[2016] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 20/2015

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**NATIONAL WATER COMMISSION**	**APPELLANT**
AND	**VRL OPERATORS LIMITED**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**
AND	**THE NATIONAL WORKS AGENCY**	**3RD RESPONDENT**
AND	**STANLEY CONSULTANTS INC**	**4TH RESPONDENT**
AND	**FREDERICK RODRIQUES & ASSOCIATES LIMITED**	**5TH RESPONDENT**

Kevin Williams and Colin Alcott instructed by Williams, Alcott & Associates for the appellant

Walter Scott QC, Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the 1st respondent

Miss Carlene Larmond and Andre Moulton instructed by the Director of State Proceedings for the 2nd and 3rd respondents

Mrs Denise Kitson QC and Mrs Trudy-Ann Dixon-Frith instructed by Grant Stewart Phillips & Co for the 4th respondent

Charles Piper QC and Demar Kemar Hewitt instructed by Charles E Piper & Associates for the 5th respondent

30 September, 1, 2 October 2015 and 22 April 2016

MORRISON P (AG)

Introduction

[1] This is an interlocutory appeal. It arises from a ruling made by Batts J on 13 February 2015, on an application for court orders in an action which is now part heard before him, that certain items of documentary evidence are admissible as exceptions to the rule against hearsay.

[2] The claimant in the action is the 1st respondent (VRL), in its capacity as the lessee and operator of a hotel formerly known as 'Hedonism III' in Runaway Bay, St Ann (the hotel). VRL claims substantial damages against (i) the appellant (NWC), a body corporate established by the National Water Commission Act, with responsibility for the provision of potable water and other water related services throughout Jamaica; (ii) the 2nd respondent, under and by virtue of the Crown Proceedings Act; (iii) the 3rd respondent, an executive agency under the Executive Agencies Act; (iv) the 4th respondent, an American firm, which is engaged in the business of providing consultancy services in construction management, contract administration and resident engineering; and (v) the 5th respondent, a Jamaican company, which is engaged in the

business of providing civil engineering services.[1] For the purposes of this judgment, I will refer to NWC and the 2nd – 5th respondents collectively as the defendants.

[3] VRL's claim is based on the alleged negligence of one or more of the defendants. VRL alleges that, over a five day period in March 2005 (the relevant period), as a result of that negligence, NWC supplied turbid water and water considerably below normal pressure to the hotel, thus causing frequent interruptions to the supply of water to the hotel while efforts were being made to resolve the situation. VRL further alleges that the hotel had full occupancy over the relevant period and that, as a result of "the very turbid, very low pressure or non-existent water supply", the hotel's guests suffered "severe inconvenience", in consequence of which some guests checked out. By reason of these matters, VRL alleges that it has "suffered severe embarrassment, injury to its reputation, by among other things, much negative publicity on the internet by guests of the [hotel] [over the relevant period] and repeat guests, as well as inconvenience, direct loss and damage".[2]

[4] Each of the defendants takes issue with VRL on its claim and puts VRL to proof on the issue of damages.

[5] By notice filed on 24 October 2014, VRL notified the defendants of its intention, pursuant to sections 31E-31H of the Evidence Act (the Act), to tender in evidence at the trial a variety of hearsay statements made in documents. By notices of objection filed

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[1] A sixth defendant to the action, Jose Cartellone Contrucciones S.A. Civiles S.A., is not a party to the appeal.
[2] Further Amended Particulars of Claim, para. 19.

shortly thereafter, the defendants all took objection to VRL tendering the said documents in evidence and required the presence, at the trial, of their makers for cross-examination. On 27 January 2015, Batts J made certain pre-trial orders in the matter, including an order that VRL's application to have the various documents admitted in evidence should be deferred for consideration at the trial. Following on from this, on 6 February 2015 VRL filed an amended notice of application for court orders (the application) giving formal notice of its intention to apply for the admission in evidence of the documents set out in the notice previously filed by it on 24 October 2014.

[6] It is against this background that the substantive matter came on for trial, as it happened, also before Batts J, on 9 February 2015. With the concurrence of the parties, the question of the admissibility of the various documents was dealt with as a preliminary matter and the application was heard, as the learned judge put it[3], "as a trial within a trial". The documents which it was sought to admit were categorised by the learned judge, again with the concurrence of the parties, as follows[4]:

Category A: Monthly revenue analyses and occupancy statistics, and various statistics and reports relating to room revenues over the period 2002-2008, of the hotel and its sister hotel, Hedonism II. These documents were produced by VRL and are all said to have been computer-generated.

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[3]At para. [5] of his judgment.
[4]See para [7] of the judgment.

Category B: Certificates of competence and professional training in respect of Mr Anthony Cheng, the witness whom VRL proposed to call to speak to its computer system.

Category C: The Annual Travel Statistics (ATS) published by the Jamaica Tourist Board (JTB) for 2005 and 2008.

Category D: Auditors' reports on the statutory financial statements and supplementary information for VRL and International Hotels (Jamaica) Ltd (IHL), 2004-2009; and for VRL Management Ltd (VRML) for the year ending 31 May 2009.

[7] For the purposes of this judgment, I will gratefully adopt this very helpful categorisation. The defendants did not pursue their objections to the Category B documents and they were accordingly admitted as Exhibits 2(a)-(i). In due course, after hearing evidence from various witnesses and submissions by counsel on behalf of VRL and the defendants, Batts J made the ruling which is the subject of this appeal. Put shortly, the learned judge admitted the Category A documents, as business documents under section 31F, and as computer-generated documents under section 31G; the Category C documents, as public documents, under a common law exception to the rule against hearsay rule; and the Category D documents, on the basis, the learned judge said[5], that he "did not understand the Defendants to be pursuing seriously the objection

[5]At para. [8] of his judgment.

to this category of documents". I will return to the learned judge's detailed reasons for his ruling in respect of each category later in this judgment.

[8] The principal issue which arises on this appeal is therefore whether the learned judge was correct in his decision to admit the Category A, C and D documents on the stated bases. But a further issue arose when the appeal was called on for hearing on 30 September 2015. At that time, Dr Barnett for VRL brought to the court's attention the fact that the Act had very recently been amended, in respects that were directly relevant to the issues to be canvassed before us, by the Evidence (Amendment) Act 2015 (the 2015 Act). VRL's application was that the court should determine the applicability and significance of the 2015 Act, which came into effect on 11 August 2015, as a preliminary matter, and, if necessary, dismiss the appeal without any further hearing. However, after hearing submissions from all counsel in the case, the court decided that it would hear the appeal in the usual way and take the effect of the 2015 Act into account in coming to its decision in due course.

The legal context

[9] As is well known, evidence of a statement made by someone not called as a witness may or may not be admissible. If what it is intended to prove by the evidence is the fact that the statement was made, then it will, generally speaking, subject to considerations of relevance and any other exclusionary factor, be admissible for that

purpose. However, if the evidence is tendered to establish the truth of what is contained in the statement, it is hearsay evidence and as such generally inadmissible[6].

[10] The rationale for the rule against hearsay has often been explained by reference to, among other things, the potential unreliability of such evidence, given the difficulty of testing its accuracy[7]. But, as the well-known decision of the House of Lords in **Myers v Director of Public Prosecutions**[8] demonstrates, the rule has come to have a life of its own. In that case, the defendant and another were charged with conspiracy to receive stolen cars. The conspiracy which the prosecution alleged against him involved (i) the purchase of wrecked cars and their log books; (ii) the theft of cars nearly identical to the wrecked cars; (iii) the disguising of the stolen cars to make them conform as nearly as possible to the details contained in the log books of the wrecked cars; and (iv) the sale of the stolen cars as the repaired and renovated wrecked cars. In order to prove that the cars which were sold were in fact the stolen cars, the prosecution called as a witness an employee of the manufacturer of the wrecked and stolen cars. He produced microfilm records of cards completed by other employees which showed that the numbers stamped on the cylinder blocks of the cars which had been sold were the same as the numbers on the cylinder blocks of the stolen cars.

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[6]See **Subramaniam v Public Prosecutor** [1956] 1 WLR 965, 970.
[7]See, for instance, Richard May, Criminal Evidence, 2nd edn, para. 8-04; Cross on Evidence, 3rd edn, page 3
[8][1965] AC 1001.

[11] The majority of the House of Lords held that the records were inadmissible hearsay: as Lord Reid put it[9], "…the entries on the cards were assertions by the unidentifiable men who made them that they had entered numbers which they had seen on the cars". In an obviously reluctant concurrence, Lord Morris of Borth-y-Gest explained the basis of the decision in this way[10]:

> "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 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."

[12] Although the actual result of **Myers**, as it relates to the admissibility of business records, was swiftly reversed in England by the passing of the Criminal Evidence Act 1965[11], the case remains the best modern example of the truly technical dimensions of the rule against hearsay. As Lord Reid also observed in that case[12], "[t]his is a highly technical point, but the law regarding hearsay evidence is technical, and I would say absurdly technical". So notwithstanding the fact that, as Lord Morris pointed out in

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[9] At page 1022
[10] At page 1026
[11] Now substantially reflected in section 31F of the Act.
[12] At page 1019

reference to the microfilm records[13], "there would be every expectation that figures would be correctly recorded", the evidence was still excluded as hearsay evidence, "although it is the kind of hearsay evidence which, if the law can be altered, it would be eminently reasonable to admit".[14]

[13] Over a period of many years, the rule came to be subject to numerous exceptions at common law and, for present purposes, it is happily unnecessary to rehearse what is a long and complex history.[15] One well-known such exception, however, is the rule that statements in public documents are generally admissible evidence of the truth of their contents. As will be seen in due course, the continued applicability of this exception in Jamaica is one of the issues arising on this appeal.

[14] In addition to the common law exceptions, the legislature has from time to time intervened to provide for statutory exceptions to the rule against hearsay.[16] This was the explicit aim of the Evidence (Amendment) Act 1995 (the 1995 Act), by which, under the rubric, "Hearsay and Computer-generated evidence", Part 1A was added to the Act. First, there is section 31A, which provides that any statement which, before the coming into force of the amendment, "would by virtue of any rule of law, have been admissible in evidence of any fact stated therein, shall continue to be admissible as evidence of that fact by virtue of this section".

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[13] At page 1027

[14] **Myers** was considered and applied by this court in **R v Homer Williams** (1969) 13 WIR 520.

[15] For a full account, see Cross, op. cit., 3rd edn, chapter 18.

[16] In England, the reform process for civil proceedings started with the Evidence Act 1938, which made hearsay statements in documents admissible under certain conditions – see Ian Dennis, The Law of Evidence, 3rd edn, para. 16.27.

[15] Next, section 31B defines 'document' expansively, to include, in addition to a document in writing –

> "(a) any map, plan, graph or drawing;
>
> (b) any photograph;
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> (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
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> (d) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some otherequipment) of being reproduced therefrom."

[15] Then follows section 31C (which is concerned with the admissibility of written statements in criminal proceedings), and section 31D (which is concerned with the admissibility of "first-hand hearsay" statements in criminal proceedings).

[16] Section 31E is applicable to civil proceedings only. Expressly stated to be "[s]ubject to section 31G", section 31E(1) provides that, in any civil proceedings, "a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible". Section 31E(2) provides that, unless this requirement is dispensed with by the court pursuant to section 31E(6), any party who intends to tender such a statement in evidence must give notice to every other party to the proceedings, indicating the statement to be tendered and the person who made the

statement. Section 31E(3) provides that every party who receives such a notice shall have the right to require the attendance, as a witness, of the person who made the statement. But this right is subject to section 31E(4), which provides that the party who wishes to put the statement in evidence shall not be obliged to call the maker as a witness if the court is satisfied that that person is -

> "(a) is dead;
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> (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
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> (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
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> (d) cannot be found after all reasonable steps have been taken to find him; or
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> (e) is kept away from the proceedings by threats of bodily harm."

[17] As Sykes J makes clear in his notable judgment in **Sinclair and Jackson v Mason and Dunkley**[17], to which we were referred by Mr Williams, counsel for the NWC, the grounds listed in section 31E(4) must be established by evidence called at the trial. In other words, it is not sufficient for the party seeking to admit the hearsay evidence merely to assert reliance on the statutory ground relied on as an excuse for the witness' attendance.

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[17]Supreme Court Claim No CL 1995/S – 188, judgment delivered 5 August 2009.

[18] Section 31E(5) goes on to provide that, where the statement sought to be tendered by virtue of the section is other than documentary, it can only be proved by direct oral evidence from its maker or a person who heard it or otherwise perceived it being made. And section 31E(7) provides that where the maker of the statement sought to be tendered is called as a witness in the proceedings, the statement will only be admissible with the leave of the court.

[19] Section 31F deals with the admissibility of documents, grouped under the heading "business documents", in both civil and criminal proceedings. It is again expressed to be "[s]ubject to section 31G". The combined effect of section 31F(1) and (2) is that such a statement in a document is admissible as evidence of any fact stated in it of which direct oral evidence would be admissible if–

> "(a) the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid;
>
> (b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement;
>
> (c) each person through whom the information was supplied received it in the course of a trade, business profession or other occupation or as the holder of an office, whether paid or unpaid."[18]

[18] Section 31F(2)

[20] With respect to civil proceedings, the provisions of section 31F(4)-(8) are essentially similar to section 31E(2)-(7) above. In particular, they provide that, unless the requirement of notice is dispensed with by the court, the party seeking to rely on a statement falling within this section must also give 21 days' notice. This condition is again subject to the right of every party so notified to require the attendance of the maker of the statement as a witness, save where the court is satisfied that the maker is unavailable by reason of any of the matters specified in section 31F(6)(a)-(e). The list of matters specified in section 31F(6)(a)-(e) is identical to those set out in section 31E(4)(a)-(e), save that (i)section 31F(6)(d) requires it to be proved that the maker of the statement "cannot be found **or identified** after all reasonable steps have been taken to find **or identify** him" (emphasis mine); and (ii) the word "or" at the end of section 31E(4)(d) does not appear at the end of section 31F(6)(d).

[21] Section 31G provides that, unless the conditions stated in the section are satisfied, "[a] statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein …". In general terms, the conditions set out in section 31G(a)-(d) relate to proof that the computer was operating properly and not subject to any malfunction; that it was properly programmed; and that there is no reasonable cause to believe that the accuracy or validity of the document has been adversely affected by any improper process or procedure or by inadequate safeguards in the use of the computer. The same conditions are required to be satisfied in relation to each computer, where two or more computers were involved in the production of the document or in the recording of

the data from which the document was derived. In **Suzette McNamee v R**[19], Dukharan JA (Ag) (as he then was) observed[20] that " all subsections [of section 31G] must be satisfied before a computer generated document is admissible in evidence". In other words, section 31G(a)-(d) must be construed conjunctively.[21]

[22] Before the coming into force of the 2015 Act, section 31H provided that, "[w]here a statement contained in a document produced by a computer does not constitute hearsay, such a statement shall be admissible if the conditions specified in section 31G are satisfied in relation to that document".

[23] And finally for present purposes, section 31L provides that "in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value".

[24] Turning briefly to the 2015 Act, the first point of significance to note is the amended definition of 'document'. In the new section 1A[22], 'document' is now defined simply, to mean "…in addition to a document in writing, anything in which information of any description is recorded". Secondly, sections 31E and 31F have now been amended by the deletion of the opening words, "Subject to section 31G…". Thirdly, the original section 31G has been repealed and replaced by an entirely new section 31G, in

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[19]RMCA No 18/2007, judgment delivered 31 July 2008
[20]At para. 20, page 8

[21] I might add that Dukharan JA (Ag) also observed in passing at para. 21 that "Section 31G…is similar to… Section 69 of [PACE]".

[22]In substitution for the original section 31B, which has now been repealed.

which 'computer' is defined as "…any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, and includes any data storage facility or electronic communications system directly connected to or operating in conjunction with such device or group of such interconnected or related devices"[23]. And fourthly, section 31H of the Act has been repealed. It will, as I have already indicated, be necessary to consider the impact of these provisions in due course.

The hearing before Batts J

[25] A total of seven witnesses gave evidence during the hearing of the application. For present purposes, I propose to do no more than to give a brief indication of the evidence tendered in support of admitting each category of evidence and the learned judge's reasons for concluding that they should all be admitted.

Category A (computer-generated evidence)

[26] The documents falling within this category were described by the learned judge[24], to whom I am indebted for his summary of the evidence, as "unsigned computer generated tables and data related to room occupancy and revenues over a period of time". They were produced in evidence as exhibits to the witness statement of Mr Lenworth Lobban[25], a former employee of SuperClubs. In his witness statement,

[23] Section 31G(7)
[24] At para. [10]
[25] Dated 10 October 2014

which was ordered to stand as his examination-in-chief, Mr Lobban stated that he had worked with SuperClubs as group financial controller between 1996 and 2003 and as group chief accountant between 2003 and 2012. The evidence described VRL's "System, Applications and Products in Data Processing", or SAP system. According to Mr Lobban[26], one feature of the SAP system was "its ability to generate sophisticated reports for use as management tools…[such as]…the Break Even analysis report, which enabled management to examine the effect of varying room rates and occupancies on the profitability of the business". The hardware for the SAP system consisted of computer servers and network devices. Access to the system was departmental rather than individual. At all material times from May to October 2004, the system operated properly, did not malfunction, was properly programmed and was not subject to any alteration which would have affected the accuracy or validity of the content of the documents.

[27] However, human input was necessary and data was inputted by persons from all over and at varying locations, whether hotel, front desk or travel agents overseas. In his fifth witness statement[27], which was ordered to stand as his examination-in-chief, Mr David Kay, VRL's vice president for corporate finance, said that –

> "… the persons who inputted the data contained in those documents are not identifiable because different persons at different times and at different locations, including foreign locations, are responsible for the carrying out of those

[26] At para. 10 of his affidavit
[27] Dated 6 February 2015

> functions, and having examined the records I have ascertained that it is not possible to identify the particular individuals such as employees of travel agents, accounting persons and front desk persons at hotels who at any particular time performed the function."

[28] But under cross-examination, Mr Kay accepted that it might be possible to identify the source of some data inputted to the SAP system, as for instance when information was inputted by an external source such as Expedia.

[29] The SAP system took information from computers at each hotel and, in addition to being done by hotel staff, data entry could be done by guests themselves online. While SAP did have systems to ensure that "edit/change/update functions" were subject to very stringent controls, it was subject to human intervention and various persons would have access to it for that purpose. Output information from the system, comprising reports, results of analyses and the like, was always generated from data within the system and was therefore dependent on the source data inputted into it.

[30] As already indicated, Batts J admitted the Category A documents, as business documents under section 31F and as computer-generated evidence under section 31G. As regards the section 31F criteria, the learned judge said this[28]:

> "[24] … It is clear to me that these documents were *'created or received'* in the course of trade *[section 31F2(a)]* [sic] and the information supplied was whether directly or indirectly, by persons who may reasonably be supposed to

[28] At paras[24]-[25] of his judgment

have had personal knowledge of the matters dealt with *[section 31F2(b)]* [sic]. In other words the assorted persons, possibly in the hundreds at tour desks, front desks in the hotels, and even customers online, would have personal knowledge of the bookings they were making and would have done so in the course of business or trade. Furthermore, a notice and an objection having been filed, [VRL] has led evidence sufficient to demonstrate that,

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

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

[31] And finally, as regards section 31G, the learned judge took the view that it introduced a separate route to admissibility, which was discrete from, and not governed by, either section 31E or 31F. The learned judge said this[29]:

> "[27] I also find that the requirements of **section 31 G** were satisfied ... I am persuaded that the words 'subject to' in sections 31 E and section 31 F, mean exactly what they say. That is the rules as they are stated for 'a statement made' must be read in light of, or with due deference to the specific provisions of section 31 G. Section 31 G therefore allows a statement in a document produced by a computer 'which contains hearsay' to be admissible if it is proved among other things that, 'there is no reasonable cause to believe that there was any error in the preparation of the data from which the document was produced'.
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> [28] This latter requirement would be unnecessary and otiose if it were necessary to call the persons who input [sic] the data or to prove that such persons could not be found. In short it seems, with respect, that it would make nonsense of the existence of **section 31 G**, to place that further onus on the party seeking to rely on computer generated evidence. If the input persons have to be called then there is no advantage in having the document produced by the computer tendered. Each inputter will give evidence of the data he or she was responsible for. The modern tool, the computer, would then reflect neither a saving in time nor money if, in order to put the document it produces into evidence, one must first show that the several persons who ever input data are dead or otherwise unavailable. That could not have been the intention of Parliament and the words of the statute '*subject to'* far from compelling such a conclusion, suggests the precise opposite." (Emphases in the original)

[29] At paras [27]-[28]

Category C (JTB statistics)

[32] The ATS for 2005 and 2008 were produced by Mrs Antoinette Lyn, a member of the JTB's management staff. Mrs Lyn has been employed to the JTB for several years and, since 2004, has been the manager of the Research & Market Intelligence Unit (the unit). Mrs Lyn stated[30] that, in carrying out its statutory functions under the Tourist Board Act (the JTB Act), the JTB "collects and compile [sic] data upon various aspects of tourism in or relevant to Jamaica and periodically publishes its findings". The unit, which is responsible for carrying out this function, publishes the ATS, which include, among other things, statistics relating to hotel room nights sold in all-inclusive and non-all-inclusive hotels. Each duly licensed hotel in Jamaica is required by the JTB to submit to the unit annually a return detailing its room nights sold and percentage occupancies by month and year for the relevant period. The majority of all-inclusive hotels comply with this requirement in a timely manner. The statistics in the ATS are based on data from those returns and, in respect of non-compliant hotels, estimates from data collected from details of persons' intended addresses in Jamaica as they appear in immigration cards provided by the Passport and Immigration Agency. As is well known, these cards are required to be completed by persons arriving in the island at the various ports of entry. As head of the unit, Mrs Lyn stated[31], she was "responsible for preparing and I did duly prepare" the ATS for 2005 and 2008. Further, Mrs Lyn went on to say[32],

[30] At para. 4 of her witness statement dated 26 September 2014.
[31] At para. 9 of her witness statement dated 26 September 2014.
[32] At para. 4 of her second witness statement dated 28 January 2015

"…in pursuance of [its] statutory function and duty, JTB records, retains and publishes" the data contained in the ATS to the public, and "the said data is available for reference and inspection by the public".

[33] In admitting the ATS as public documents, after rehearsing the rival contentions for and against their admission, Batts J said this[33]:

> "[33] ...Dr. Barnett submitted and I agree, that the documents were in the nature of public documents and admissible as an exception to the hearsay rule. The Defendants objected to their admission because it was contended that they were not made by a public body which had a duty to monitor or regulate. Reliance was placed on passages in *Cross on Evidence 7th edition* … which emphasize the duty to keep the record. I am however satisfied, when regard is had to the Tourist Board Act that the preparation of these very comprehensive reports is a part of the duty of the Tourist Board. I believe the ordinary Jamaican, or for that matter, ordinary hotelier, would be astounded to hear it suggested that as part of its remit the Tourist Board was not obligated to have up to date statistics on visitor arrival and such the like. It would be impossible for the Board to carry out its several functions (*detailed at section 11 of the Act*) without such data and information, to inform its decisions. I accept the evidence of Mrs. Antoinette Lyn, the manager, Research and Intelligence Unit that the information is not only collected but also cross referenced with data from the Immigration Section.
>
> [34] I am fortified in my approach by the landmark decision of the English Court of Appeal in ***R v Halpin [1975] QB 907*** which extended the nature of the 'public document' exception to the hearsay rule, to documents prepared by private persons but filed with the company registry. The submission of counsel in that case was that as the Registrar's role was administrative there was no duty to

[33] At paras [33] - [35] of his judgment

> inquire into the accuracy of the documents filed, and hence they were not public documents. In rejecting the submissions Lord Lane stated,
>
> > 'But the common law should move with the times and should recognize the fact that the official charged with recording matters of public import can no longer in this highly complicated world, as like as not, have personal knowledge of their accuracy.
>
> [35] In this case I hold the common law rules are sufficient to allow for the documents' admission. I find as a fact and on a true construction of the Tourist Board Act that the Jamaica Tourist Board does have a duty to collate and collect data. Further, that it sometimes supplements that data with information from the immigration authorities. There is therefore reasonable reliability in the records kept which are always available for public inspection."

Category D (auditors' reports and financial statements)

[34] The documents in this category were produced by (i) Mr Peter Williams, a chartered accountant, who, as a partner in the accounting firm of PricewaterhouseCoopers (PwC), was the engagement partner with responsibility for the audit of VRL, IHL and VRML over the relevant period; and (ii) Mr John Issa, a director and executive chairman of VRL from its inception, a director of IHL and VRML and a director of the SuperClubs Group of Companies (SuperClubs), of which VRL, IHL and VRML are all members. Although both gentlemen testified that they were not present when the financial statements were actually being prepared, the auditor's report for each of the companies over the relevant period was signed by Mr Williams on behalf of

PwC, while the financial statements were all signed by Mr Issa in his capacity as a director of the companies.

[35] In admitting these documents, the learned judge said this[34]:

> "…The opinion letter for the auditors was deponed to by Mr. Peter Williams, a partner of [PwC]. The accompanying financial statements were signed by Mr. John Issa who identified them as the financials of companies of which he was chairman. I did not understand the Defendants, all this evidence having been lead [sic], to be pursuing seriously the objection to this category of documents …"

The grounds of appeal

[36] Dissatisfied with Batts J's decision, NWC, with the leave of the learned judge, filed the following grounds of appeal:

> "A. The Learned Judge erred as a matter of law and/or fact in his ruling that the Annual Statistics for the years 2005 and 2008, issued by the Jamaica Tourist Board, were public documents for the purposes of the common law exception to the hearsay rule.
>
> B. The Learned Judge erred and failed to recognize that the categories of documents that were admissible in evidence under the former common law 'public documents' exception have been codified in sections 22 – 28 inclusive of the Evidence Act and that no common law exception now exists outside the aforesaid sections of the Act, and that the Claimant/1st Respondent did not satisfy any of the provisions in sections 22 – 28 inclusive of the Evidence Act relative to these documents.

[34] At para. [8]

C. The Learned Judge erred in failing to recognize that the Annual Travel Statistics for the years 2005 and 2008, issued by the Jamaica Tourist Board, contained second hand hearsay (hearsay on hearsay) and/or computer generated information and that these specific limitations in the Annual Travel Statistics for the years 2005 and 2008, issued by the Jamaica Tourist Board, were never overcome on the evidence before the Learned Judge.

D. The Learned Judge erred as a matter of law in failing to appreciate that the admissibility of computer based or computer generated evidence did not just depend on the fulfillment of the conditions in section 31G of the Evidence Act, but also that the conditions in sections 31E and/or 31F of the Evidence Act had to be satisfied as a prelude to the consideration of the additional requirements in section 31G of the Evidence Act.

E. The Learned Judge erred as a matter of law in failing to appreciate that section 31G of the Evidence Act was not a *'stand-alone'* section but merely contained additional requirements or conditions that had to be satisfied in circumstances where the documentary hearsay being sought to adduce and admitted into evidence was computer based or computer generated.

F. The Learned Judge erred as a matter of law in failing to recognize that the burden of proof is with the Claimant/1st Respondent in satisfying the court that any of the conditions specified in section 31E(4) and/or section 31F(6) of the Evidence Act had been satisfied, and that the aforesaid burden of proof could only be satisfied with clear and cogent evidence meeting the required standard of proof, which evidence was lacking in this matter.

G. The Learned Judge erred in finding that the 1st Respondent/Claimant had led any and /or sufficient evidence at the hearing to satisfy the requirements and burden and/or standard of proof in relation to section 31E(4)(d) and/or section 31F(6)(d) of the Evidence Act.

H. The Learned Judge erred in admitting into evidence the Financial Statements of International Hotels (Jamaica) Limited for the years 2004, 2005, 2006, 2007, 2008, and the Financial Statements for VRL Management Limited for the years 2009 in circumstances where the 1st Respondent/Claimant had not satisfied the court as to the relevance of those Financial Statements and/or in circumstances where the prejudicial effect of the admission of those Financial Statements outweighed their probative value.

I. The Learned Judge erred as a matter of law in allowing the admission into evidence of the Financial Statements of VRL Operators Ltd (the 1st Respondent) for the years 2004, 2005, 2006, 2007, 2008 and 2009, and International Hotels (Jamaica) Limited for the years 2004, 2005, 2006, 2007, 2008, and the Financial Statements for VRL Management Limited for the year 2009 in circumstances where the 1st Respondent/Claimant had not satisfied the court as to the matters set out in section 31F(2)(a)-(c) inclusive, as well as any of the pre-conditions set out in either section 31E(4) and/or section 31F(6) of the Evidence Act."

[37] Counter-notices of appeal were also filed on behalf of the 2nd – 5th respondents. Although they each differed in detail, their general effect was also to challenge the learned judge's decision in relation to (i) the requirements of and the relationship between sections 31E, 31F, 31G and 31L (in particular whether section 31G is a 'stand alone' provision, or whether it can only be relied on after the conditions specified in sections 31E and/or 31F have been satisfied); (ii) whether the ATS fell within the public document exception to the hearsay rule; and (iii) the applicability of section 31F. I therefore propose to consider the matters canvassed before us on this appeal under these broad headings.

Sections 31E, 31F, 31G and 31L

[38] Mr Williams for the NWC challenged the learned judge's decision to admit the documents in Categories A and D. His principal submission was that section 31G, rather than being a discrete, stand alone provision, as the judge found, is in fact required to be read together with sections 31E and 31F. It is therefore necessary for the party seeking to admit hearsay evidence under sections 31E and/or 31F to satisfy the court to the requisite standard that the conditions laid down in those sections have been met before reliance can be placed on section 31G. In this case, the requirements of sections 31E and 31F were not met, in that the identity of the makers of the hearsay statements was not known and there was no evidence of what reasonable steps had been taken to identify or to find them. Further, it was submitted, the evidence before the learned judge was insufficient to support a finding that the "cumulative requirements of section 31G" had been satisfied. In these circumstances, Mr Williams submitted, the learned judge erred in admitting the Category A documents, as well as the Category D documents pertaining to VRL. In relation to the Category D documents pertaining to IHL and VRML, Mr Williams also challenged the learned judge's decision to admit those documents, on the basis that they were not relevant and that, in any event, they ought to have been excluded under section 31L, in that, their prejudicial effect outweighed their probative value.

[39] For the 2nd and 3rd respondents, Miss Larmond was content to adopt Mr Williams' submissions as regards the admissibility of the Category A and Category D documents.

[40] For the 4th respondent, Mrs Kitson QC also supported Mr Williams' submissions in respect of the Category A and Category D documents. In a detailed analysis in her skeleton arguments, Mrs Kitson challenged the admissibility of the computer-generated evidence under section 31G. She also sought to demonstrate both the similarity of the relevant English legislation and the consequent applicability of decisions from that jurisdiction, particularly as regards the relationship between the equivalents of sections 31E, 31F and 31G.

[41] For the 5th respondent, Mr Piper QC challenged the admissibility of the Category A, but not the Category D, documents. He was for the most part therefore content to adopt the relevant parts of the skeleton arguments filed on behalf of NWC and the 4th respondent. But, Mr Piper was particularly careful to emphasise that the drafters of the Act had expressly made section 31F subject to section 31G. Accordingly, he submitted, it was clear that the two sections had to be read together whenever it was sought to admit hearsay evidence generated by a computer.

[42] Responding for VRL, Mr Walter Scott QC submitted the exact opposite on the effect of the words "subject to section 31G" in sections 31E and 31F: by the use of those words, it was submitted, the drafter of the Act was seeking to emphasise that the conditionalities of sections 31D, 31E and 31F do not apply to computer-generated documents which are being admitted by virtue of section 31G. Accordingly, Mr Scott submitted, the learned judge was correct in both his conclusions and his reasoning on this point. But Mr Scott also submitted that, because of the nature of the case, VRL had

adduced evidence sufficient to satisfy the criteria of admissibility under section 31F and that the learned judge had therefore come to the correct conclusion on that basis as well. Submitting that the section 31G criteria were also met, Mr Scott referred to the evidence adduced by VRL as regards the reliability of the computer system, both as regards hardware and software. On the basis of this evidence, it was submitted, Batts J was correct in admitting the evidence and no basis had been shown to disturb his findings. Insofar as the Category D documents pertaining to VRL are concerned, Mr Scott submitted that they were clearly business documents and as such admissible under section 31F; alternatively, they were not hearsay documents at all and were therefore capable of being admitted in evidence by their makers, *viz*, Messrs Williams and Issa. Additionally, in relation to the documents pertaining to IHL and VRML, Mr Scott submitted that they were clearly relevant on the issue of the damages to which VRL would be entitled should it succeed in establishing liability.

[43] Counsel on all sides of the argument in this casevery helpfully referred us to several authorities to support their respective contentions on the proper interpretation and application of sections 31E, 31F and 31G. I will consider some of them in the discussion which follows.

[44] The starting point is the relationship between sections 31E and 31F, on the one hand, and section 31G, on the other. I have already noted that the opening words of sections 31E and 31F state both provisions to be "[s]ubject to section 31G" and the true import of this phrase was the subject of much discussion during the hearing of this

appeal. As my summary of the rival submissions demonstrates, the positions are not readily reconcilable.[35]

[45] In support of his submission that the effect of the words "subject to section 31G" in sections 31E and 31F was to emphasise that the conditions of admissibility laid down in those sections do not apply to computer-generated documents sought to be admitted under section 31G, Mr Scott referred us to the decision of the Caribbean Court of Justice (CCJ) in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 1)**[36]. In that case, which has the distinction of being the first to be decided by the CCJ, the court was concerned with the provisions of sections 7 and 8 of the Caribbean Court of Justice Act 2003 of Barbados (the Barbados CCJ Act). Section 7 provided for an appeal to the CCJ with the leave of the Court of Appeal of Barbados in, among other cases, "… any civil proceedings where, in the opinion of the Court of Appeal, the question is one that by reason of its great general or public importance or otherwise, ought to be submitted to the court". Section 8 provided that, "[s]ubject to section 7, an appeal shall lie to the [CCJ] with the special leave of the court from any decision of the Court of Appeal in any civil or criminal matter". Among the issues for decision by the CCJ was whether the inclusion of the words, "[s]ubject to section 7" in section 8 meant that an application for leave under the former was a pre-condition for special leave under the latter.

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[35] See paras [38] and [39] above
[36] [2005] CCJ 1 (AJ); (2005) 69 WIR 35

[46] The court held that, on a true construction of the sections, it was not: both sections provided separate and independent routes by which an aggrieved party might appeal to the CCJ. Delivering the judgment of the court, de la Bastide P explained the basis of the decision as follows[37]:

> "[28] I turn now to an 'in limine' objection to the application for special leave taken by counsel for the respondents. He submitted that it was a pre-condition of applying to this court for special leave that application should first be made to the Court of Appeal for leave to appeal to this court. He referred to ss 7 and 8 of the CCJ Act which, as we have seen, provide respectively for appeals to this court with the leave of the Court of Appeal and with special leave of this court. He placed great reliance on the words 'Subject to section 7' by which s 8 was introduced. He argued that those words made it compulsory in every case for an application to be made under s 7 before one was made under s 8.
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> [29] We do not agree that the words 'Subject to section 7' have that effect. It is true that, when one provision is expressed to be subject to another, the effect is to make the first provision subordinate to the second so that, to the extent that full force and effect cannot be given to both provisions without a conflict between them arising, the first provision must yield to the second. The impact of these words, therefore, depends very much on the content and scope of each provision. In the instant case both ss 7 and 8 provide different routes by which a party aggrieved by a decision of the Court of Appeal may reach this court. The route via s 7 involves the obtaining of leave from the Court of Appeal on certain grounds which are specified in that section. The route via s 8 involves obtaining special leave from this court on grounds which are unspecified but are left to be determined by us. Notwithstanding the use of the words 'Subject to section 7' in s 8, these two routes are separate and independent of each other and do not

[37] At paras [28]-[29]

> intersect. The limitations imposed by s 7 on the grant of leave by the Court of Appeal do not apply to the grant of special leave by this court under s 8. Clearly the words 'Subject to section 7' do not have that effect. Similarly, it would be reading far too much into those words to construe them as requiring that every application made to this court for special leave under s 8 must be preceded by an (unsuccessful) application for leave under s 7. If that had been the intention, one would have expected the draftsman to so provide in clear and explicit terms."

[47] de la Bastide P's observation on the general effect of the phrase 'subject to' has been expressed in various ways in a variety of circumstances. Thus, in the Canadian case of **Massey-Harris Co Ltd v Strasbourg**[38], for instance, MacDonald JA stated that "[w]hen a provision in a statute is 'subject to' another provision requiring something to be done, the first provision is conditional upon the performance of what is required by the provision referred to". To similar effect, in **C & J Clark Ltd v Internal Revenue Commissioners**[39] Megarry J explained that "… the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections".[40]

[48] But what the actual decision in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 1)** demonstrates is that the general principle will in a proper case give way to different considerations dictated by the content, scope and, I

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[38] [1941] 4 DLR 620, 622

[39] [1973] 2 All ER 513, 520

[40] See also G.S. Thornton, Legislative Drafting, 3rd edn, page 89, where, discussing the particular drafting technique, the learned author describes as "the subservient clause" the clause beginning with the words "subject to"; and "the dominant clause", as the one which follows.

might add, overall context of the provisions in question. So, in that case, the CCJ had regard primarily to the language of sections 7 and 8, taken within the wider context of the Barbados CCJ Act, rather than to the general principle of statutory interpretation.

[49] In this case, Batts J took the phrase "subject to section 31G" in sections 31E and 31F to mean[41] that those sections "must be read in light of, or with due deference to the specific provisions of section 31G". Taken by itself, this statement is, of course, in the light of the general principle stated in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 1)** and the other cases to which I have referred, unexceptionable. But the real issue arises from the learned judge's further conclusion from this that section 31G "therefore allows a statement in a document produced by a computer 'which contains hearsay' to be admissible", once the conditions laid down in that section have been satisfied.

[50] In support of the contrary submission that the words "[s]ubject to section 31G" in sections 31E and 31F must be taken to mean that, in order to be admissible under section 31G, computer-generated evidence must first satisfy the conditions of admissibility in either section 31E or 31F, or both, counsel for the defendants in the court below placed great reliance on the decision of the English Court of Appeal in **R v Minors, R v Harper**[42]. In that case, the courtwas concerned with the relationship between sections 68 and 69 of the Police and Criminal Evidence Act 1984 (PACE). The

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[41]At para. [27]
[42][1989] 2 All ER 208

textual evidence strongly suggests that, in drafting sections 31E and 31G, the drafter had sections 68 and 69 directly in mind. Thus, in terms broadly similar to sections 68 and 69, sections 31E and 31G respectively provide for the admissibility in evidence of a hearsay statement in a document and the admissibility of evidence derived from computer records. As in the case of sections 31E (and 31F), section 68 is expressly stated to be subject to section 69.

[51] In **R v Minors, R v Harper**, the court addressed the very question with which we are now concerned: that is, whether evidence of a computer record could only be admitted under section 69 if the conditions set out in section 68 were satisfied. The court answered this question in the affirmative. Steyn J, delivering the judgment of the court, stated[43] that "it must be remembered that documentary records of transactions or events are a species of hearsay, which are not admissible unless they come within the scope of a common law or statutory exception to the hearsay rule." In considering whether section 69 "constitutes a self-contained code governing the admissibility of computer records in criminal proceedings", as had been assumed in the court below, the learned judge observed that the wording of section 68 was wide enough to cover a computer print-out and on that basis rejected the argument that section 69 fell to be regarded as a separate code exclusively governing computer records[44]:

> "…Section 69 is, however, entirely negative in form. It lays down additional requirements for the admissibility of a

[43] At pages 212-213
[44] At page 213

> computer record which has already passed the hurdle of s 68. In other words, such a document will only be admissible if it satisfies the foundation requirements of both ss 68 and 69."

[52] We were also referred to **R v Spiby**[45], in which the court was concerned with the admissibility of computer print-outs of telephone conversations made from a hotel. The evidence was that the computer functioned automatically without the intervention of any human being. At trial, the print-outs were admitted as real evidence and this ruling was upheld on appeal: as Taylor LJ put it[46], "[w]hat was recorded was quite simply the acts which had taken place in regard to the telephone machinery and there was no intervening human mind". The court accordingly considered that there was no necessity to have regard to the "detailed criteria laid down in sections 68 and 69". In other words, it was held, where information is recorded by mechanical means without the intervention of a human mind, no hearsay consideration arises in respect of the record made by the machine. Of direct relevance for present purposes, in the course of his analysis of the legal position, Taylor LJ referred to Steyn J's conclusion in **R v Minors, R v Harper**, that sections 68 and 69 of PACE required to be read together, with clear approval.

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[45] (1990) 91 Cr App R 186
[46] At page 191

[53] Next, we were referred by Mrs Kitson to the decision of the House of Lords in **R v Shephard**[47]. The principal question for determination in that case was whether a party seeking to rely on computer evidence could discharge the burden cast on it by section 69(1)(b) of PACE to establish that at all material times the computer was operating properly without calling a computer expert; and, if so, how? The House answered this question in the affirmative, deciding that, although the nature of the oral evidence required to discharge the burden would vary, depending on the complexity of the computer and its operations, it would normally be possible for the evidence as to the computer's reliability to be given by a person who was familiar with it, in the sense of knowing what the computer was required to do, and who could say that it had been doing it properly.

[54] In the course of his discussion on the requirements of section 69, Lord Griffiths, who delivered the leading judgment, said this[48]:

> "The object of s 69 of the Act is clear enough. It requires anyone who wishes to introduce computer evidence to produce evidence that will establish that it is safe to rely on the documents produced by the computer. This is an affirmative duty emphatically stated:
>
> > 'a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein *unless it is shown.*' (Emphasis added.)

[47] [1993] AC 380
[48] At page 384

> Such a duty cannot be discharged without evidence by the application of the presumption that the computer is working correctly expressed in the maxim omnia praesumuntur rite esse acta as appears to be suggested in some of the cases. Nor does it make any difference whether the computer document has been produced with or without the input of information provided by the human mind and thus may or may not be hearsay. If the document produced by the computer is hearsay it will be necessary to comply with the provisions of section 24 of the Criminal Justice Act 1988, the successor to section 68 of the Police and Criminal Evidence Act 1984, before the document can be admitted as evidence and it will also be necessary to comply with the provisions of section 69 of the Act of 1984."

[55] Lord Griffiths went on to indicate[49] that, contrary to the views expressed by Steyn J and Taylor LJ in **R v Minors, R v Harper** and **R v Spiby** respectively, even where information is recorded by mechanical means without the intervention of a human mind, it would still be necessary to satisfy the requirements of section 69:

> "It is surely every bit as important that a document produced by a computer and tendered as proof of guilt should be reliable whether or not it contains hearsay."

(I would observe in passing, since the question does not arise in this case, that it is no doubt considerations along similar lines which informed the presence in the Act of the now repealed section 31H[50].)

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[49] At page 385

[50] See para.[22] above

[56] Finally on this point, I should mention the decision of this court in **Robinson & Attorney General v Henry & Henry**[51]. The court was concerned in that case with what Panton P described[52] as "computer generated information which had not been verified as required by law". In upholding the trial judge's refusal to admit this evidence under section 31G, Panton P, with whom the other members of the court agreed, said this[53]:

> "[26] ...In his witness statement, Mr Naylor clearly stated that he had no personal knowledge of the information that he was producing from the computer records of Black Horse Limited. He also said that if the computer was not operating correctly or was out of operation at any time, such default 'was not such to affect the accuracy of the information'. I am unable to understand how he could have made such a statement. Furthermore, under cross-examination, he confirmed that the figures and statement of accounts to which he had made reference were put in the computer by someone whose identity he does not know.
>
> [27] In the circumstances, I do not think that the learned judge can be faulted for applying section 31G to Mr Naylor's evidence. As regards the evidence of Mr Dalton-Brown, it is obvious that the learned judge was not convinced that the diagnostic report was authentic and reliable. The fact that the parties may have agreed to the admission of the report as an exhibit does not mean that the learned judge was obliged to accept its contents, hook, line and sinker. It is the duty of a party producing evidence to show its authenticity and reliability. In any event, I am not surprised that the judge did not lay great store on Mr Dalton-Brown's evidence seeing that there were apparently important matters that he either did not notice or did not remember. He did not generate confidence."

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[51] [2014] JMCA Civ 17
[52] At para.[18]
[53] At paras [26]-[27]

[57] It appears from this passage that Panton P took it to be significant that the witness who produced the computer-generated records had no personal knowledge of the information contained in them. On this basis, it may be arguable, as Mr Williams and Mrs Kitson submitted, that the learned President's comments support the view that section 31G, standing by itself, was insufficient to support the statement's admissibility. But, with respect, I cannot read this decision as providing definitive support for NWC's contention in this case. Rather, it seems to me, the generality of the learned President's language strongly suggests that, as Batts J explained[54], "…*the section 31 G* application failed because the trial judge found the supporting evidence unreliable".

[58] However, **R v Minors, R v Harper**, as well as the dicta of Taylor LJ and Lord Griffiths in **R v Spiby** and **R v Shepherd** respectively, provide clear authority for the view that, under PACE, a computer-generated document could only be admitted under section 69 if the prior requirements of section 68 were also satisfied. In other words, the two sections had to be read together whenever it was sought to admit hearsay evidence generated by a computer, with the result that the document in question was required to satisfy both sections. Section 69 was therefore treated as prescribing, as Steyn J put it[55], "additional requirements for the admissibility of a computer record which has already passed the hurdle of section 68".

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[54] At para. [29] of his judgment.
[55] See para. [51] above

[59] Bennion on Statutory Interpretation[56] makes the point that "… the interpreter of an enactment must take into account the state of the law at the time the enactment was passed". By the time the drafters of the 1995 Act came to settle the amendments that would result in sections 31E, 31F and 31G of the Act, **R v Minors, R v Harper** and the authoritative dicta in the other cases to which I have referred would have been known to represent the law in England as regards the relationship between sections 68 and 69 of PACE. In these circumstances, given the strong family resemblance between sections 68 and 69 and sections 31E, 31F and 31G, I can see no basis for construing sections 31E, 31F and 31G any differently from the way in which sections 68 and 69 were construed in **R v Minors, R v Harper** and the other cases. It seems to me that, had the legislature intended that, contrary to the established learning in those cases, section 31G should function as a stand-alone route to the admissibility of computer-generated documents containing hearsay statements, it would have so provided in express terms.

[60] But quite apart from any question of authority, I consider the view that, in order for computer-generated documents to be admissible under section 31G, they must first have cleared the hurdle of either section 31E or 31F, to be entirely justified by the terms and objectives of the sections themselves. The obviously modest aim of those sections is to provide, subject to the stated conditions, limited exceptions to the rule against hearsay. In my view, to construe section 31G as having opened up a discrete

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[56] 4th edn, by FAR Bennion, page 511

route of admissibility in respect of computer-generated hearsay documents, is to treat that section as having, effectively, abolished the rule against hearsay in respect of all such documents, irrespective of their provenance and without reference to any of the restrictive conditionalities set out in sections 31E and 31F. While this might well be a desirable outcome, I regret that I find it impossible to suppose that the legislature would have intended to achieve such a far-reaching reform of the rule against hearsay without saying so expressly.

[61] I therefore consider that Batts J erred in concluding that section 31G permits the introduction in evidence of a hearsay document independently of the provisions of either section 31E or section 31F, as they stood at the time of the hearing before him. In my view, section 31G does not provide an alternative method of admitting documentary hearsay evidence. Rather, it lays down, if I may borrow Steyn J's formulation in **R v Minors, R v Harper**, additional requirements for the admissibility of computer-generated documents which have already passed the hurdle of either section 31E or 31F.

[62] But I must now consider whether my analysis of the relationship between sections 31E, 31F and 31G has been affected in any way by the 2015 Act. One of the stated objectives of the 2015 Act, which came into force on 11 August 2015, was "to simplify the requirements which need to be complied with before [computer evidence]

may be deemed admissible"[57]. As I have already noted, sections 31D, 31E and 31F have been amended by the deletion from each of them of the opening phrase, "Subject to section 31G". The original section 31G has also been repealed and replaced by a new section 31G, which I cannot avoid reproducing in full:

> "31G – (1) Subject to the provisions of this section, in any proceedings, a statement in a document or other information produced by a computer shall not be admissible as evidence of any fact stated or comprised therein unless it is shown that –
>
> (a) there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; and
>
> (b) at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.
>
> (2) Subject to subsection (3), in any proceedings where it is desired to have a statement or other information admitted in evidence in accordance with subsection (1) above, a certificate –
>
> (a) dealing with any of the matters mentioned in subsection (1); and
>
> (b) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,
>
> shall give rise to a presumption, in the absence of evidence to the contrary, that the matters stated in the certificate are

[57] See the Memorandum of Objects and Reasons which Miss Larmond was kind enough to supply to the court.

accurate, and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(3) Where a party intends to rely on a certificate referred to in subsection (2), that party shall, at least thirty days before commencement of the trial, serve on the other party (or, in the case of an accused, his attorney-at-law) written notice of such intention, together with a copy of the certificate.

(4) Any person who in a certificate tendered which he knows to be false or does not believe to be true commits an offence and shall be liable –

(a) on conviction, on indictment in the Circuit Court to a fine or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment; or

(b) on summary conviction in a Resident Magistrate's Court to a fine not exceeding one million dollars or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment;

(5) Where the circumstances of the case are such that, on the application of either party, the court considers that the prejudicial effect of enabling a party to benefit from the presumption under subsection (2) in relation to the matters stated in a certificate would outweigh the probative value of the certificate, the court may require the party who is seeking to rely on the statement in a document or other information produced by the computer, to prove the matters referred to in paragraphs (a) and (b) of subsection (1) by adducing evidence thereof.

(6) Nothing in subsection (1) shall affect the admissibility of an admission or a confession by an accused.

(7) In this section, 'computer' means any device or group of interconnected or related devices, one or more of

> which, pursuant to a program, performs automatic processing of data, and includes any data storage facility or electronic communications system directly connected to or operating in conjunction with such device or group of such interconnected or related devices."

[63] As can readily be seen, the new section 31G significantly recasts the original provision by introducing a mechanism for certification of the requirements relating to the operational integrity of the computerwhich are contained in section 31G(1). A certificate will give rise to a presumption, in the absence of evidence to the contrary, that those requirements have been met. The party intending to rely on a certificate must, at least 30 days before the commencement of the trial, serve the other party (or, presumably, parties) with written notice of such intention, together with a copy of the certificate. It is only where the court considers, on application by either (or, presumably, any) party, that the prejudicial effect of enabling a party to benefit from the presumption to which the certificate gives rise would outweigh the probative value of the certificate, that the court may require the party seeking to rely on the computer-generated statement to prove the requirements of section 31G(1) by adducing evidence.

[64] For VRL, Dr Barnett submitted that the deletion of the phrase "Subject to section 31G" from sections 31D, 31E and 31F eliminated any question as to the need to satisfy the conditionalities of more than one section. Thus, it was submitted, in so far as business documents are concerned, the only conditions which must be satisfied are those contained in section 31F; while, in relation to computer-generated evidence, the

opening phrase of the new section 31G ("Subject to the provisions of this section") makes it clear that the admissibility of computer evidence containing hearsay requires only the satisfaction of those conditions mentioned in that section. Further, it was submitted, in the absence of any contrary indication, the amendments introduced by the 2015 Act take effect immediately on the enactment date and therefore apply to all pending, existing and future proceedings, including the instant case. Accordingly, it was submitted, the admissibility of the relevant documents is now "beyond question, if it ever was" and the appeal should be dismissed without more.

[65] Mr Williams for NWC disagreed on a number of bases. First, that VRL's arguments based on the 2015 Act constituted a new ground on which it was seeking to uphold the decision of the court below and as such would require the filing of a counter-notice of appeal, in accordance with rule 2.13(3) of the Court of Appeal Rules 2002 (the CAR). Second, that a statutory amendment enacted subsequent to the judge's decision cannot now avail VRL, since it is the law as it stood as at the date of the decision which must be applied. And third (and in any event), that, far from assisting VRL, the amendments introduced by the 2015 Act are more in favour of the defendants' position in the case. On this last point, Mr Williams forcefully contended that the definition of a computer in the new section 31G(7), as a device which "performs automatic processing of data", excluded from its ambit those computers, such as those relied on in the instant case, which are dependent on the inputting of information by means of human intervention.

[66] None of the other defendants felt able to support either Mr Williams' first or, it appears, his second point. Miss Larmond, Mrs Kitson and Mr Piper all considered it to be open to the court to take into account recent developments in the law without the need for a counter-notice of appeal. But Mrs Kitson specifically asked us to record her association with Mr Williams' third point relating to the actual impact of the 2015 Act on the appeal.

[67] Dr Barnett very helpfully provided us with some material on the effect of a change in the law pending an appeal to this court. In **Farmers & Merchants Trust Co Ltd v Chung and Patrick City Ltd**[58], the court was concerned with the validity of a sub-division contract which had been entered into without prior approval by the Kingston and St Andrew Corporation. At the time of the trial, under the relevant legislation as it then stood, this failure rendered the contract illegal and void. However, by the time the appeal came on for hearing the legislation had been amended, with retrospective effect, to provide that a failure to obtain prior approval for a sub-division did not nullify a sub-division contract. It was held that this court was entitled to give effect to the amendments. Delivering the leading judgment, Graham-Perkins JA (Ag) (as he then was), with whom the other members of the court[59] agreed, stated[60] that:

> "… it is clear, both on authority and on principle that this court is entitled, in the case of retrospective legislation enacted since the trial, and extending to pending

[58] (1970) 15 WIR 366
[59] Moody and Eccleston JJA
[60] At page 376

> proceedings, to make such order as the trial judge could have made if the case had been heard by him at the date on which the appeal was heard."

[68] In arriving at this conclusion, the court had regard to rules 12(1) and 18(3) of the Court of Appeal Rules 1962, which provided respectively that "[a]n appeal to the court shall be by way of re-hearing …" and that "[t]he court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require". In similar vein, though not identically worded, rule 1.16(1) of the CAR provides that "an appeal shall be by way of re-hearing"; and rule 2.15(b)(b) provides that, in relation to civil cases, the court has the power to "give any judgment or make any order which, in its opinion, ought to have been made by the court below".

[69] Dr Barnett also referred us to Bennion on Statutory Interpretation[61], in which, under the rubric "Retrospective operation: procedural provisions", the following appears[62]:

> "Because a change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings. This presumption does not operate where, on the facts of the instant case, to apply it would contravene the principle that persons should not be penalised under a doubtful enactment."

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[61] 5th edn, by FAR Bennion
[62] At page 320

[70] And further, under the rubric "*Evidence*"[63] –

> "Enactments relating to evidence are equated to procedural enactments. In the debates on the Bill for the Civil Evidence Act 1995 Lord Hailsham of St Marylebone said:
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> > 'Purely procedural and evidential changes in the law should apply as from the moment when the law is enacted to proceedings which are currently before the courts'."

[71] Lord Hailsham's observation was quoted with approval by Phillips LJ (as he then was) in **Bairstow and others v Queens Moat Houses plc**[64]. However, in that case there was no scope for the application of the presumption as the legislation in question[65] expressly provided that, subject to such transitional provisions as might be made, it did not apply to proceedings begun before its commencement.

[72] It is therefore clear that this court is entitled to take into account changes in the law arising out of legislation with retrospective effect enacted since the trial and extending to pending proceedings. Subject to any contrary indication in the legislation itself, purely procedural and evidential changes in the law are expected to be for the general benefit of litigants and others and are presumed to apply to both pending and future proceedings as from the moment when the law is enacted. This presumption is complemented by the provisions of the CAR, which provide that an appeal is a re-hearing and empower the court to give any judgment or make any order which, in its

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[63] At page 322
[64] [1998] 1 All ER 343, 351
[65] Civil Evidence Act 1995, section 16(3)

opinion, ought to have been made by the court below. I therefore consider that this court may take into account the provisions of the 2015 Act and its impact on the decision under review.

[73] In this regard, the principal point for consideration is whether the effect of (i) the deletion of the opening phrasesfrom sections 31D, 31E and 31F, which made them subject to section 31G; and (ii) the opening phrase of the new section 31G ("Subject to the provisions of this section"), is to put it beyond question that section 31G is intended by the legislature to provide a self-contained code for the admissibility of computer-generated documents.

[74] In my view, the contention that this is the effect of the 2015 Act is, though alluring, unsustainable. For, as it seems to me, all that the phrase achieved in the un-amended sections 31E and 31F was to emphasise that, to the extent that hearsay statements which it was sought to have admitted under those sections were contained in documents generated by computer, it would also be necessary to have regard to the requirements of section 31G. The words "subject to section 31G" directed attention to what I have already characterised as additional requirements laid down in that section for the admissibility of such documents. In my view, by so doing, the legislature merely made explicit a linkage that was already implicit in the opening words of the un-amended section 31G ("[a] statement contained in a document produced by a computer which constitutes hearsay shall not be admissible in any proceedings as evidence of any fact stated therein unless …").

[75] Accordingly, the removal of the opening words "subject to section 31G" in sections 31E and 31F does nothing to affect the imperative obligation, now contained in the new section 31G, on a party seeking to rely on "a statement in a document or other information produced by a computer" to satisfy the requirements of the new section 31G. Perhaps more importantly for present purposes, I think that my conclusion that, under the un-amended sections 31E, 31F and 31G, a computer-generated document sought to be admitted under section 31G had first to be admissible under one or both of sections 31E and 31F, remains unaffected by the provisions of the amended sections 31E, 31F and 31G. All that the 2015 Act has done, as the memorandum of objects and reasons to which I have already referred suggests that it set out to do, is to simplify the requirements which need to be complied with before computer evidence may be deemed admissible. It has not, in my judgment, affected the prior requirement to satisfy the criteria for the admissibility of documentary hearsay evidence under the provisions of sections 31E or 31F.

[76] This conclusion makes it unnecessary for me to express a view on Mr Williams' further submission that, in any event, by defining 'computer' as a device which "performs automatic processing of data", the new section 31G(7) has excluded all evidence produced by computers other than those which function automatically without human intervention. But I am bound to observe that, if valid, this proposition would have this startling result: although it is common ground that the clear intention of the 1995 Act was to render certain categories of hearsay statements generated by computer admissible, the legislature has now reversed itself by confining the category

of documents produced by computer admissible under the new section 31G to those which are generated automatically without human intervention; that is, to documents which are not hearsay at all. I strongly doubt that it could possibly have been the intention of the legislature, a full 20 years after its first attempt to liberalise the rule against hearsay, to, in effect, turn the clock back in this way. In my view, the words "automatic processing" in section 31G(7) are referable to the internal processes of the device itself and have no bearing on the question whether or not that data has been inputted by means of some human intervention.[66]

[77] My conclusion on the true import of section 31G primarily affects the Category A documents, which the learned judge admitted as business documents under section 31F and computer-generated documents under section 31G[67]. So it is in the first place necessary to determine whether, as Mr Scott submitted that he was, the learned judge was correct to treat these documents as business documents falling within section 31F.

[78] The conditions of admissibility of statements contained in a document under that section are, it will be recalled, that, firstly, the document must have been created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid; secondly, the information supplied in the document must have been supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to

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[66] For a similar definition of 'computer' in a modern statute, see section 2(1) of The Cybercrimes Act, to which Mr Williams very properly referred us.

[67] See para. [30] above

have had, personal knowledge of the matters dealt with in the statement; and thirdly, each person through whom the information was supplied must have received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid.[68]

[79] I think that it is clear enough, as Batts J found, that the Category A documents were, if not created, certainly received by Mr Lobban, who produced them, "in the course of a trade". It seems to me that the learned judge was also entitled to conclude from the evidence that the information supplied in these documents was supplied, either directly or indirectly, by persons (who section 31F does not require to have been the makers of the statements) who may reasonably have been supposed to have personal knowledge of the matters dealt with. These were, as Batts J put it, "…the assorted persons, possibly in the hundreds at tour desks, front desks in the hotels, and even customers online, [who] would have personal knowledge of the bookings they were making…". Finally, I also consider that each person through whom the information came to be supplied would have done so in the course of business or trade.

[80] In my view, therefore, the primary conditions for the admission of the Category A documents as business documents under section 31F were satisfied by the evidence produced before the judge on behalf of VRL. Thereafter, the defendants having exercised their right to require that the makers of the statements in question be called as a witness, VRL was required to prove "to the satisfaction of the court", as section

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[68] Section 31F(2)

31F(6) states, that the maker was unavailable by reason of one (or, in a proper case, more than one) of the reasons set out in that subsection. So the burden of proof in this regard was, as Mr Williams submitted, on VRL. I have already referred to Sykes J's conclusion in **Sinclair and Jackson v Mason and Dunkley**[69] that the section 31E(4) grounds relied on by the party seeking to tender a hearsay statement must be established by evidence called at the trial. I am also prepared to accept that view as equally applicable to the grounds listed in section 31F(6). But it seems to me that the nature of the evidence required to satisfy this obligation must necessarily vary from case to case, depending on the particular ground of exemption relied on and the overall circumstances of the case.

[81] As we have seen, Batts J considered that the evidence adduced by VRL was sufficient to prove the requirement of section 31F(6)(d), that is, that the maker of the hearsay statements contained in the Category A documents "cannot be found or identified after all reasonable steps have been taken to find or identify him". I respectfully agree with the learned judge's conclusion. I have already suggested[70] that the progenitor of section 31F was the English Criminal Evidence Act 1965, a measure enacted in direct response to the decision in **Myers**. In that case, the problem which led to the evidence of the numbers stamped on the engine blocks of the allegedly stolen cars being excluded as inadmissible hearsay was that the workmen who entered the numbers were unidentifiable. I am not aware of any authority – and Mr Williams

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[69] See para. [17] above
[70] See para. [12] above

directed us to none – which makes the admissibility of statements contained in business documents under the statutory exception created by either the Criminal Evidence Act 1965 or section 31F contingent upon the identification of the actual makers of the hearsay statements contained in the documents. Any such requirement would, in my view, restore the very mischief which the legislation sought to cure.

[82] In my view, the evidence which Batts J heard and accepted in this case was more than sufficient to justify his conclusion that, on a balance of probabilities, the persons – obviously numerous, various, transient and, in some cases, far-flung –who inputted the source data for the Category A documents could neither be found nor identified, despite reasonable steps to do so. In the particular circumstances of this case, the requirement to show reasonable steps was, I think, easily met by the evidence which demonstrated to the court's satisfaction that the nature of the subject matter was such as to render such steps as might reasonably be taken to find or identify the makers of the statements ultimately ineffective. I accordingly consider that, for the reasons which I have attempted to state, the learned judge was correct to find the Category A documents admissible as business documents pursuant to section 31F.

[83] I will now turn briefly to the section 31G criteria. As Batts J indicated in his judgment, he had the benefit of a considerable amount of evidence, including rebuttal evidence called by the 4th respondent, on the question of whether the operations of VRL's computer system were such as to satisfy the requirements of section 31G. Having

reviewed this evidence in some detail, Batts J found that the criteria for admissibility of the computer-generated evidence had been satisfied.

[84] As regards the proper approach to Batts J's findings in this appeal, Mrs Kitson submitted that, given that the learned judge's findings were not based on the credibility of the witnesses who testified before him, the general rule enshrined in **Watt or Thomas v Thomas**[71], that an appellate court will not lightly disturb a trial judge's findings of fact, ought not to apply in its usual rigour. For this proposition, Mrs Kitson very helpfully referred us to the judgment of McIntosh JA, sitting as a single judge of this court, in **Scotiabank Jamaica Trust and Merchant Bank Limited v National Commercial Bank Jamaica Limited and Jamaica Redevelopment Foundation Inc**[72]. There, in considering an application for a stay of execution pending appeal, the learned judge of appeal observed[73] that "even where the challenges appear to involve findings of fact, for the most part they are not concerned with issues of the credibility of witnesses so that the proposition in the authorities such as **Watt v Thomas** are not applicable to the instant case".

[85] While I am naturally inclined, albeit without full argument, to accept the view of McIntosh JA on this point, I would nevertheless approach Batts J's findings on this issue on the basis that, once there is material in the evidence to support them on a balance of probabilities, this court ought not to disturb them.

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[71] [1947] AC 484
[72] [2013] JMCA App 5
[73] At para. [26]

[86] In challenging the learned judge's findings in this regard, Mr Williams directed attention in his skeleton argument[74] that, while the evidence established that there was not one, but two, computer systems interfacing on or at VRL's hotel properties, evidence had been led in relation to the functioning of the SAP system only, thereby creating a gap in the evidence which was, in the light of this court's decision in **Suzette McNamee v R**[75], "fatal to any proper finding that the cumulative requirements of section 31G … had been satisfied". For his part, Mr Piper also complained in his skeleton argument[76] that the evidence adduced by VRL "[fell] short of demonstrating that the use of more than one computer did not introduce any factor that might reasonably be expected to have any adverse effect on the validity or accuracy of the documents, which is a fundamental requirement of section 31G(d) of the Act".

[87] In his skeleton argument[77], on the other hand, Mr Scott submitted that the uncontradicted evidence adduced by VRL through its various witnesses had demonstrated "that the use of more than one computer did not in any way compromise the accuracy of the data". Accordingly, it was submitted, this court ought not to disturb the learned judge's findings on this issue.

[88] On this score, as Mr Scott pointed out, both Mr Lobban and Mr Anthony Cheng gave evidence that, in the case of the former, "… the use of more than one computer …

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[74] At para. 72
[75] See para. [21] above
[76] At para. 23
[77] At para. 11

did not introduce any factor that might reasonably be expected to have had any effect on the validity or accuracy of the document"; and, in the case of the latter, "whilst there were more than one hardware servers or computers … involved in the production of the document or in the recording or storage of the data from which the document was derived … I have no reason to assume or believe that the multiple hardware may adversely affect the functionality of the SAP service because SuperClubs' SAP system is specifically designed as cluster computing". Neither witness was challenged in cross-examination on this evidence.

[89] So there was evidence supporting the learned judge's findings on this point. More generally, nothing has been put forward in this appeal, in my view, to impugn the learned judge's conclusion that the preconditions to the admissibility of the computer-generated documents contained in section 31G had been met in this case. There was evidence showing, as Mr Scott submitted[78], "the reliability of the computer system, both hardware and software and the rigid checks and balances employed … [and that] …there was no relevant breakdown or improper interaction in the system". I would therefore conclude that the learned judge, having correctly found that the documents in question were admissible as business documents under section 31F, was also correct in admitting them as computer-generated documents under section 31G.

[90] It may be convenient to turn now to the Category D documents. These, it will be recalled, are the auditors' reports on the statutory financial statements and

[78] At para. 10 of his skeleton arguments

supplementary information for VRL and IHL for 2004-2009; and for VRML for the year ending 31 May 2009. By what, as it now appears, must obviously have been a misunderstanding, Batts J took the defendants to not be "pursuing seriously the objection to this category of documents"[79].

[91] But on appeal, as we have seen, Mr Williams, supported by Miss Larmond and Mrs Kitson, but not by Mr Piper, has challenged the judge's decision to admit these documents, principally on the ground that they were inadmissible under either section 31E or 31F, but also on the ground, in relation to the documents pertaining to IHL and VRML, that they were irrelevant and that their prejudicial effect outweighed their probative value.

[92] Some of my conclusions in relation to the Category A documents are equally applicable to the Category D documents. Thus, insofar as Mr Williams repeated his contention that it was necessary to identify the makers of the hearsay statements which it was sought to admit under section 31F in particular, I am content to refer to my earlier discussion on the point[80]. But in any event, it seems to me that, as Mr Scott submitted, the companies' auditors' reports and supplementary financial statements must be admissible in the ordinary way, without any hearsay consideration arising, through the auditors, who were responsible for their preparation and who signed off on them, and the companies themselves, whose documents they are. I therefore think that

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[79] See para. [35] above
[80] See paras [80]-[82] above

the Category D documents were properly admitted through Mr Williams, the relevant PwC audit partner, and Mr Issa, the chairman of VRL and a director of all the other companies involved.

[93] In relation to the Category D documents which relate to the companies in the SuperClubs group other than VRL, that is, IHL and VRML, the two questions which arise are whether they are relevant and whether, in any event, they ought to have been excluded by the judge on the ground that their prejudicial effect outweighed their probative value.

[94] As far as the first question is concerned, Mr Williams contended that the financial statements for IHL and VRML do not provide ready comparators on the basis of which to assess the financial performance of VRL and they therefore have no relevance in this case. While this could well be so, it seems to me that the question of whether they have any impact on VRL's claim for damages, as Mr Williams contended that they cannot, must ultimately be a matter for the determination of the trial judge at the appropriate time. I would therefore not be inclined, particularly in a case where at least one of the defendants did not object to these documents being admitted in evidence, to exclude them at what is still a very preliminary stage of the litigation.

[95] The second question is clearly related to the first. For, Mr Williams said, if irrelevant material of this kind is placed before the learned judge, it can only have a prejudicial effect. Mr Williams therefore invited us to apply section 31L, which gives the

court a discretion to "exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value".

[96] While counsel may no doubt recall that, during the hearing of this appeal, I expressed some skepticism as to the relevance of this power in a civil case, it is beyond argument that section 31L, which extends to "any proceedings", applies equally to both criminal and civil proceedings. In this regard, Mrs Kitson drew our attention to the judgment of Harrison JA, sitting as a single judge of this court, in **Monica Harris v Lawson Atkins et al**[81]. In that case, D McIntosh J had declined to allow the applicant to rely on a medical report without calling the maker on the ground, among others, that "it would be unjust and manifestly prejudicial to the Defendants …". Harrison JA refused to grant permission to appeal from this ruling, because "[g]iven the factual situation disclosed in the affidavits and medical reports, the applicant … has not shown where the learned judge has improperly exercised his discretion ..."[82] However, one unusual feature of this case was that the applicant had known for well over a year that the defendants were objecting to the medical report going into evidence and required his attendance at the trial.

[97] Each case must therefore turn on its own facts. In the instant case, Mr Williams based his contention that the prejudicial effect of the financial statements of IHL and VRML would exceed their probative value entirely on his submission that they were

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[81] [2010] JMCA App 20
[82] Per Harrison JA, at para. [36]

irrelevant. However, given the view I have expressed on that point, it seems to me that, again, the effect of this evidence must remain a matter for the decision of the trial judge upon a consideration of all the evidence.

[98] I would accordingly conclude that the learned judge was entirely correct to admit the Category D documents in evidence.

The public document exception

[99] This issue has to do with the Category C documents, that is, the ATS published by the JTB for the years 2005 and 2008. As will be recalled, these documents were admitted by Batts J as public documents under the common law exception to the hearsay rule. On this issue, this time supported by Mrs Kitson and Mr Piper, but not Miss Larmond, Mr Williams again led the charge, submitting that the learned judge erred in admitting the Category C documents under the common law exception. But before coming to the rival submissions, it may be helpful to consider briefly the contours of the public document exception at common law, as derived from the authorities and other material to which we were referred by counsel.

[100] The principle itself is uncontroversial:

> "In civil and criminal cases, statements in public documents are generally admissible evidence of the truth of their contents."[83]

[101] The leading authority on the question of what is a public document for these purposes is still the decision of the House of Lords in **Sturla and Others v Freccia and Others** (**Sturla v Freccia**)[84]. At issue in that case was who was entitled to succeed to the property of one Mrs Brown, who had died intestate in 1871 leaving no known relations. The appellants sought to establish that they were next of kin to Mrs Brown's deceased father, a Mr Mangini, who had represented the Genoese government in London from 1781 up to the time of his death in 1803. In support of their case, the appellants sought to rely on a report made to the Genoese government in 1790 by a committee appointed by it to enquire into Mr Mangini's suitability to be given a higher authority as the agent of the government in London. The appellants contended that the report, which contained statements as to the birthplace and age of Mr Mangini which they considered favourable to their case, was admissible as a public document.

[102] The unanimous conclusion of the House of Lords, affirming the decisions of the courts below, was that the report did not qualify as a public document. In an oft-cited speech, Lord Blackburn explained the decision as follows:[85]

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[83] Cross on Evidence, 7th edn, page 572
[84] (1880) 5 App Cas 623
[85] At pages 643-644

> "Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi*-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.
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> In many cases, entries in the parish register, of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were 'public' then, because the Common Law of *England* making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, ever after.
>
> Taking that view of the matter, I think it becomes clear that this document is not evidence. …"

[103] Over the years, **Sturla v Freccia** has been applied in a number of cases in a variety of circumstances. I will mention a few of those to which we were referred. In

Heyne v Fischel & Co[86], the issue was whether documents kept by the Post Office for the purpose of showing at what time telegrams were received and sent out were admissible in evidence as public documents. In concluding that they were not, Pickford J observed[87] that:

> "...These documents were not meant to be preserved for more than a short time; they were not documents to which the public had access; they were not the result of a public inquiry, and they did not deal with a general public right. They were merely documents enabling the Post Office to regulate the pay of its servants and to see how the telegraph boys were doing their work."

[104] In **Pettit v Lilley**[88], the court was concerned with the admissibility of regimental records maintained by the Army. The question arose because, in registering the birth of her child, the respondent gave the name of her husband, who was a soldier, as the father. She was later convicted summarily for having made a false statement on the ground that her husband was overseas on military service at the time that the child was conceived. She appealed and, at the hearing of the appeal, in order to prove non-access, the prosecution sought to put in evidence certain regimental records relating to her husband. The officer in charge of the records, who was called as a witness, stated that the records in question were official records and documents, kept by a government department and preserved at the Regimental Records Office; they were not documents

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[86] (1913) 30 TLR 190
[87] ibid
[88] [1946] 1 All ER 593

to which the public had access, nor were they kept for the use or information of the public. The recorder held that the records were not admissible under the common law and, since there was no other evidence, quashed the conviction.

[105] On appeal to the High Court, the prosecution contended that regimental records were public documents and therefore admissible at common law as *prima facie* evidence of the facts stated in them. The argument failed on the basis that the regimental records, not being documents to which the public could have access, were not public documents. After considering Lord Blackburn's speech in **Sturla v Freccia**, Lord Goddard CJ, delivering the leading judgment, said this[89]:

> "It seems to me clear from Lord Blackburn's speech that to be a public document it must be one made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it.
>
> Now here, it appears to be beyond controversy, and, indeed, it was found as a fact, that the public has no right of access to these records. They are records which in my opinion, an officer of the Crown could refuse to produce on a *subpoena* if it was considered contrary to the public interest so to do. If a document is a public document, it must be so equally in time of war as in time of peace, and it is obvious that it might be most detrimental to the public interest to allow in time of war persons to have access to these records as they would show the movement of troops....
>
> …In my opinion, these records are not within the class that can be described as public documents. They are not kept for the information of the public but for the information of the Crown and the Executive, and accordingly, in my opinion,

[89] At pages 596-597

> the recorder was right in refusing to admit them as evidence. ..."

[106] And, to take the more modern example to which Dr Barnett referred us, in **West Midlands Probation Board v French**[90], the issue was whether a licence upon which a prisoner serving a term of imprisonment was released under supervision was admissible. The licence was signed by a governor of the prison and it was common ground that the conditions of release recorded in it amounted to hearsay evidence. In concluding that the licence was admissible under the public document exception, Aikens J, delivering the judgment of the Divisional Court, said the following[91]:

> "[39] There is no doubt that there is a rule of the common law that public documents are admissible in both civil and criminal proceedings as evidence of the truth of their contents. That rule was well established by the middle of the 19th century and was re-affirmed by the House of Lords' decision in ***Sturla v Freccia***... As the speech of Lord Blackburn in particular makes clear, (see pp 642 – 4 especially), the document in question must be 'public' in three senses. First, the document must be made by a public officer, ie. an officer acting under a public duty when creating the document. Secondly, the document must be public in the sense of it being created for an official, as opposed to a private purpose. Thirdly, it must be a public document in the sense of its purpose; it must be made for the purpose of the public making use of it. Lord Blackburn's speech makes it clear (at p 643) that in this last respect, 'public' does not mean the whole world. It means all those who would have a legitimate interest in the matter that is recorded in the document.

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[90] [2008] EWHC 2631 (Admin)
[91] At paras 39-41

> [40] We have no doubt that the Licence was a public document within the description given to it by Lord Blackburn and the other law lords in ***Freccia's case***. This document was produced by a public official, viz the Governor of HMP Blakenhurst. He produced it under an official duty, first because he was acting on behalf of the Secretary of State and secondly because there must be a duty to record acts taken pursuant to the criminal justice machinery of the land. It was an official, as opposed to a private document. It was produced for a public purpose, ie to show that a statutory procedure under criminal justice legislation was being carried out on behalf of the Secretary of State.
>
> [41] Lastly, the document was something to be seen and acted upon by the 'public', in the sense of all those who are interested in carrying out the licence. The 'public' in this case would include not only the prison service; probation service and the police, but also any member of the general public who may legitimately wish to know why this person, who had been sentenced to a period of imprisonment, was on licence for a period of three months."

[107] Professor Peter Murphy has summarised the conditions of admissibility of documents as public documents as follows[92]:

> "(a) that the document must have been made and preserved for public use and must contain matters of public interest…; (b) that it must be open to public inspection; (c) that the entry or record sought to be proved must have been made promptly after the events which it purports to record; and (d) that the entry or record sought to be proved must have been made by a person having a duty to inquire into and satisfy himself of the truth of the facts recorded."

[92] Murphy on Evidence, 7th edn, para. 7.27

[108] Professor Murphy goes on to observe that the fourth condition has given rise to difficulty in modern times because of the impossibility of public officers charged with the duty of making records for public being able to personally verify the contents of the record. Thus in **R v Halpin**[93], for instance, the prosecution was concerned to prove that the appellant, who was charged with conspiring with two others to cheat and defraud a borough council by means of inflated claims for work done, was a director of a company at the time when a fraud was committed. In order to establish this, evidence was adduced of entries in a file from the companies' register containing the statutory returns made by the company in compliance with the Companies Act 1948. The appellant was convicted and appealed on the ground, *inter alia*, that the file was not admissible in evidence under the public document exception, since it had been recorded by an official who was unable to satisfy himself as to the truth of its contents.

[109] In a judgment delivered by Geoffrey Lane LJ, the court observed[94], after considering **Sturla v Freccia** and some even earlier authorities, that "[i]t seems to be inescapable from those authorities that it was a condition of admissibility that the official making the record should either have had a personal knowledge of the matters which he was recording or should have enquired into the accuracy of the facts". But, on the particular facts of the case, it was held that in modern times it was no longer always possible for an official charged with recording matters of public import in a document for public use to have personal knowledge of their accuracy. It was sufficient

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[93] [1975] 2 All ER 1124
[94] At pages 1127-1128

if the function originally performed by one man had been fulfilled by two different officials, the first having knowledge of the facts and being under a statutory duty to record that knowledge and forward it to the second who, in his turn, was under a duty to preserve the document for public inspection. Accordingly, since the 1948 Act cast on a limited company the duty to make accurate returns of company matters to the registrar so that those returns could be filed and inspected by the public, the necessary conditions had been fulfilled to make those documents admissible as evidence of the truth of their contents. The appeal was accordingly dismissed.

[110] The rationale for the court's approach was explained by Geoffrey Lane LJ in this way[95]:

> "There is no doubt that in a case such as the present the official in the companies' register has no personal knowledge of the matters which he is putting on the file or recording. There is equally no doubt that it would be most convenient if the identity of directors and so on could be established simply by production of the file from the companies' register containing the returns made by the company. We do not, however, feel that convenience on its own is an adequate substitute for precedent, tempting though such a solution might be. The common law as expressed in the earlier cases which have been cited were plainly designed to apply to an uncomplicated community where those charged with keeping registers would, more often than not, be personally acquainted with the people whose affairs they were recording and the vicar, as already indicated, would probably himself have officiated at the baptism, marriage or burial which he later recorded in the presence of the churchwardens on the register before putting it back in the coffers. **But the common law should move with the**

[95] At page 1128

> **times and should recognise the fact that the official charged with recording matters of public import can no longer in this highly complicated world, as like as not, have personal knowledge of their accuracy**.
>
> What has happened now is that the function originally performed by one man has had to be shared between two: the first having the knowledge and the statutory duty to record that knowledge and forward it to the registrar, the second having the duty to preserve that document and to show it to members of the public under proper conditions as required.
>
> Where a duty is cast on a limited company by statute to make accurate returns of company matters to the registrar, so that those returns can be filed and inspected by members of the public, the necessary conditions, in the judgment of this court, have been fulfilled for that document to be admissible. All statements on the return are admissible as prima facie proof of the truth of their contents." (Emphasis mine)

[111] **R v Halpin** therefore emphasises the importance of applying the long-established principles in the context of, and taking into account, modern realities. It is a point to which Batts J, who quoted the same passage which I have highlighted above[96], was explicitly attracted and which VRL obviously underscores in this appeal.

[112] So, against this background, I come now to the submissions. Mr Williams' main submission was a radical one: sections 22-28 of the Act now provide for the admissibility of certain classes or types of documents that formerly fell within the common law exception, and, since there is nothing in the Act which preserves the

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[96] See para. [33] above

common law exception, the common law exception no longer applies in Jamaica. Mr Williams submitted that regard must therefore be had to sections 22-28, in particular sections 22 and 28, in order to determine the admissibility of public documents and there was no evidence to satisfy the conditions set out in those sections. In support of this submission, Mr Williams relied on the well-known case of **Attorney-General v De Keyser's Royal Hotel Limited**[97], in particular Lord Dunedin's pithy observation[98] that "…if the whole ground of something which could be done by the prerogative is covered by statute, it is the statute that rules". Accordingly, so the submission ran, where a statute is enacted to cover a situation formerly and solely covered by the common law, it is the statute that must be looked at and the common law position falls away completely, unless specifically preserved by the statute.

[113] But, in any event, Mr Williams also submitted, even if the common law exception did apply in this case, the ATS did not come within the "classical and well accepted definition of public documents", as laid down in **Sturla v Freccia**.

[114] For VRL, Dr Barnett submitted, adopting the words of Lord Browne-Wilkinson in **R v Secretary of State for Home Department, ex parte Pierson**[99], that Parliament "is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication". In this case, there was no such indication in the Act and so there was no basis to suggest that

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[97] [1920] AC 508
[98] At page 526
[99] [1998] AC 539, 573

Parliament had in any way intended to restrict or alter the common law in respect of the public document exception. It was further submitted that Batts J had correctly determined that the ATS for 2005 and 2008 were public documents, as these documents fit squarely within the parameters of the common law exception. As regards the duty to enquire, we were referred to section 11(1)(h) of the JTB Act, which provides that, within the limits of their resources, it shall be the duty of the JTB "to make all such enquiries and to collect all such information as they may think necessary for the purpose of carrying out their duty under this section". We were also referred to sections 22-23 of the Public Bodies Management and Accountability Act (the PBMA Act), which mandate public bodies, such as the JTB, to prepare periodic reports on their performance and achievements. And in any event, it was submitted lastly, in modern times public records are readily accessible to the public by virtue of access to information legislation.

[115] As regards the contention that the common law exception has been abrogated by the provisions of sections 22-28 of the Act, Mr Williams placed particular reliance on sections 22 and 28:

> "22. Whenever by any enactment now in force or hereafter to be in force any certificate, official or public document or documents, or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, by law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or the Senate or House of Representatives of this Island, or any Committee of the Senate or House of Representatives or in any judicial proceeding, the same shall respectively be

admitted in evidence provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective enactments made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

"28. Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law or by consent of parties authority to hear, receive, and examine evidence:

Provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding five cents for every folio or ninety words."

[116] A brief consideration of the provenance of these sections may be helpful.[100] In 1845, the British Parliament enacted an Act described as 'An Act to facilitate the Admission in Evidence of certain official and other Documents' (the Evidence Act

[100] See generally Halsbury's Statutes of England, 3rd edn, volume 12, pages 813-814

1845)[101]. Then, in 1851, the British Parliament enacted a further Act dealing with the subject of evidence, described as 'An Act to amend the Law of Evidence' (the Evidence Act 1851)[102].

[117] In 1856, the Jamaican legislature passed a law described as 'An Act to amend the law of evidence' (the 1856 Act)[103]. Section 2 of the 1856 Act corresponded in virtually identical language to section 1 of the Evidence Act 1845. That provision, also in virtually identical language, is what now appears as section 22 of the Act. Section 9 of the 1856 Act corresponded in virtually identical language to section 14 of the Evidence Act 1851. That provision, again in virtually identical language, is what now appears as section 28 of the Act. In other words, sections 22 and 28 have formed part of Jamaican law since 1856, thereby predating the decision in **Sturla v Freccia** by close on 25 years. (For completeness, I might add that sections 23-27 of the Act also derive directly from the 1856 Act and, by extension, the Evidence Acts of 1845 and 1851.)

[118] Although it can hardly be said that section 22 was drafted in an easily accessible style, it appears to me to provide no more than this: where any enactment provides that any certificate, official or public document and the like, or a certified copy of it, is admissible as evidence of any fact in a court or other tribunal, it shall be admitted in evidence if it purports to be sealed, stamped or signed as required by that enactment, without proof of the seal, stamp, signature, or of the official character of the person

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[101] 8 & 9 Vict.c. 113
[102] 14 & 15 Vict. c. 99
[103] Chap. 19/1856

who appears to have signed the document, once the original document could have been so admitted.

[119] For its part, section 28, which is only slightly less dense, merely provides that, where any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, but there is no statutory provision for the admission of a copy, then an examined copy or extract of the document, certified as a true copy or extract by the officer in charge of the original, will be admissible in evidence.

[120] In my view, both sections are therefore, as the long title to the Evidence Act 1845 indicated of its provisions, purely facilitative of proof. Because section 22 refers to official or public documents admissible by virtue of "any enactment" and section 28 refers to documents "of such a public nature as to be admissible in evidence", neither section provides any guidance on the substantive admissibility of public documents. Indeed, they beg the very question which would in due course be answered by the House of Lords in **Sturla v Freccia**. I am therefore quite satisfied that Mr Williams' submission that the decision and the common law principles which it explains have been overtaken by sections 22-28 is plainly unsustainable. And, if there was ever any question whether **Sturla v Freccia** remained good law after the enactment of the 1995 Act, this too is completely put to rest by section 31A[104], which expressly preserves and

[104] See para. [14] above

gives statutory force to the admissibility of statements previously admissible at common law by virtue of one or other of the various exceptions to the rule against hearsay.

[121] The only other matter which therefore arises is whether the **Sturla v Freccia** criteria, as explained and applied in later cases, have been met in this case. In order to make this assessment, I will approach the matter on the basis, though not strictly in the same order, of Professor Murphy's summary of the requirements[105]: (i) the document must have been made and preserved for public use and must contain matters of public interest; (ii) it must be open to public inspection; (iii) the entry or record sought to be proved must have been made promptly after the events which it purports to record; and (iv) the entry or record sought to be proved must have been made by a person having a duty to inquire into and satisfy himself of the truth of the facts recorded.

[122] To start with, there can be no question, in my view, that the ATS contains important information concerning matters of public interest, given the well-known significance of the tourist industry to the Jamaican economy. Mrs Lyn's unchallenged evidence[106] was that the unit which she headed at the JTB was responsible for preparing the ATS for 2005 and 2008 and that the data contained in them was retained and made available for reference and inspection by the public. Mrs Lyn also testified, again without challenge, that the data contained in the ATS was collected and compiled from various sources, presumably on an ongoing basis, and published annually. On this

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[105] See para. [107] above
[106] See para. [32] above

basis, therefore, I also consider the requirement that the record which is sought to be proved must have been made promptly after the recorded events was substantially, even if not precisely, met.

[123] I would therefore regard requirements (i) and (iii) as having been satisfied. But requirements (ii) and (iv) are, in my view, be problematic. As regards the former, the requirement that the record should be open to public inspection must, it seems to me, connote something more than that the keeper of the record is willing to allow the public to access it. Rather, members of the public must have access to the record as a matter of right. I think that this is the clear implication of Lord Blackburn's statement in **Sturla v Freccia**[107] that a public document must be a document "made for the purpose of the public making use of it, and being able to refer to it". As has been seen[108], this was in fact the explicit basis of the decision in **Pettit v Lilley**, in which Lord Goddard CJ pointed out that, because the public had no right of access to the regimental records, access to them could be refused by the Crown in an appropriate case.

[124] Although, as Professor Cross observed[109], **Pettit v Lilley** has been criticised as having accorded too much weight to the public access requirement, it was subsequently adopted without reservation by the Privy Council on an appeal from Cyprus in **Thrasyvoulos Ioannou and Others v Papa Christoforos Demetriou and**

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[107] See para. [102] above
[108] At para. [105] above
[109] 7th edn, page 577

Others[110]. In that case, significantly for present purposes, the Board held that the report in question did not come within the public document exception because, among other reasons, it had not been shown that "the report was in fact at all times open to public inspection or that an inference to this effect should be drawn from the fact that it was produced in evidence without objection by the … authorities"[111].

[125] In the instant case, despite JTB's wholly admirable stance in making the data contained in the ATS available to the public, there is in my view simply no evidence that members of the public have access to this information as a matter of right. Put another way, there is nothing to suggest that, should JTB's policy with regard to making the data available to the public change for some reason, it could nevertheless be compelled by subpoena or other legal process to do so. Curiously, although it is clear that he must have been made aware of it, Batts J made no comment at all on requirement (ii), instead choosing to focus on what he described[112] as the "reasonable reliability in the records kept which are always available for public inspection". In my respectful view, the learned judge erred in this, given the central importance attached to this requirement by the authorities.

[126] I have not, of course, lost sight of Dr Barnett's, as ever, thoughtful submission that all of this may have to be re-evaluated in the light of modern access or freedom of information legislation, such as the Access to Information Act which entered into force

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[110] [1952] 1 All ER 179
[111] Per Lord Tucker, at page 186
[112] At para. [35]

on 5 January 2004. The aim of the Access to Information Act, as set out in section 2, is to grant to the public "a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature". But whether and, if so, what impact the provisions of the Access to Information Act have on the common law rules which I have been discussing is, in my respectful view, another matter for another case. It seems clear from Batts J's judgment that no submissions were directed to him on this point and, in the absence of either a counter-notice of appeal by VRL seeking to support the learned judge's judgment on different grounds or full argument on the matter, I do not think that it would be right for the court to embark on a consideration of the issue.

[127] And, finally, there is requirement (iv); that is, that the entry or record sought to be proved must have been made by a person having a duty to enquire into and satisfy himself of the truth of the facts recorded. VRL hinges the existence of a duty to enquire on the provisions of the JTB Act and the PBMA Act. As has been seen, section 11(1)(h) of the former Act imposes a duty on the JTB "to make all such enquiries and to collect any such information as they may think necessary for the purpose of carrying out their duty under this section". Sections 22 and 23 of the latter Act, on the other hand, obliges all public bodies to prepare and submit annual, half-yearly, quarterly and other reports containing information primarily of a financial and management nature.

[128] Taking the PBMA first, I doubt that anyone could possibly gainsay the importance of the provisions of that Act in respect of the all-important matters of accountability and governance on the part of public bodies. But I have been hard put to see how these provisions can be of any real assistance on the question of whether the JTB was under a duty to enquire into and record matters concerning the tourist industry. These two things are simply not related.

[129] Nor, in my view, do the provisions of section 11(1)(h) of the JTB Act take the matter much further. It may, of course, be possible to say on the basis of that section that, as Batts J concluded[113], the JTB was indeed under a duty to enquire into and record "up to date statistics on visitor arrival and such the like". However, what the authorities plainly require, as the court reiterated in **R v Halpin**[114], is that the official making the record should either have had personal knowledge of the matters being recorded or should have enquired into the accuracy of the facts. In that case, as has been seen, it was possible to treat this requirement as having been satisfied by a combination of two officials: the one who, knowing the facts, was under a statutory duty to record them and the other who was under a duty to preserve the record for public inspection. But, in the instant case, there is absolutely nothing to suggest that JTB, having collected data from various stakeholders, undertook any enquiries in order to satisfy itself of the accuracy of the information provided to it. I do not therefore think that requirement (iv) has been made good in this case.

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[113] At para. [33] of his judgment
[114] See para. [109] above

[130] In all the circumstances, therefore, I consider that the learned judge fell into error in deciding to admit the Category C documents as public documents under the common law exception to the rule against hearsay. I would accordingly rule those documents to be inadmissible hearsay evidence. While I readily acknowledge the force of the arguments which led the learned judge to the opposite conclusion, the pre-conditions to the applicability of the common law exception are, in my judgment, sufficiently entrenched as to require legislative intervention for their modification or relaxation.

Conclusion

[131] For all the reasons I have attempted to state, I would accordingly propose that this court (i) dismiss the appeal against the learned judge's decision to admit the Category A and Category D documents; (ii) allow the appeal against the learned judge's decision to admit the Category C documents and order that the ATS are not admissible in evidence at the trial; and (iii) invite written submissions from all the parties on the matter of costs within 21 days of the date of delivery of the court's judgment.

McDONALD-BISHOP JA

[132] I have read in draft the comprehensive judgment of the learned President. I agree with his reasoning and conclusion and there is nothing useful that I could add.

F WILLIAMS JA (AG)

[133] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion. I have nothing to add.

MORRISON P (AG)

ORDER

(i) The appeal against Batts J's decision to admit the Category A and Category D documents is dismissed;

(ii) The appeal against Batts J's decision to admit the Category C documents is allowed and the court orders that the said documents are not admissible in evidence at the trial.

(iii) Written submissions are invited from all the parties on the matter of costs within 21 days of the date hereof.