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ROYAL COURT

(Samedi Division)

175

5th October, 1992

Before: F.C. Hamon, Esq., and Jurats Vint and Vibert

BETWEEN	Stanton Limited	FIRST PLAINTIFF
AND	George Julien Louis	
AND	Sharon Margaret Louis (née O'Brien)	SECOND PLAINTIFFS
AND	D.O. Moon, P. de C. Mourant, K.S.Baker, R.V. Jeune, C.E. Coutanche, I.C. James, A.R. Binnington, J.D.P. Crill, T.J. Herbert and J.A. Richomme, exercising the profession of Advocates, Solicitors and Notaries Public under the name and style of Mourant du Feu & Jeune	DEFENDANTS

Interlocutory Judgment on application to exclude expert witnesses, who have yet to give evidence, from Court, whilst evidence of other witnesses as to fact is being heard.

Advocate P.C.Sinel for the Plaintiffs

Advocate J.G. White for the Defendants

JUDGMENT

THE COMMISSIONER: At the beginning of this case there were objections raised by Counsel as to two expert witnesses, if that is what they are, remaining in Court while the whole of the evidence was heard.

The normal procedure, of course, and we should not need to repeat it, is well set out in the case of Tomlinson -v- Tomlinson [1980] 1 All ER 593 Fam. D., where Sir John Arnold P. says at page 596:

"It seems to me the right course is this: witnesses should not be under any obligation to leave the court, except where an order is made excluding them; that the proper course for justices to pursue, if an application is made to them, would be to exclude the witnesses, unless they were satisfied that that would not be an appropriate step to take; but that, if they think it is a case in which perhaps the witnesses should be excluded, then where a party is not represented they should suggest that perhaps he might like to make an application to that effect. This of course does not apply and never has applied to the parties themselves or their solicitors or their expert witnesses. Those are never excluded from the court."

The question which is raised before us is whether either Mr. Keevil or Mr. Ellison qualify, in the circumstances, as expert witnesses. Because the point was unusual, we asked Counsel to go away and research the matter and we heard argument from both Mr. White and Mr. Sinel. Two authorities were cited to us. Halsbury's Laws of England volume 37 paragraph 461, says this of expert evidence:

"Expert evidence may simply be described as the opinions of an expert on any question or issue on which he is qualified to express his opinions, and therefore, where a person is

called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence will be admissible in evidence. The function of the expert is to give expert assistance to the court on the subject of his own expertise. Thus, it is for the expert to explain technical terms appearing in documents which have to be construed by the court, to give his opinion on the working of any technical process or system or to inform the court as to the state of the latest knowledge with regard to the matters before it; and it seems that he may express his expert opinion on an issue in the proceedings in question."

And, then we heard again from the well known work of Cross on Evidence (7th Ed'n) chapter 13 at page 494, where the author writes this:

"The functions of expert witnesses were succinctly stated by Lord President Cooper in Davie v Edinburgh Magistrates when he said:

> ***'Their duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.'"***

It seems to us, on what we have heard, that evidence can take three forms. There is evidence which can be described as direct factual evidence, which bears directly on the facts of the case, and in circumstances such as those, of course, no one could say that the person giving that evidence is an expert in the technical sense of the term. Secondly, there is opinion evidence, which may be given with regard to the facts as they have been proved. Thirdly, there is evidence which might be described as factual

which is used to support or contradict opinion evidence and as w
agreed with Mr. White, and I think with Mr. Sinel, expert evidenc
obviously includes both the second and the third categories t
which we have referred.

Now in no way does one decry the qualifications an
experience of either of the two witnesses that have been called.
But, bearing in mind the facts and the arguments adduced to us, we
can say this: despite the objections raised by Mr. Sinel we cannot
see that we can exclude the evidence of Mr. Keevil (a partner in
the firm of Touche Ross and a Fellow of the Institute of Chartered
Accountants). Everything that he sets out in his statement, which is the introduction to his report, is based on papers and documents that he has studied and information with which he has been supplied. We quite understand Mr. Sinel's saying that he may be incorrect in his facts but he seems to have based those facts - and we have only had a brief opportunity to look at the points that have been referred to us - on documents and statements that have been made available to him. In the circumstances, although his facts may be wrong, we do not feel that he should be excluded as an expert on that point alone.

We are more concerned, however, with the evidence of Mr. Ellison, and again we in no way wish to detract from his expertise and his qualifications. Looking at the objections that have been raised by Mr. Sinel, we do feel that Mr. Ellison has perhaps gone too far. That is to say that he has exceeded his objective approach as an expert and has entered, it seems to us, into the factual arguments of the case. We only have to look at his introduction where he says at paragraph 2. 1. "*I am extremely familiar with the subject property. My companies' carried out valuations and structural reports on the property as follows...*" and then he includes the reports that he has made for banking institutions in 1988 in 1990 and for a company in 1991. He has

also, we feel, involved himself in facts relating to other matters throughout his report and introduction. In those circumstances, looking at the criteria which we have to consider, and somewhat reluctantly, we have come to the conclusion that he has probably outdistanced himself from being able to say that he is, in the circumstances, a totally objective and unbiased expert who has not got involved in direct factual evidence which bears directly on the case. Of course his report does not entirely cover factual matters but there are enough of those factual matters, we feel, to cause us concern. Mr. Sinel is concerned that, if allowed to stay, he would listen to the evidence as it progressed in the Court and then, as Mr. Sinel put it to us, be able to tailor his evidence in some way. We feel that he should be excluded.

Now, I must say this: it seems to us surprising that on a case, which is only running for a limited time, objections of this nature were not raised much earlier when the papers were being disclosed by one party to the other. It seems to us quite wrong that a point as obtuse as this has been raised at this stage when the parties should really have picked up the argument and raised it between themselves at a much earlier stage. It causes the Court considerable concern and I must say that we should not have been concerned with this matter at this late stage.

Authorities

Cross on Evidence (7th Ed'n): pp.493-7.

4 Halsbury 37, para. 461.

Tomlinson -v- Tomlinson [1980] 1 All ER 593.