

SCB

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

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Judgment Book

CLAIM NOS.	C.L. 1995/B-228 C.L. 1995/B-253 C.L. 1997/F-053 C.L. 1995/B-129 C.L. 1995/B-248	
BETWEEN	FINANCIAL INSTITUTIONS SERVICES LIMITED	CLAIMANT
AND	DONALD PANTON	1 ST DEFENDANT
AND	JANET PANTON	2 ND DEFENDANT
AND	JEFFREY PANTON	3 RD DEFENDANT
AND	WINSTON DWYER	4 TH DEFENDANT
AND	ORRETT HUTCHINSON	5 TH DEFENDANT
AND	RAYMOND CLOUGH	6 TH DEFENDANT
AND	RAYMOND GARCIA	7 TH DEFENDANT
AND	EDWIN DOUGLAS	8 TH DEFENDANT
AND	UNIJAM LIMITED	9 TH DEFENDANT
AND	DOJAP INVESTMENTS LIMITED	10 TH DEFENDANT
AND	DJNJ INVESTMENTS LIMITED	11 TH DEFENDANT

Dave Garcia and Annaliesa Lindsay for Claimant instructed by the Director of State Proceedings.

Abe Dabdoub and Sharon Usim for 1st, 2nd, 3rd, 7th, 8th, and 10th Defendants instructed by Chancellor and Company.

Raymond Clough the 6th Defendant appears in person.

Heard: 3rd August, 19th August, 16th September, 17th September, 2004

RATTRAY, J.

Financial Institutions Services Limited seeks an Order of this Court pursuant to rule 32.6 of the Civil Procedure Rules 2002 for permission to rely on the expert report to be prepared by Mr. Edward Avey, a Forensic and Investigative Accountant. As presently drafted, its application also seeks an Order that Mr. Avey's report when prepared be filed and served on all parties on or before the 17th September, 2004.

Financial Institutions Services contends that the issues in this matter involve extremely complicated financial transactions, the relevant documentation including numerous financial statements and other records of such a nature that the Court would be assisted by the expert report of Mr. Avey.

Let me from the outset indicate that although Counsel for the Defendants made no express concession with respect to this

application, there appeared to be no challenge to Mr. Avey's qualifications as an expert Forensic and Investigative accountant. His resume was extensive and revealed international experience over a period of almost 30 years.

Counsel Mr. Dabdoub also accepted that the field of forensic and investigative accounting is a field susceptible of expert testimony.

The real complaint of the Defendants lies with the individual chosen by Financial Institutions Services as its expert witness. In the only Affidavit filed in opposition to this application, that of Jalil Dabdoub dated the 29th day of July 2004, that deponent stated that he was Junior Counsel in the case of **Eagle Merchant Bank and others vs Paul Chen Young et al.** In that case, he states that an expert report of the same Mr. Avey was permitted to be put in evidence. He further states that Mr. Avey gave evidence that he was retained by the Government of Jamaica to investigate certain financial entities.

Mr. Avey himself, in an Affidavit sworn to on the 16th August 2004, also stated that his firm had been retained by the Government of Jamaica and subsequently through the Financial Institutions Services to investigate the reasons for the failure of the Blaise Financial entities. He further stated that subsequently his firm was

retained to investigate two other major banking groups and that he led the team of forensic and investigative accountants that carried out these contractual arrangements.

The argument then is that based on the information set out above, Mr. Avey cannot be considered an unbiased, impartial or independent witness and the Defendants strenuously object to Financial Institutions Services being allowed to rely on any report to be prepared by Mr. Avey.

It was also submitted by the 6th Defendant, which submission was adopted by Counsel Mr. Dabdoub, that it is the opinion of the 6th Defendant that Mr. Avey does not meet the overriding duty to the Court of impartiality on the matters relevant to his expertise as required by rule 32.3 (1) of the Civil Procedure Rules 2002 which reads:-

“It is the duty of an expert witness to help the Court impartially on the matters relevant to his or her expertise.”

It was further submitted that this duty of impartiality overrides any obligation to the persons by whom he is paid as stipulated by rule 32.3 (2) of the said Rules.

The 6th Defendant contended that the expert evidence presented must be and should be seen to be the independent product

of the expert uninfluenced as to form or content by the demands of litigation as required by rule 32.4 (1) of Civil Procedure Rules 2002. This requirement the 6th Defendant submitted has not been met by Mr. Avey, who he described as the "hired gun" of Financial Institutions Services.

Mr. Avey has stated in his Affidavit filed in support of this application that:

- (i) the forensic accounting investigations conducted by his firm were completed in or about 1997 and the firm fully paid for its work.
- (ii) If appointed an expert witness, compensation would be based on professional time spent in preparing the report.
- (iii) he has not been contracted on nor has he ever accepted a retainer on a contingency basis.
- (iv) he has no interest in the outcome of the instant litigation.
- (v) he is available to give evidence in his professional capacity as a forensic investigative accountant and to assist the Court in that regard.
- (vi) if requested to prepare a report and / or to give evidence at trial as an expert witness, his obligations would be to the Court and not to any party involved in the litigation.

While these assertions remain unchallenged the 6th Defendant, and by the adoption of his submissions the other Defendants, nevertheless maintain that Mr. Avey cannot provide an unbiased impartial report. As no report as yet exists for an examination to be carried out, what then is the basis for this conclusion?

The answer to this question seems to lie in the perceived relationship between Mr. Avey and Financial Institutions Services.

But this in itself is not sufficient to disqualify Mr. Avey from giving evidence as an expert witness. The head note in the case of

Field vs. Leeds City Council January 18, 2000, Times Law

Reports at page 18 reads:-

“A properly qualified expert witness who understood that his primary duty was to the Court was not disqualified from giving evidence by the fact that he was employed by one of the parties to the litigation.”

Both Counsel Mr. Dabdoub and Mr. Clough have relied on the Chancery Division case of **Liverpool Roman Catholic**

Archdiocessan Trustees Incorporated vs. Goldberg (No. 3)

(2001) 1 WLR 2337, the head note of which reads:-

“Where there is a relationship between a proposed expert witness and the party calling him which a reasonable observer might think is capable of making the views of the expert unduly favourable to that party, his evidence should not be admitted however unbiased his conclusions might probably be.”

This case however was disapproved by the English Court of Appeal in the case of **Regina (Factortame Ltd and Others) vs. Secretary of State for Transport, Local Government and the Regions (No. 8)** (2002) 3 WLR 1104. There it was the view of the Court of Appeal that “the test of apparent bias is not applicable to an expert witness as it is to a tribunal. Although it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, such disinterest is not automatically a precondition to the admissibility of his evidence”.

I was greatly assisted by the unreported Jamaican Judgment of my brother Mr. Justice Anderson in the case of **Eagle Merchant Bank of Jamaica Limited and Others vs. Paul Chen Young and Others** Claim No. CL 1998/E-095. In that case, which coincidentally dealt with an application to exclude the expert witness report of the same Edward Avey, the learned Judge stated:-

“I also hold that the test of apparent bias advocated by Evans-Lombe J. in Liverpool has been overruled by the Factortame case, and although I am not bound by it, I hold that it represents a correct analysis for the purposes of this application.”

My learned brother Mr. Justice Anderson also referred in his Judgment to the recent case of **Helical Bar Plc and Another vs. Armchair Passenger Transport Limited** (2003) EH WC 367 a first instance decision of Nelson J. There the Court found that "it was settled that the test of apparent bias applicable to a Court or tribunal was not the correct test in deciding whether the evidence of an expert witness should be excluded. It was not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determined whether an expert witness should be precluded from giving evidence".

I am in full agreement with the position taken and the principles espoused by my learned brother in the Eagle case and I adopt and endorse them insofar as they are relevant to the present application.

I am of the view therefore that the mere fact that Mr. Avey was previously contracted to Financial Institutions Services does not prevent him being appointed an expert witness in this case.

I also find that the complaint of the 6th Defendant that he does not feel he can obtain an impartial report from Mr. Avery because of a perceived bias is met by the case of **FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) vs. Fagenblat** 2003 VSCA 33, a case cited by the 6th Defendant himself.

At paragraph 29 of that Judgment Ormiston JA opined:-

“However desirable it may be as a matter of common sense in the presentation of party’s case that an expert witness be seen to be independent, there is therefore no authority requiring this Court to hold that an ‘interested’ expert’s evidence be rejected because of a perception the witness might favour the party seeking to adduce that evidence.”

Based on the authorities referred to herein, I am not satisfied that the objections of the Defendants to Mr. Avey being called as an expert witness for the Claimant have any merit.

On the material before this Court, I find that Mr. Avey has no interest in the outcome of these proceedings. He has the relevant expertise to give expert evidence and is aware of his duty to the Court and appears willing and able to fulfill that duty.

Even if it were to be shown that he has an interest in the outcome of the proceedings, which I do not accept, it is for the Judge at trial to determine questions of relevance and the weight to be given to the expert testimony, bearing in mind that the final decision in the action rests solely with him.

In the circumstances an Order is granted as follows:-

- (1) That the Claimant be given permission to rely on the expert report to be prepared by Mr. Edward Avey, a Forensic and Investigative Accountant.

- (2) That Mr. Avey's report when prepared is to be filed and served on all parties on or before March 10, 2005 by 3 pm.
- (3) Leave to Appeal refused.
- (4) No Order as to costs.