

JERSEY / JUDGMENT

Neal -v- Hawksford Trustees Jersey Limited [2017] JRC 083 (05 June 2017)

[2017] JRC 083

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the master:

Introduction

1. This judgment represents my detailed reasons for refusing to permit certain evidence to be adduced as expert evidence and setting out what expert evidence would be permitted.

Background

2. The defendant is trustee of the John Neal Family Trust (the "Trust"). The defendant became trustee on 16 th June, 2011. 3. The plaintiffs are all beneficiaries of the Trust. The third to sixth plaintiffs are minor children and are represented by Advocate Olaf Blakeley as Guardian ad Litem . 4. The primary assets of the Trust, the subject matter of the dispute were three companies Anthony Investments (Esplanade) Limited, JCN Investments (Jersey) Limited and Evreux Holdings Limited ("the Companies"). 5. On 9 th October, 2013, the Royal Court ordered the winding up of the Companies on a just and equitable winding up basis as reported in a decision of the Royal Court dated 12 th November, 2013, reported at Representation of Anthony Investments (Esplanade) Ltd and Others

[2013] JRC 217A . In particular, the court concluded at paragraph 36 that Anthony Investments (Esplanade) Limited was insolvent on a cash flow basis. 6. On 2 nd December, 2014, the Royal Court granted declarations sought by the liquidators of the Companies for Anthony Investments (Esplanade) Limited to sell its freehold interest in 44 Esplanade, St Helier, Jersey ("the Property"). The reasons for the court's decision are recorded in a Royal Court judgment dated 3 rd December, 2014, reported at Representation of Anthony Investments and Others

[2014] JRC 240B . At paragraph 16, the Royal Court noted the evidence of Mr Rabet in relation to the financial position of the Companies in sanctioning a sale of the Property. 7. The present proceedings were commenced by an order of justice dated 24 th April, 2015. While the plaintiffs' order of justice is lengthy, in broad terms the plaintiffs allege that, but for

the mismanagement of the Trust and the Companies by the defendant, neither the winding up orders nor a sale of the Property would have been required. Accordingly, the plaintiffs claim the loss in value to the Trust of the Property as a result of its alleged mismanagement and the consequential sale of the Property which is said to have been on a distressed basis as well as a claim for loss of future profit as a result of the sale of the Property. 8. The mismanagement complained of is summarized in paragraph 81 of the amended order of justice as follows:- (i) The unmeritorious defence of the Lending Litigation. (ii) The withdrawal of support to the Spanish Companies. (iii) The charging of exorbitant and disproportionate directors' fees. (iv) The use of company (and therefore Trust) funds to meet personal expenses and the payment of professional fees for other beneficiaries. 9. On 10 th October, 2016, directions were given by me firstly requiring statements signed by witnesses of fact to be exchanged on 3 rd March, 2017, and secondly permitting expert evidence in the fields of valuation and finance relating to 44 The Esplanade with such reports to be exchanged by 5pm on 7 th April, 2017. 10. Ultimately witness statements of facts were exchanged without exhibits on 31 st March, 2017, and re-exchanged with exhibits on 11 th May, 2017, and expert evidence was exchanged on 8 th May, 2017. 11. However, in re-exchanging witness evidence with exhibits, the plaintiffs produced an affidavit of Robert Behan sworn on 21 st April, 2017. Mr Behan is a chartered accountant and a director of PFKBBA Limited a firm of chartered accountants. PFKBBA were the accountants for the Companies prior to the winding up in October 2013. Mr Behan was also a director of the Companies from 8 th February, 2010, until the end of September 2010. 12. At paragraph 77 of his affidavit sworn on 21 st April, 2017, Mr Behan stated as follows:- "I have recently prepared a report (RB Report)" [114] which is a simple report to demonstrate the position the JCN Group should have been in had the family infighting being controlled by the appointment of an independent board. The 2017 Report shows the rental income was sufficient to clear all family loans and Trust loans by the end of 2017 whilst maintaining repayments on the HSBC commercial mortgage." 13. It is the RB Report that the defendant objects to because it is an expert opinion given by a witness of fact. The defendant also criticises the assumptions relied upon in relation to the RB Report. 14. The plaintiffs further produced a report from Mr Alistair Rothwell, also a chartered accountant of Bracken Rothwell, confirming he agreed with the RB Report. Decision 15. The relevant test as to whether the court should permit expert evidence was considered in AG v Bhojwani

[2009] JRC 207A . At paragraph 21 Commissioner Clyde-Smith stated as follows:- "The general rule is that a witness may give evidence only as to matters observed by him. His opinions are not admissible . One of the recognised exceptions to this rule is that which relates to the opinions of an expert. This exception is confined to subjects which are not, or are not wholly within the knowledge and experience of ordinary persons. On such subjects a witness may be allowed to express opinions if the witness is shown to possess sufficient knowledge or experience in relation to the subject upon which the opinion is sought to render his opinion of assistance to the court." [emphasis added] 16. The problem with the

RB Report is that Mr Behan is a witness of fact. This is clear both from his affidavit at paragraphs 1 to 76 and the skeleton argument filed by the plaintiffs in relation to the present application. No objection is taken to paragraphs 1-76 being introduced in evidence by Mr Behan as a witness of fact. 17. However Mr Behan cannot give evidence as a witness of fact and at the same time give an expert opinion about matters he was involved with and which are part of the dispute between the plaintiffs and the defendant. To allow such an opinion breaches the general rule set out in *Bhojwani* cited above. Secondly, Mr Behan's previous involvement means he is not qualified to give an independent expert opinion now because he was involved at the time of the events now complained of. Accordingly his opinion is not admissible. 18. As Advocate Blakeley neatly put it, "there is a difference between opinion evidence and evidence of opinions held". Mr Behan, as a chartered accountant involved with the Companies will clearly have held at the time of any relevant events complained of opinions based on his professional skill and judgment as a chartered accountant. To the extent any opinions he held at the time are relevant to the matters now in dispute, he is entitled to give evidence of those opinions. However, in doing so he is a witness of fact. 19. However, the ability to give evidence of opinions held when giving professional advice which opinions subsequently are relevant to a dispute does not turn that individual into an expert able to give an independent expert opinion after the event. A person can be a witness of fact; a person may be qualified to be an expert if expert evidence is allowed by the Royal Court but they cannot be both. For these reasons I refused to give permission to adduce paragraph 77 onwards of Mr Behan's affidavit or the RB Report. 20. In refusing permission, however, I did allow the plaintiffs liberty to apply to amend Mr Behan's affidavit if advised to do so. I indicated that any amendments should be limited to evidence of relevant opinions held at the time of any relevant events giving rise to the present dispute. I made it clear that it would not be permissible on any such application however to attempt to introduce "expert opinion" as distinct from evidence of a relevant professional opinion held by Mr Behan at the time relevant events took place. 21. As a consequence of not permitting the RB Report to be admitted as expert evidence, I also refused to permit Mr Rothwell's evidence to be adduced. This is because Mr Rothwell's evidence in summary was simply a critique of the RB Report. As Mr Behan's RB Report could not be admitted as evidence then it followed that it would not be permissible to allow a review of that report to be admitted. 22. That is not to say that Mr Rothwell is not qualified to act as an expert. He is a chartered accountant and therefore in principle could act as an expert. I record however that Advocate Gleeson reserved his position, if Mr Rothwell produced any new report in the future in accordance with the direction I gave, whether such a report might not be independent because Mr Rothwell had already approved the RB Report. These are matters for the plaintiffs and Mr Rothwell to consider. They may also be matters which will require adjudication at trial in due course. 23. While I excluded the reports of Mr Behan and Mr Rothwell, I did permit the parties to adduce expert evidence from an accountant. This permission goes beyond directions previously given. The focus of the expert evidence previously allowed was on the loss in value to the Trust as a result of the alleged mismanagement of the Companies

and what was said to be the forced sale of the Property together with consequential loss of future profit. The evidence permitted in respect of valuation and finance related to assessing these losses. 24. However, as noted above, the court ordered a winding up of the Companies on 9 th October, 2013, and ordered a sale of the Property on 2 nd December, 2014. While the plaintiffs accept that these previous decisions of the Royal Court cannot be directly challenged, they are entitled to argue that it was the conduct of the defendant that led to the orders for the winding up of the Companies and the sale of the Property being made by the Royal Court. To succeed on this aspect of their claim, the plaintiffs will therefore have to show that had monies not been expended due to the defendant acting in breach of duty, either the Companies would not have been ordered to be wound up or a sale of the Property would not have been ordered. 25. This argument however, does not merely require the plaintiffs to establish that breaches of trust have taken place; they have to demonstrate that but for any breaches of trust established at trial; the orders of the Royal Court in October 2013 and December 2014 would not have been made. Otherwise the plaintiffs' claim will be a collateral attack on the judgments of the Royal Court ordering a winding up of the Companies and the sale of the property or alternatively would be inviting the Royal Court in the present proceedings to reach a decision inconsistent with its earlier rulings. 26. Accordingly, I required the plaintiffs to produce a schedule setting out what losses they allege flow from each breach of trust relied upon and what they say the financial position of each of the Companies would have been both on a cash flow basis and on a balance sheet basis as at 9 th October, 2013, and 2 nd November, 2014, had the defendant not acted in breach of trust as alleged. I further permitted any such schedule to be supported by expert accounting evidence. 27. Ultimately, it is a matter for the plaintiff whether they choose to adduce such evidence, but in my judgment it would assist the Royal Court to decide if breaches of trust are established against the defendant what the consequences are said to be. In particular, assuming that breaches of trust are established, the Court needs to determine the consequences of any such breach and whether any breaches would have made any difference to the Royal Court's decisions to wind up the Companies and/or order the sale of the Property. The plaintiffs must therefore be given an opportunity to show what the position of the Companies would have been had the defendant acted in the manner the plaintiffs now say the defendant should have acted. 28. I accept this task will not be straightforward because it may well require an expert to make a number of assumptions and consider a range of possible findings. However, I still consider a statement of the plaintiffs' position and supporting accounting evidence will assist the Royal Court at trial to understand how it is said that the financial consequence of acting (or failing to act) in a particular manner would have made a difference to the financial position of the Companies and in particular would allow them to continue in existence and not be wound up and/or would have avoided the sale of the Property. 29. The jurisdictional basis for the orders I have set out is contained in Rule 6/20(2) of the Royal Court Rules 2004 , as amended, which permits the court to specify the number of expert witnesses that may be called. In this case as the directions in respect of the expert evidence given were going to

take effect after the introduction of Amendment No.20 to the Royal Court Rules 2004 , as amended ("the Rules") and the introduction of the overriding objective, I considered that Rule 6/20(2) should be construed having regard to that overriding objective which is set out in Rule 1/6. This includes the obligation in Rule 1/6(6) to identify issues at an early date, to decide which issue need full investigation and to control the progress of any case. 30. I therefore reached the conclusion that the overriding objective permitted me to determine the scope of any expert evidence under Rule 6/20(2) as part of deciding whether or not to give permission to adduce expert evidence. This is consistent with the approach taken under the Civil Procedure Rules which contain the same overriding objective which has now been introduced into the Royal Court Rules and where under Civil Procedure Rule 35/1 expert evidence is restricted to that which is reasonably required to resolve the proceedings. In deciding whether or not to grant permission under Rule 6/20 of the Rules, I reached the view that the same approach should be taken namely permission to adduce expert evidence generally should only be granted where such evidence is reasonably required to resolve proceedings. 31. Finally, given that I refused to grant permission to admit the RB Report, I ordered the first and second plaintiffs to pay the costs of the defendant of and incidental to the issue that has led to this judgment on the standard basis. 32. Finally, I should record that because the defendant alleged that one witness statement filed on behalf of the plaintiffs contained matters of opinion or submission, and went beyond factual evidence, I also permitted the parties to issue an application to challenge any parts of a witness statement that either contained opinion evidence or submission (see *Minorities Finance v Arya Holdings*

[1994] JLR 149 at 172, lines 15 to 20. The observations in *Minorities* I consider also apply to witness statements intended to stand as evidence in chief at trial. Any witness statement which breaches this guidance is also likely to breach the overriding objective because inserting irrelevant statements is not dealing with a case justly and also leads to costs being incurred which are unnecessary. *Authorities Representation of Anthony Investments (Esplanade) Ltd and Others*

[2013] JRC 217A . *Representation of Anthony Investments and Others*

[2014] JRC 240B . *AG v Bhojwani*

[2009] JRC 207A . *Royal Court Rules 2004, as amended. Minorities Finance v Arya Holdings*

[1994] JLR 149 . Page Last Updated: 08 Jun 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2017/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/neal-v-hawksford-trustees-jersey-limited-2017-jrc-083-05-june-2017>

Prepared on 24 October 2026 · Esheria