QC and Mrs Kerry Ann Sewell instructed by Nunes Scholefield DeLeon & Co for the appellant

William Panton and Miss Teri Ann Lawson instructed by DunnCox for the respondent

18, 19 December 2012; 26 April 2013 and 4 July 2014

PANTON P

[1] On 26 April 2013, in respect of this matter, we ordered as follows:

> "Appeal allowed. Order of Jones J set aside. A new trial is hereby ordered to take place as soon as possible."

We indicated then that we would put our reasons in writing. We do so now, and apologize for the delay.

[2] The order of Jones J was made in respect of a claim filed by the respondent in 2007. The respondent provides x-ray and diagnostic services at 1 Ripon Road, Saint Andrew, whereas the appellant supplies, installs, services and maintains air conditioning units. The appellant was contracted to provide equipment maintenance services to the respondent in respect of an air conditioning unit that the respondent had purchased from the appellant. On 11 May 2003, combustible material within the fan coil of the air conditioning unit ignited and started a fire which destroyed a section of the respondent's premises as well as items of equipment essential to the respondent's business.

[3] The respondent contended that the fire and subsequent loss were due to the appellant's failure to adequately maintain the air conditioning unit. In this regard, the respondent alleged a breach of contract as well as negligence. The appellant denied the allegations and averred that the respondent had operated a nuclear gamma machine that it owned in a manner which it knew or ought to have known was dangerous and against specification; and that its positioning and handling of the machine, had caused or was the main contributor to the fire in question.

[4] The learned judge found that "on a balance of probabilities", the appellant was negligent "in failing to properly maintain and repair the air conditioning unit" (para. [50] of his reasons) and that due "to the frequency with which the unit malfunctioned", the appellant was "in breach of the inspection service contract" (para. [52] of his reasons). Consequently, he found the appellant "liable in both contract and tort" (para. [53]).

[5] Given the nature of the complaint, the learned judge clearly had important factual findings to make. The respondent called an expert in the person of Mr Basil Nelson. He is an engineer who had then to his credit the experience of having investigated more than 100 fires. The learned judge accepted Mr Nelson's evidence in its entirety and consequently laid the blame for the fire squarely on the appellant. He quoted extensively from Mr Nelson's report while indicating how he came to his decision.

[6] The learned judge, in para. [29] of his reasons for judgment, stated that in a further expert report Mr Nelson had said that he had reviewed the report of Mark Hook, the appellant's expert witness filed on 30 September 2009, and that as a result he (Mr Nelson) had done further investigations as to the origin of the fire. In the final analysis, Jones J said that he accepted "the view put forward by the expert witness Mr Nelson for the Claimant as to the origin of the fire" (para. [37]). The learned judge added "In this case, there is no competing expert evidence opposing the Claimant's account of the origin of the fire, with the result that the conclusions of Mr Nelson are unchallenged" (para. [40]).

[7] As stated in para. [28] of the learned judge's reasons, the report of Mr Mark Hook, the appellant's expert witness, was struck out on the basis that there was a failure to meet the requirements of Part 32 of the Civil Procedure Rules. The learned judge also denied the request for Mr Hook to give oral evidence. His reason for ruling in that manner was that it would have required a court order.

[8] At the trial, Mrs Symone Mayhew, who then appeared for the appellant, made an application for the report of Mr Hook to be admitted and for evidence to be taken from him with a view to clearing any procedural barriers that there may have been. The learned judge denied the application. He did so even after it was pointed out that there was no obligation for him to accept the evidence, if, after considering it, he thought that it was unreliable or did not meet the requirements of expert evidence.

[9] In view of the learned judge's stance in respect of Mr Hook's report, and the failure to allow evidence to be given in the manner suggested by Mrs Mayhew, it was not open to Mr Nelson to be allowed to give evidence as regards the contents of Mr Hook's report and his (Mr Nelson's) subsequent investigations. This situation created an unnecessary imbalance which was not in the interests of justice. It is ironic that, having not entertained evidence from Mr Hook, the learned judge relied on Mr Nelson's report which paid attention to, and commented on, Mr Hook's report.

[10] In the circumstances, ground ii of the grounds of appeal succeeded. A new trial is imperative to allow for the consideration of both expert reports, and a determination made along with the other evidence in the case.

DUKHARAN JA

[11] This is an appeal from a decision of Jones J, delivered on 17 December 2010, wherein he found in favour of the respondent who sought damages against the appellant for negligence and/or breach of contract and consequential loss of earnings.

[12] We heard arguments from the appellant and the respondent on 18 and 19 December 2012, and reserved our decision until 26 April 2013. On that date, we allowed the appeal, set aside the order of Jones J and ordered a new trial to take place with costs to the appellant. We promised to put our reasons in writing and this is a fulfillment of that promise.

Background of this appeal

[13] The appellant is a limited liability company and is in the business of selling, installing and servicing air conditioners. The respondent is also a limited liability company and is in the business of providing medical diagnostic services. On 9 October 2002, the appellant and the respondent entered into a contract for the servicing of an air conditioning unit on the respondent's premises. Under the terms of the contract, the appellant agreed to perform the following in respect of the air conditioning unit:

(a) inspect the control panels and unit casing making recommendations if any;

(b) check electrical components (contractors), relays, motorized value etc and record current ratings of motor and compressors;

(c) check suctions and discharge pressure and supply and return air temperature at the evaporator coils;

(d) adjust belts, temperatures and timer setting as necessary;

(e) grease bearings and check for signs of wear and tear;

(f) wash filters, coils and clean cabinets; and

(g) test run all equipment.

[14] Pursuant to the contract, the appellant agreed to service the air conditioning unit on a quarterly basis and respond to service calls made by the respondent.

[15] On 11 May 2003, there was a fire at the respondent's premises which destroyed and/or damaged several pieces of the respondent's diagnostic equipment including the following:

i. Gamma camera

ii. Mammographic System

iii. Phillips IU 22 Ultrasound Imaging System

iv. Phillips HDI 5000 and

v. Comtronic Computer

[16] The respondent alleged that the fire was caused by the negligence and/or breach of contract of the appellant and commenced proceedings against it on 30 March 2007, claiming damages for the lost equipment and consequential loss of profits. The appellant filed a defence denying the claim and alleged that the fire was as a result of the respondent's own negligence. In a trial that lasted four days, Jones J made the following order:

(i) Judgment for the claimant

(ii) Damages are assessed as follows:

(a) US$586,165.21 and J$1,015,171.38 for the replacement costs of the equipment referred to in paragraph [5] above.

(b) Consequential loss of profits in the sum of J$7,077,847.00.

(c) Costs to the claimant to be taxed if not agreed.

[17] It was the finding of Jones J, inter alia, that the appellant breached its duty of care to the respondent by failing to properly maintain and repair the air conditioning unit. The appellant was in breach of the terms of its service contract with the respondent and, in particular, a clause in the contract which required the appellant to do inspections and make recommendations, if any. It was also the finding of the learned judge that the expert report of Mr Mark Hook, the appellant's expert, was not admissible into evidence, but the expert report of Mr Basil Nelson, the respondent's expert, was preferred by the court. It was also the learned judge's finding that the cause of the fire in the air conditioning unit was attributable to an earth fault and this fault could have been detected by a mega test.

[18] It is on the basis of the learned judge's findings that the following 10 grounds of appeal were filed:

"i. The learned judge [sic] finding that the Appellant was in breach of its duty of care to the Respondent and breached the terms of its service contract with the

Respondent was inconsistent with and against the weight of the evidence tendered at trial.

ii. The learned judge erred as a matter of law and/or improperly exercised his discretion in ruling that the expert report of Mark Hook was inadmissible, because of non compliance with Part 32 of the Civil Procedure Rules. As [sic] there was no sufficient or proper basis for him to have so ruled particularly in circumstances where the report was already in evidence at the commencement of the trial and had been referred to and relied on by Basil Nelson the Respondent's expert witness.

iii. The learned judge erred as a matter of law when he found that the standard of care for skilled persons as set out in the case of Bolam v Firern [sic] Management Committee was not applicable to the instant case but was limited to professionals;

iv. The learned judge erred as a matter of law when he failed to reject the evidence of Mr. Basil Nelson.

v. The learned judge erred as a matter of law when he failed to reject the evidence of Mrs. Ouida Nesbeth-Dunn.

vi. The learned judge erred as a matter of law when he conflated the issues of betterment and mitigation, when such issues ought to have been considered separately with due regard to the relevant principles of law.

vii. The learned judge erred as [sic] matter of law when he found that the Respondent's attempts at mitigation were reasonable.

viii. The learned judge erred as a matter of law when he found that the Respondent did not experience a betterment as a result of the purchasing of the new machines.

ix. The learned judge erred as a matter of law when he failed to allow a discount on the cost of the replacement machines as a result of the betterment that the Respondent gained by the purchase of new machines.

x. The learned judge erred when he accepted that the Respondent was entitled to be compensated for the loss of a comtronic computer and awarded the cost of the replacement computer when there was no evidence that such [sic] this item was damaged/destroyed in the fire and allowed."

[19] A counter-notice of appeal was also filed by the respondent. The grounds of appeal are as follows:

"a) While the Learned Judge was correct in finding in favour of the Claimant on its claim the Learned Judge erred in law in not ordering interest at a commercial rate to the Claimant.

b) Further/Alternatively the Learned Judge erred in law in not exercising his discretion under the Law Reform (Miscellaneous Provisions) Act and not including in his judgment that interest followed the judgment in favour of the Claimant."

Submissions

[20] Mr Foster QC for the appellant, argued grounds ii, iii and iv together as they were inextricably related. He submitted that the essence of the submissions made below by counsel for the respondent was that the expert report did not comply in form or substance with the requirements of the Civil Procedure Rules (CPR). In the context of those provisions, counsel for the respondent below had submitted that in relation to Mr Hook's report, it stated that, "This report was for the exclusive use of the British

Caribbean Insurance Company and was not intended for any other purpose", and it could not be impartial.

[21] Mr Foster submitted that it was beyond dispute that Part 32 of the CPR was framed in a manner to ensure that expert witnesses not only understand, but act as witnesses of the court and not in the interests of the parties who may have commissioned the preparation of their expert report. Their evidence must be independent, impartial and unbiased and must at all times seek to assist the court in the resolution of issues that the court requires assistance on. He further submitted that the fact that an expert has not complied with the requirements of Part 32 of the CPR, is not *ipso facto* a sufficient basis to exclude it from evidence. The court must be satisfied, he argued, that apart from non-compliance with the rules, the expert is incapable of being independent or impartial and therefore could not reasonably discharge his duties to the court.

[22] Mr Foster cited the case of **Fields v Leeds City Council** (2000), The Times, January 18 to support his argument. In that case, the trial judge refused to allow the City Council to call a surveyor, who was an expert witness at the trial, because he was employed to the Council. The judge had given the impression in his ruling that his objection to the expert as a witness was not in relation to his qualifications but where he was employed, as he was of the view that he was incapable of being a truly independent witness. The Court of Appeal in considering the issues, while it understood that the judge was anxious to embrace the spirit of Part 35 of the CPR

(which is equivalent to our Part 32), was however, of the view that the council should have been given the opportunity to satisfy the court that the witness was capable of giving expert evidence.

[23] Counsel submitted that the clear conclusion to be drawn from the decision of the Court of Appeal in **Field v Leeds**, is that a court should not reject the evidence of an expert witness simply because there may be some *prima facie* evidence of bias, but where issues of independence or impartiality come into question, and it is appropriate to do so, the court should assess whether the witness is familiar with the need to be objective and can discharge his duties to the court in an independent and impartial manner.

[24] Learned Queen's Counsel submitted that it was for the court, through questions posed to the expert, to determine his independence and thereby the reliability of his evidence. Without this type of investigation, he argued, whether at a trial or at a hearing in chambers, the court runs the risk of excluding valuable expert evidence for what may be an immaterial or insignificant conflict. Counsel further submitted that the learned judge, without more, concluded that the evidence (in Mr Hook's report) was biased, was not impartial and it would not have been the independent product of the expert, simply because the report was addressed to British Caribbean Insurance Company. Counsel further submitted that rejection of the evidence by the judge in those circumstances, was even more an injudicious exercise of a discretion as Mr Hook

was present at court and was available to satisfy the judge on oath, as to whether he understood his role as an expert witness, as prescribed by Part 32 of the CPR.

[25] Counsel was critical of the use of the report of Mr Nelson and the admissibility of his evidence by the learned judge. Mr Nelson had referred to and relied on aspects of the report, and taken investigative steps based on positions taken by Mr Hook. In fact, Mr Nelson's final theory, he argued, of the cause of the fire was disclosed by considering photographs attached to Mr Hook's report. Counsel further submitted that it was therefore difficult to disentangle Mr Nelson's evidence which was admitted in evidence from aspects of Mr Hook's report which was ruled inadmissible. Counsel also cited the following cases: **Toth v Jarman** (2006) Times, 17 August and **R (Factortame Ltd and Others) v Secretary of State for Transparent**, **Local Government and the Regions (No 8)** [2002] 3 WLR 1104.

[26] Mr Panton, in response, for the respondents, submitted that the defects in Mr Hook's report were not only procedural pursuant to Part 32 of the CPR, but the failure to follow procedure had consequential implications on the substance of those reports. He further submitted that Mr Hook's reports were not addressed to the court as required by Part 32.12 of the CPR but were expressly stated in the introductions as being "exclusively for the use of British Caribbean Insurance Company and was not intended for any other purpose". The reports were not an independent assessment as required by rule 32.4(1) and (2) of the CPR due to the fact that the reports were

prepared and/or signed by not only Mr Hook, but other persons including a Mr Thomas Young and a Mr Kevin Haye, neither of whom was approved by the court as experts.

[27] Counsel submitted that the duties and responsibilities of expert witnesses in civil cases include the following:

(i) Expert evidence presented to the court should be and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(ii) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.

[28] Counsel cited the case of **Stevens v Gullis** [2000] 1 All ER 527, where it was held that the requirements of the practice direction to the English rules (equivalent to Part 32 of the CPR) were intended to focus the expert's mind on his responsibilities so that the litigation might progress in accordance with the overriding principles contained in the CPR. In that case, the expert had demonstrated that he had no conception of those requirements, and the judge had no alternative but to bar the expert from being called as an expert witness.

[29] Counsel submitted that in the present case, the admissibility issue does not stand on its own. If the learned judge had exercised his discretion and admitted Mr Hook's report, he would still have been entitled to discount its probative value based on the

substantive defects and would not have given Mr Hook's report any weight and in so doing, would have arrived at the same conclusion.

Analysis on ground ii

[30] It is quite clear that Jones J accepted Mr Nelson's report that the fire was caused by the negligence of the appellant. However, what is also clear is that the learned judge in coming to his conclusion considered at Mr Hook's report. In fact, the final theory of the cause of the fire in Mr Nelson's report was disclosed by considering photographs attached to Mr Hook's report. As counsel for the appellant pointed out, it was difficult to disentangle Mr Nelson's report, which was admitted in evidence, from aspects of Mr Hook's report, which was ruled inadmissible.

[31] Although rule 29.1(2) of the CPR enables the court to exclude evidence that would otherwise be admissible, as part of the court's general power to control evidence given at the trial, the procedural deficiencies relating to Mr Hook's report did not justify the exclusion of his evidence. It should have been admitted, attaching whatever weight that was considered appropriate. Jones J was wrong to exclude that evidence, seeing that he used several areas of Mr Hook's report that were in Mr Nelson's report to come to his decision.

[32] It is clear therefore that both expert reports ought to have been considered. Ground ii therefore succeeded. It therefore became unnecessary to consider the other grounds of appeal that were filed. As stated, we ordered a new trial.

MCINTOSH JA

[33] I have had the opportunity of reading the draft reasons for the decision handed down by the court in this appeal on 26 April 2013, as penned by the Honourable President and my brother Dukharan JA. I have noted the difference in their approach in that while the Honourable President, in his characteristic style went straight to the heart of the matter, (undoubtedly meaning no disrespect to the industry of counsel as demonstrated by their submissions and the several authorities to which they referred the court), my brother Dukharan JA was more expansive in his approach. But, ultimately, in my humble opinion, both captured the basis for the order we made as stated in para. [1] herein and I unreservedly agree with their reasoning and conclusions.