

JERSEY / JUDGMENT

Corbin v Doryneck and Anor

[2022] JRC 057 (02 March 2022)

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judgment

the commissioner: 1. The above proceedings have recently resulted in a judgment Corbin v Dorynek

[2022] JRC 047 dated 16 th February 2022. This judgment is to be read in conjunction with that judgment. 2. At the beginning of the trial, Advocate Benest, on behalf of the Plaintiff, applied for a ruling that certain reports by a deceased expert should be admitted in evidence. This was opposed by Advocate Franckel on behalf of the Second Defendant. Having heard argument, I ruled that the reports should not be admitted at that stage and gave very brief reasons for my decision. However, I said that I would give fuller reasons in due course and this judgment constitutes those reasons.

Background

3. By Act dated 30 th April 2020 ("the Act"), the Master ordered, amongst other matters, that each party had permission to rely on the evidence of a seamanship expert to opine on issues relating to the reasonable and competent use and navigation of the vessels. The Master also made the usual orders about the experts subsequently meeting to identify points of agreement and disagreement and preparing a joint statement thereafter dealing with such matters. He also gave leave for any of the experts to prepare a short supplemental report within 28 days of the joint meeting. 4. The Plaintiff filed a report from Mr Patrick Yeoward , the First Defendant filed a report from Mr Roderick Pike and the Second Defendant filed a report from Mr Lee Moss crop . 5. These three experts subsequently held discussions as instructed and prepared a joint report dated 10 th March 2021 setting out points of agreement and disagreement. Mr Pike and Mr Moss crop then prepared supplemental reports both dated 12 th March 2021; Mr Moss crop's supplemental report included a detailed critique of the evidence of Mr Pike as well as of Mr Yeoward . All of these reports were disclosed and produced to all the parties. 6. Sadly, Mr Pike subsequently died and this was notified by the lawyers acting for the First Defendant to those acting for the Plaintiff and Second Defendant on 2 nd June 2021. The First Defendant then instructed a replacement expert, Ms Candi Abbott. She provided her report on 23 rd July 2021. She then met via Zoom

with Mr Yeoward and Mr Mossdrop , as a result of which a joint report dated 27 th August 2021 was signed by them setting out their points of agreement and disagreement. Ms Abbott then filed a supplemental report dated 30 th August 2021 and Mr Mossdrop filed a supplemental report on 1 st September 2021. All of these reports were also disclosed and produced to all the parties. 7. Mr Yeoward , Ms Abbott and Mr Mossdrop were all scheduled to, and did, give evidence at the trial. This was in accordance with the Act whereby each party was entitled to rely on the evidence of one seamanship expert. The only difference as a result of what occurred was that the expert relied upon by the First Defendant was Ms Abbott rather than Mr Pike. Advocate Benest's

submissions

8. Although it was the First Defendant who had instructed Mr Pike, he was content to rely solely on the evidence of Ms Abbott as the replacement for Mr Pike. However, Advocate Benest, on behalf of the Plaintiff, applied for a ruling that Mr Pike's original report, the joint statement to which he had contributed and his supplemental statement should all be admitted in evidence and placed before the Jurats. 9. In essence, he submitted that Mr Pike's evidence was clearly relevant evidence and therefore admissible. He argued that the Court did not have a general discretion to exclude relevant evidence. In this context, he referred to the observation of the Court of Appeal in A v B (H Party Convened)

[2006] JLR 518 where Beloff JA said at

- [29] and [30] (omitting all references): "29. It is axiomatic that only relevant evidence is admissible in civil (or indeed criminal) proceedings. The issue in this appeal is the extent, if any, of the power of the court to exclude relevant evidence in the exercise of a discretion. The general rule is that such a power does not exist in the absence of express provision in statute or rule: this is the position in Scotland and Australia... and in the majority of commonwealth courts, Queensland and Canada apart... This was also the common law position in England and Wales..., although now modified by the Civil Procedure Rules, r.32.1(2). 30. It does not, however, follow that relevant evidence must always be admitted. Rules of law such as those relating to legal professional privilege may lead to its exclusion. It will also be excluded if its admission would be an abuse of the process of the court...; contrary to the public interest...; or if the court, having imposed time limits for the production of statements, holds that to allow evidence contained in such statements to be admitted where there has been disobedience to those orders would defeat the ends of justice, bearing in mind the court's obligations to litigants as a group and not merely to litigants of a particular case before it.... Furthermore, the court may consider the evidence of insufficient relevance to justify its admission when the consequent impact on the conduct of the case would be disproportionate..., otherwise it appears to be accepted that there is no common law discretion to exclude it.... There is nothing in the common law of Jersey to contrary effect." 10. Furthermore, submitted Advocate Benest, the fact that Mr Pike's evidence would be hearsay evidence (because he could not be called as a witness) was not a

ground on which the Court could exclude his evidence as Article 3(1) of the Civil Procedure (Jersey) Law 2003 specifically provided that 'Evidence shall not be excluded on the ground that it is hearsay' . 11. He contended that none of the exceptions envisaged in the passage from *A v B* quoted above were applicable. Furthermore, there would be no prejudice to any of the parties. Mr Pike's reports had long been disclosed and the experts for the other parties had had ample time to consider his reports; indeed, Mr Mossdrop in particular had, in his supplemental report dated 12 th March 2021 spelled out his criticisms of Mr Pike's evidence. Any of the experts could elaborate on such criticisms when giving oral evidence. Accordingly, no prejudice to the other parties would be caused by the inclusion of Mr Pike's evidence. 12. He accepted that Mr Pike's evidence could not be tested in cross-examination, but this went to the weight which the Court might ascribe to this evidence, not to its admissibility. The parties would be able to make submissions on any point in connection with Mr Pike's evidence. 13. Advocate Benest also relied on two decisions of the High Court of England and Wales. In *Gurney Consulting Engineers v Gleeds Health and Safety Limited*

[2006] EWHC 43 (TCC) , a firm of structural engineers was a defendant in proceedings brought by the owner relating to a refurbishment project of a terrace of houses which had collapsed in the course of the refurbishment. Gurney had joined in, and sought contribution from, several other parties such as architects, contractors and Gleeds , who were the project managers. Gurney settled with the claimant and with the architects and contractors two weeks before the trial. This left only Gurney's claim for contribution against Gleeds . 14. Prior to the settlement, the various other parties had instructed experts and all the expert reports had been exchanged. Gleeds wished to rely on the reports of those other experts, which were seemingly broadly consistent with the evidence of their own expert. Gurney, on the other hand, sought to exclude the other expert reports on the basis that the parties who had settled were no longer parties to the litigation. 15. The judge referred to Rule 35.11 of the Civil Procedure Rules which provides: "Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial." 16. He held that the reference to a party included a party who had earlier disclosed an expert report but who had ceased to remain a party to the proceedings because it had settled. Gleeds were therefore entitled, pursuant to the Rule, to use the reports of the experts which had been disclosed by the other parties before they had settled. He held further that he considered this to be in accordance with the overriding objective on the facts of that case. 17. The decision in *Gurney* was followed in *Shepherd Neame Limited v EDF Energy Networks (SPN) plc and Others*

[2008] Bus LR Digest D43. That was again a case where a party wished to rely on expert reports disclosed by parties who had settled with the claimant on the second day of the trial. Akenhead J agreed with and followed *Gurney* on the basis of the express terms of CPR 35.11. He made it clear, however, that the objecting party, EDF, could call the experts of the parties who had settled and would be permitted to cross-examine those experts even though EDF was calling them. Discussion 18. I reject the above submissions for the following reasons: (i) I do not find the English cases of *Gurney* and *Shepherd Neame* to be

of assistance. They both turned on the terms of CPR 35.11 which provides specifically that any party may use an expert's report as evidence when that report has been disclosed by another party. There is no equivalent rule in the Royal Court Rules. (ii) I accept, of course, the general thrust of the observations of Beloff JA in *A v B* quoted above. However, Beloff JA was not purporting to set out an exhaustive list of the circumstances in which the Court may exclude relevant evidence. Thus, there is no mention of the limitation which the Court may impose on the admission of expert evidence. (iii) RCR 6/20(2)(d) provides that the Court may '...order that not more than a specified number of expert witnesses may be called'. Thus, there is clear authority in the Royal Court Rules for the Court to prohibit the admission of evidence from an expert witness if this would result in the number of such witnesses which has been specified by the Court being exceeded. (iv) In this case, the Master exercised the power conferred by RCR 6/20(2)(d) by limiting the number of seamanship experts which each party could call to one. The effect of allowing Mr Pike's reports to be admitted would result in the First Defendant in fact adducing evidence from two seamanship experts, which would be contrary to the Master's order. (v) Whilst it is open to the Court to depart from a limit imposed by the Master, there would have to be very strong grounds before doing so. The whole object of the above Rule and of the order made by the Master in this case, is to comply with the overriding objective and achieve the proportionate conduct of litigation. Parties are entitled to prepare for trial on the basis that limits on expert evidence imposed by the Master will be adhered to. (vi) I see no reason to depart from the Master's order; quite the contrary. Furthermore, there is no question of any unfairness or injustice resulting from the exclusion of Mr Pike's reports. Because the First Defendant has a new seamanship expert in Ms Abbott, each party will still be able to call one seamanship expert and will be free to cross-examine the experts called by the other parties. Thus, the position envisaged by the Master is preserved and all parties are treated equally. Conversely, if Mr Pike's reports are admitted, not only will this distort the balance of experts, but his evidence will also be untested by cross-examination. Advocate Benest argued that this can be dealt with as a matter of the weight which the Court gives to his evidence. However, in circumstances where each party is able to rely upon one expert who will be cross-examined, I see no benefit (but possible disadvantage) in having evidence from a further expert who cannot be cross-examined. (vii) The fact that Mr Pike's evidence is already before the parties and the other seamanship experts is not persuasive. The decisive recipient is the Court and the Court should decide this matter on the basis fixed by the Master, namely one seamanship expert for each party who can be cross-examined by the parties. (viii) It is also to be noted that this application was not made by the First Defendant, who instructed Mr Pike; it was made by the Plaintiff. The First Defendant has remained neutral in relation to the application. 19. For these reasons, I concluded that, subject to the point I am about to discuss, I should refuse the application to admit Mr Pike's report, his supplemental report and the joint statement dated 10 th March 2021 in evidence. Advocate Benest's additional argument 20. During oral argument, Advocate Benest raised a new submission which had not been foreshadowed in his skeleton argument. He submitted that he may well wish to cross-

examine Mr Mosscrop , the seamanship expert for the Second Defendant, about alleged inconsistencies between what he was saying in his current reports and what he said in his supplemental report dated 12 th March 2021, which consisted substantially of a critique of Mr Pike's reports. Advocate Benest submitted that it would not be possible to make sense of Mr Mosscrop's supplemental report dated 12 th March 2021 without looking also at the reports of Mr Pike and that accordingly Mr Pike's report should be admitted at this stage. 21. It would of course be open to Advocate Benest to cross-examine Mr Mosscrop over any alleged inconsistencies between his evidence (including his current reports) and what he said in his supplemental report dated 12 th March 2021. However, that does not mean that it would necessarily be the case that reference would have to be made to Mr Pike's reports. That would depend upon the nature of the cross-examination and whether Advocate Benest could satisfactorily cross-examine Mr Mosscrop by reference only to his supplemental report dated 12 th March 2021 or whether, in order to make the points which he wished to make, it would also be necessary to refer Mr Mosscrop and the Court to the contents of Mr Pike's reports. 22. In my judgment, it was not necessary or appropriate to admit Mr Pike's reports into evidence simply on the off chance that the nature and extent of Advocate Benest's cross-examination of Mr Mosscrop might require reference to those reports. 23. I therefore refused leave to admit Mr Pike's reports, but made it clear that I would be willing to reconsider my ruling if the nature of Advocate Benest's cross-examination of Mr Mosscrop made it necessary to refer to Mr Pike's reports (rather than just to Mr Mosscrop's supplemental report) to such an extent that those reports should be made available to the Court in full. 24. As it transpired, Advocate Benest's cross-examination of Mr Mosscrop during the trial made no reference to Mr Mosscrop's supplemental statement dated 12 th March 2021, or of any alleged inconsistencies between the content of that statement and Mr Mosscrop's evidence to the Court. Accordingly, the matter never arose for reconsideration. *Authorities Corbin v Dorynek*

[2022] JRC 047 . A v B (H Party Convened)

[2006] JLR 518 . Civil Procedure (Jersey) Law 2003. *Gurney Consulting Engineers v Gleeds Health and Safety Limited*

[2006] EWHC 43 (TCC) . *Shepherd Neame Limited v EDF Energy Networks (SPN) plc and Others*
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