THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NOS. 211 AND 212 OF 1998

BETWEEN:

ORMISTON ARNOLD BOYEA
HUDSON WILLLIAMS

Claimants

V

EASTERN CARIBBEAN FLOUR MILLS LTD.

Defendant

Appearances:
Dr. J.S. Archibald QC, Mr. Sydney Bennett QC and Mr. Stanley John for the Claimants
Sir Henry Forde Q.C., Mr. Berry L.V. Gale QC and Mrs Leodean Worrell for the Defendant

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2006: June 21- 28
2006: September 27

RULING

[1] **THOM J:** This is a claim for wrongful dismissal. The Defendants have counterclaimed for damages for breach of contractual and fiduciary duties.

[2] During the cross-examination of the Claimant Ormiston Boyea objection was made by the Claimants to certain documents which were disclosed by the Defendants. Several hundreds of documents have been disclosed by the parties in this case. Learned Queen's Counsel Mr. Bennett for the Claimants informed the Court that the Claimants intended to object to several of the Defendant's documents. The Court decided to hear all of the arguments on admissibility of documents before further cross-examination of the Claimant Ormiston Boyea.

[3] The Claimants objected to the following documents:

(a) The Report of Mr. Karl Hudson Phillips Q.C.

(b) The KPMG report and the witness statement of Mr. James McAuley.

(c) Documents in support of issues not arising on the pleadings.

[4] The Claimants' grounds of objections were stated as follows:

(a) Hearsay

(b) - Ultimate issue for the Judge to determine
- Irrelevance
- Failure to observe the rules of natural justice
- Private Injury

(c) Non-impartiality of the proposed expert

(d) Matters not in issue on the pleadings.

[5] Learned Queen's Counsel for the Defendant Mr. Gale submitted that the application should be dismissed for the following reasons:

(a) Delay in making the application in relation to the KPMG report.

(b) The Court has no jurisdiction to exclude admissible evidence

(c) Impartiality goes to weight not to admissibility

(d) Matters found to be hearsay or irrelevant could be excluded at the time of considering the judgment.

(e) Whether an issue arises on the pleadings must be determined not only on the pleadings but also on the witness statements and the documents disclosed.

[6] I will consider first the submission dealing with delay since if I agree with the submission of the Defendant there would be no need for me to consider the other submissions.

DELAY

[7] Learned Queen's Counsel for the Defendant Mr. Gale submitted that there has been substantial delay in making the application and the application ought to be dismissed. Learned Queen's Counsel referred the Court to an order made by Justice Cenac on February 6, 1998 for both parties to adduce expert evidence of accountants. A similar order was made at Case Management on the 3rd April 2003. The KPMG report was served on the Claimants since September 23, 2003 in keeping with the terms of the Order.

[8] Learned Queens' Counsel referred the Court to the case of Liverpool Roman Catholic Archdiocesan Trustees Incorporated V David Goldberg [2001] Lloyd's Rep P.N. 518., the decision of Justice Neuberger where he outlined the approach that should be taken by the Court when considering application to exclude expert evidence. Learned Queen's Counsel submitted the Defendant was relying on the fifth consideration which reads:

> "In principle it seems to me that if there is real doubt as to whether or not expert evidence ought to be put in as admissible, the issue should be determined in favour of admissibility..."

[9] Learned Queen's Counsel also referred the Court to CPR Part 11.3 (1) which reads:

> "So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review."

[10] Learned Queen's Counsel further submitted that to exclude the KPMG Report at this stage the trial having commenced would adversely affect the Defendant's case since the report forms a substantial basis for proof by the Defendant of matters both in the defence and counterclaim.

[11] Learned Queen's Counsel Mr. Bennett for the Claimants submitted in response that the application should have been made at Case Management. CPR 32.4 requires that the application to call expert evidence must name the expert to be called and there was no such application made before the court naming Mr. McAuley or KPMG as an expert. Had the Defendant named KPMG or Mr. McAuley in the application at Case Management the Claimants would have objected. Further if the report is inadmissible for non-compliance

with procedural requirements or because of improper or irrelevant content or hearsay it does not become admissible because objection is made at a late stage.

[12] I agree with the submission of Learned Queen's Counsel Mr. Gale that the application is made very late. Whilst it is correct that neither Mr. McAuley nor KPMG were named in the Order made at Case Management, the Claimants received the report and had it in their possession for almost three years prior to trial. They were therefore fully aware that the Defendant's expert was Mr. McAuley Senior Vice President of KPMG Forensic Inc.

[13] However if an expert report contains hearsay or irrelevant matters then the fact that the application to exclude such matters is late should not preclude the Court from excluding them. The same applies to documents that are inadmissible because they are irrelevant.

[14] Further CPR 2000 Part 11.3 (2) gives the Court a discretion to hear an application at trial which should have been made before trial. Part 11.3 (2) reads as follows:

> "If an application is made which could have been dealt with at case management conference or at pre-trial review the court must order the applicant to pay the costs of the application unless there are special circumstances."

[15] In view of the above I will not dismiss the application on the ground of delay.

THE KARL HUDSON PHILLIPS REPORT

[16] The Defendant included in their list of documents a report prepared by Mr. Karl Hudson Philips Q.C. in relation to the business affairs of the Defendant. The report states that Mr. Karl Hudson Phillips was engaged by the Government of St. Vincent and the Grenadines to examine, analyze and advise on all matters pertaining to the proposed acquisition of additional shares by the Government in the Defendant. Maple Leaf Mills Ltd owned forty percent (40%) of the shares of the Defendant, Phillip Veira Investment Ltd owned thirty-six and one quarter percent (36¼%); three and three quarters percent were held by local shareholders with the voting rights held by PH Veira, and twenty percent (20%) held by the Government of St. Vincent and the Grenadines. The report shows that Mr. Karl Hudson

Phillips Q.C interviewed persons. It is not disputed that he did not interview either of the Claimants. It is also not disputed that the Report was the result of a private inquiry.

[17] Learned Queen's Counsel Dr. Archibald for the Claimants submitted that the Hudson Phillips report is inadmissible on the following grounds:

- Ultimate issue was for the Judge to determine
- Irrelevance
- Failure to observe the rules of natural justice
- Private inquiry

[18] Leaned Queen's Counsel referred the Court to the case of Three Rivers District Council and others V Bank of England No 3 [2001] 2 AER p. 513, the judgment of Lord Hope of Craighead at paragraphs 31-33 where whilst dealing with the Report of Lord Brigham Lord Hope said:

> Paragraph 31:
> "The first point that has to be borne in mind is that neither the Report itself nor any of its findings or conclusions will be admissible at any trial in this case."
>
> At Paragraph 32:
> "..... the investigation which Brigham LJ conducted was a private and not a statutory inquiry.....
>
> And at paragraph 33:
> "A further point that should be noted at this stage about the findings and conclusions in the Brigham report is that they were the result of an investigation that lacked the benefit of statutory powers and was conducted behind closed doors. The Claimants were not present nor were they represented. In the conduct of this fact finding exercise Brigham LJ was as he said in his covering letter greatly assisted by the co-operation which he received especially from the Bank and Price Waterhouse. But he had no power to compel the attendance of witnesses or to require the production of documents and there was no Counsel."

[19] Learned Queen's Counsel also referred the Court to the case of Savings and Investment Bank Ltd v Gesco Investments (Netherlands) BV and others [1984] 1AER p. 296 where the Court held:

> "A report of inspectors appointed under ss 165 and 172 of the Companies Act 1948 to investigate the affairs and ownership of a company contains only opinions

and is inadmissible as evidence in Court proceedings save for the limited purpose of winding up proceedings brought by the Secretary of State or by a person for whose protection the inspectors were appointed in which case the Court is permitted to treat the report not as evidence in the ordinary case but as material on which it can make a winding up order if that material is not challenged by proper evidence. Furthermore even if the inspector's inquiry contained in their report are referred to in an affidavit sworn for the purposes of being used in interlocutory proceedings.....such references to the inspectors opinions may be struck out under Order 41 r. 6 as being references to evidence which is otherwise inadmissible and therefore irrelevant."

[20] Learned Counsel submitted that like the Brigham Report the Hudson Phillips Report contained findings of facts, it was a private inquiry, the Claimants were not present nor were they represented. Learned Queens' Counsel further submitted that the report was commissioned not by the Defendant, but by a shareholder of the Defendant. The Board of Directors of the Defendant noted several inaccuracies in the findings of fact in the report as outlined in the minutes of the meeting after Board of Directors of the Defendant held on April 24, 1995.

[21] Learned Queen's Counsel for the Defendant Mr. Gale informed the Court during the submission of Dr. Archibald QC that the Defendant was not relying on any of the opinions or findings of the report for the purpose of determining the issues in this case. The Report is simply in evidence as a document to show that a report was commissioned. Learned Counsel also stated that the Claimant Boyea had mentioned the report in paragraph 66 of the witness statement which is admitted in evidence.

[22] Having considered the submissions and the Three Rivers case, I agree with the submissions of Leaned Queen's Counsel Dr. Archibald that the Hudson Phillips Report is not admissible. The fact that the Claimant Boyea made reference to the Report in his witness statement does not make the report admissible. In the Three Rivers case both the Claimants and the Defendant had referred to the Brigham Report in their pleadings.

THE KPMG REPORT

[23] It is convenient to deal with the objection to the KPMG Report and the witness statement of Mr. James McAuley together.

Mr James McAuley is the Senior Vice President of KPMG Forensic Inc. It is not disputed that he was responsible for the preparation of the KPMG Report. It is also not disputed that KPMG was commissioned by the Defendant prior to the dismissal of the Claimants to conduct an inquiry into the affairs of the Defendant and a report was presented to the Board of Directors of the Defendant and the Claimants were dismissed thereafter.

[24] Learned Queen's Counsel for the Claimants Mr. Bennett submitted that the KPMG Report is inadmissible on the following grounds:

(a) Impartiality

(b) Non-compliance with CPR 2000 Part 32

(c) The Report contains hearsay evidence

(d) The Report contains irrelevant matters.

[25] Learned Queen's Counsel for the Defendant Mr. Gale submitted:

(a) The Court had no jurisdiction to exclude the KPMG Report or the witness statement of Mr. James McAuley.

(b) Delay in making the application. It will be premature for the Court to made any findings of lack of impartiality in relation to KPMG and Mr. McAuley, Mr. McAuley not having been called to give evidence or subjected to cross-examination.

(c) The pleadings together with the witness statements and the documents disclosed identify the relevant issues for determination.

(d) All matters objected to are relevant to the issues of misconduct which is germane to the defense of wrongful dismissal and breach of fiduciary duty which forms the basis of the counterclaim against the Claimants.

[26] Learned Queen's Counsel urged to the Court to adopt the approach of Justice Evans-Lombe in Liverpool Roman Catholic Archdiocese Trustees Incorporated v Goldberg (No. 2) [2001] 4 AER p. 950, which would be to admit the report in evidence and rule on the question of admissibility when considering the judgment at the end of the trial.

JURISDICTION:

[27] I will deal first with the issue of Jurisdiction.

[28] Learned Queen's Counsel Mr. Gale submitted that the Court had no jurisdiction to exclude the Report or the witness statement of Mr. McAuley on the ground that it contains matters not arising on the pleadings or relevant to the issues.

[29] Learned Queen's Counsel submitted that at Common Law a judge in a civil case has no authority or discretion to exclude admissible evidence as a matter of law. This principle applies to improperly or unauthorized or unlawfully obtained evidence. The position in St Vincent and the Grenadines is unlike the position in the United Kingdom where the UK CPR Part 32. 1 (2) grants the Court the specific power to exclude evidence which would otherwise be admissible.

[30] Learned Queen's Counsel referred the Court to Blackstone Civil Practice 2003 paragraph 47.7 which reads in part:

> "Prior to the introduction of CPR a judge in a civil case had no discretion to exclude evidence admissible as a matter of law and that principle applied even if the evidence in question had been obtained improperly or unlawfully ... Rule 32.1(2) of the CPR has introduced an exclusionary discretion of general application in civil cases, including claims allocated to the small claims tract under Rule 32.1(1)".

[31] Learned Queens Counsel also referred the Court to Cross and Tapper on Evidence 10th Edition p. 230:

> "DISCRETION TO EXCLUDE RELEVANT EVIDENCE IN CIVIL PROCEEDINGS
> This topic may now have been transformed by r 32.1.2 of the new CPR Rules which starkly provides that "the Court may use its powers under this rule to exclude evidence that would otherwise be admissible." This is supplemented by the conferment of far reaching powers to determine relevance. All will depend upon how this new discretion is exercised and so far guidance has been sparse.... Consideration was given to the existence of such a discretion in cases where evidence has been unlawfully obtained and in cases where information was being withheld from the Court. There seems to be no English cases asserting a discretion to exclude pursuant to fair trial categorization on the basis that the evidence will be more prejudicial than probative in revealing evidence of extrinsic discreditable acts. It was explicitly rejected in Bradford City Metropolitan Council UK.".

[32] In response Learned Queen's Counsel Mr. Bennett submitted that there is no right to call expert evidence at Common Law. In St Vincent and the Grenadines the admissibility of expert evidence is governed by Section 29 of the Evidence Act Cap. 158 and CPR 2000 Part 32.6. Part 32.6 gives the Court the discretion to permit or refuse to permit or to exclude expert evidence.

[33] The evidence in this case which the claimants are seeking to exclude is the evidence of the Defendant's expert. It is not disputed that a party has no right to call expert evidence at Common Law. The admissibility of expert evidence in St Vincent and the Grenadines is governed by the Evidence Act 158 in particular section 29. Section 29(1) reads:

> "Subject to any rules of court, where a person is called as a witness in civil proceedings his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence----"

[34] Section 29 states that it is subject to the rules of Court. CPR 2000 Part 32 deals with expert evidence. Part 32.6 (1) gives the court a discretion to permit or not to permit expert evidence. The effect of the two provisions, that is Section 29 and Part 32.6 (1) is that when the Court grants permission to a party to call an expert witness or put in the report of an expert the report of the expert would only be admissible if it falls with section 29 of the Evidence Act. Section 29 permits the opinion on of an expert on relevant matters. Thus where the report of an expert contains opinion on matters not relevant to the issues to be

determined by the Court such opinion of the expert is not admissible pursuant to section 29 of the Evidence Act. Further Part 32.2 provides in effect that the expert evidence must be restricted to resolve the issues in the case. Part 32.2 reads:

> "Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly."

[35] In view of the above I do not agree with the submission of Learned Queen's Counsel, Mr Gale that the Court has no jurisdiction to exclude the evidence on the ground of irrelevance, issues not arising on the pleadings. I find that the Court has jurisdiction to exclude all irrelevant matters from the Report.

PART 32

[36] Learned Queen's Counsel submitted that the Report is inadmissible since it does not comply with Part 32.4, 32.6 and 32.14.

PART 32.14

[37] It was submitted that the KPMG Report does not comply with Part 32.14 (3) in that it does not contain all of the written instructions given to the expert. Leaned Counsel referred the court to document No. 627 a letter form Mr. McAuley to Mr. Tom Muir where two paragraphs of the document are blocked out. Further there is no note of any oral instructions given to the expert. Learned Queen's Counsel referred the Court to a letter from Mr. McAuley to Mr. Voorheis where it is stated that future reports would be given orally and submitted this suggestion was to avoid revealing the oral instructions and referred the court to the case of Stevens V Gullis EWCA Civil Division July 1999.

[38] It was also submitted that the witness statement of Mr. McAuley was not true and reference was made to paragraph 21 of the witness statement. Learned Counsel submitted that the witness statement cannot be true since parts of the instructions are blocked out and there is no note of oral instructions.

[39] Learned Queen's Counsel for the Defendant in response submitted that Mr. McAuley in Paragraph 21 of this witness statement certifies that he has received no other instructions other than those referred to in Schedule 22 to the KPMG Report. The Claimants were seeking to impugn the statement of Mr McAuley without a trial of the issue and without any evidence to the contrary being provided.

[40] Part 32. 14 (3) of CPR 2000 reads:

> "There must also be attached to an expert witness' report copies of:
>
> (a) all written instructions given to the expert witness
>
> (b) any supplemental instructions given to the expert witness since the original instructions were given; and
>
> (c) a note of any oral instruction given to the expert witness;
>
> and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party."

[41] Having examined the letter of April 29, 1999 two paragraphs are indeed blocked out but there is no evidence before the Court upon which the Court can find that what was blocked out were part of the instructions. Similarly there is no evidence before the court that oral instructions were actually given. The case of Stevens V Gullis is distinguishable from the present case. In Stevens' case the Court of Appeal upheld the Judge's decision to exclude the expert evidence since the expert did not demonstrate that he understood the requirements of an expert and his duty to the Court.

[42] I do not agree with the submission of Learned Counsel for the Claimants that the Report should be held inadmissible on this ground nor that Mr. McAuley's witness statement should be excluded.

PART 32.4 - IMPARTIALITY

[43] After submissions were made by Mr. Gale Q.C on the issue for impartiality and he referred the Court to the cases of Field v Leeds City Council [2001] 17 EG 165; of Factortame and others v The Secretary of State for Transport [2002] EWCA Civ. 932; and Barings PLC et al v Coopers and Lybrand [2001] Lloyds Rep p 85 Learned Queen's Counsel Mr. Bennett agreed that the question of Mr. McAuley's partiality would go to the weight of the evidence and not to the admissibility of the report.

PART 32.6

[44] Learned Queen's Counsel for the Claimants submitted that CPR 2000 Part 32.6(3) makes it mandatory that a person applying to call an expert must name the proposed expert and identify the nature of his or her expertise. Part 32.6 (3) is unlike the UK CPR Part 35.4 which requires a party proposing to call an expert witness to identify the field of expertise and where practicable the expert in that field upon which he wishes to rely.

[45] Learned Counsel further submitted that by making the Order of April 3, 2003 the Court agreed that expert evidence was required.

[46] Learned Counsel Mrs. Worrell for the Defendant submitted that permission was granted by the Court by the Order dated April 3, 2003 to call expert evidence. The fact that the Court granted the permission without naming the expert is a matter for appeal. The matter was not appealed. Further the Court has an inherent jurisdiction to make orders as it thinks fit providing there is no particular rule that prohibits it from making such order.

[47] Part 32.6 gives the Court a discretion to permit a party to adduce expert evidence. The party seeking to adduce expert evidence is required to make an application to the Court and to name the expert that the party wishes to call. Part 32.6 (3) (b) provides that permission shall only be granted to the expert named in the application.

[48] It is not disputed that expert evidence in the field of accountancy would be helpful to the Court in arriving at conclusions on the issues in this case. It is also not disputed that Mr. McAuley is qualified to be an expert in the field of accountancy.

[49] It is also not disputed that no expert was named in the Order. Having carefully considered Part 32.6 I am of the opinion that the underlying principle in Part 32.6 is that permission must be obtained from the Court before expert evidence can be called. The fact that the expert was not named in the Order does not in my opinion vitiate the clear permission granted by the Court to both parties to call two experts in accounting and for reports of the experts to be exchanged by a specific date.

[50] In the event that I am wrong in my interpretation of Part 32.6 I find that the Claimants have waived any right to object to Mr. McAuley being an expert on the ground that he was not named. The Claimants had the report in their possession for almost three years. In St Kitts Development Limited v Golf View Development Limited and Michael Simanic Civil Appeal No. 24 of 2003 (St Christopher and Nevis) Alleyne JA at paragraph 15 stated:

> "Notwithstanding that the filing and service of the witness statement of Alvin Shidlowski out of time without an order for relief from sanctions was therefore irregular, nevertheless the Respondent had ample notice of it, was not taken by surprise, could and should have raised the issue ahead of the date of trial, but sought instead to take advantage of a technical breach, a reversion to the technique of trial by ambush which the CPR seeks to discourage."

And at Paragraph 18

> "It is the duty of the Court in exercising any discretion or applying any rule to seek to give effect to the overriding objective of the Rules which is not as Counsel for the Respondent has urged, to comply with the Rules, but rather to deal with cases justly."

[51] Further Part 26.9 gives the Court a general power to rectify a matter where there has been a procedural error and no sanction has been specified. The Court is empowered to make an order and put matters right on or without an application by a party. I would so do and I order that the Defendant be permitted to call Mr. James McAuley as an expert in this case

and that the Report which was filed and served or the Claimant pursuant to the Order of Court dated April 3, 2003 be deemed to be properly filed and served.

ULTIMATE ISSUE

[52] Learned Counsel for the Claimants abandoned the submission that the report was inadmissible because it contained conclusions of fact after learned Queen's Counsel for the Defendant Mr. Gale referred the Court to Tristan Hutchinson Expert Evidence para. D and Cross and Tapper on Evidence 10th Edition p. 565 and the case of Barings PLC v Coopers and Lybrand [2001] Lloyd's Rep. Bank p. 85.

HEARSAY

[53] It is not disputed that some of the contents of the KPMG Report amount to hearsay evidence. Indeed the Report indicates that certain statements in the Report are hearsay and have not been independently verified. What is in dispute is whether the portions of the Report which the Claimants submit are hearsay are indeed hearsay evidence.

[54] The Claimants have identified twenty (20) documents in the KPMG Report that they submit amount to hearsay evidence. In his submissions Learned Queen's Counsel identified certain statements in the Report, which he submitted were not those of the witnesses who gave witnesses statements nor Mr. McAuley and were not heard directly by him. The documents relate to interviews conducted by persons other than Mr. McAuley.

[55] Learned Queen's Counsel further submitted that the documents and statements were not an exhaustive list of the hearsay evidence and urged the Court to excise all of the hearsay evidence from the Report should the court find the Report to be admissible.

[56] In support of his submissions Learned Queen's Counsel referred the Court to CPR 2000 Part 32.7 (2), section 47 (1) and (4) of the Evidence Act Cap 158 and the case of R v Abadom (1983) 1AER p. 364.

[57] In response Learned Queen's Counsel for the Defendant Mr. Gale submitted that he agreed with the submission of Mr. Bennett Q.C. on CPR 32.7 (2). He further submitted that the effect of section 47 (2) of the Evidence Act is that first hand hearsay is admissible to prove the truth in the matter but second hand hearsay while not admissible in proving the truth of the matter is admissible to prove that the statement was made. Transcripts of the interviews were disclosed, they were contemporaneous interview notes and in some instances the transcripts and tape recordings have been disclosed and produced. Further documents 560, 562 and 565 are interviews with the Claimant Boyea and are therefore admissible.

[58] Learned Queen's Counsel also submitted that even if the Report contains hearsay it does not mean that the report is inadmissible, the inadmissible parts could be excised from the Report. Counsel urged the court to adopt the approach of Evans–Lombe J in the Liverpool Roman Catholic Archdiocesan Case and rule on the issue of admissibility during the course of the judgment.

[59] It is agreed by both sides that expert evidence must be based on admissible evidence R v Abadom and Part 32.7 of CPR 2000. Part 32.7 reads.

> (1) Expert evidence is to be given in a written report unless the Court directs otherwise.
>
> (2) This rule is subject to any enactment restricting the use of 'hearsay evidence' "

[60] In R v Abadom (1983) 1 AER p. 364 the Court of Appeal of England had to determine whether statistics compiled by the Home Office Central Research Establishment which the expert had consulted in arriving at his conclusion was hearsay evidence. In ruling that the evidence was admissible Kerr L.J. said at p. 368:

> "First where an expert relies on the existence or non-existence of some fact which is basic to the question on which he is asked to express his opinion that fact must be proved by admissible evidence."

[61] Sections 47(1) and (4) of the Evidence Act cap 158 read as follows:

> "(1) 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 and to the rules of Court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."
>
> "(4) Where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section; no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it...."

[62] Section 47 in effect makes provision for hearsay evidence to be admissible in certain circumstances subject to the Rules of Court while Part 32.7 (2) provides in effect that expert evidence is subject to the hearsay rule.

[63] Section 47 must be read conjointly with Section 29 of the Evidence Act which deals with the admissibility of expert evidence. Section 29 (1) provides in effect for the admissibility for the opinion of an expert on matters on which he is qualified to give evidence. While subsection (2) provides for the admissibility of the opinion of the expert on matters which he is not qualified to give expert evidence provided the opinion is made in such a way as to convey any relevant fact personally perceived by him.

[64] The position in St. Vincent and the Grenadines can be summed up in the following manner:

(a) Expert evidence is admissible in accordance with section 29 of the Evidence Act.

(b) Expert evidence is subject to the hearsay rule, it must be based on admissible evidence;

(c) The circumstances where hearsay evidence is admissible as entered in Section 47 of the Evidence Act with the exception of subsection (2) apply to expert evidence.

[65] I do not agree with the submission of learned Queen's counsel for the Defendant that the fact that transcripts and tape recordings were provided that would make the evidence admissible. Where evidence amounts to hearsay, reducing such evidence into writing cannot make the evidence cease to be hearsay. The same applies to a recording of the evidence.

[66] Having reviewed the documents and the statements complained of in view of the provisions of Section 29 and 47 of the Evidence Act and Part 32 7 (2) of CPR 2000 I find that the documents and statements complained of with the exception of statements attributed to William Bramble which were not specifically identified and which the court could not identify in the report amount to hearsay evidence and are therefore inadmissible.

IRRELEVANCE:

[67] Learned Queen's Counsel for the Claimants Mr. Bennett submitted that the KPMG Report contains evidence in support of claims which do not form part of the case and claims which are no longer in issue between the parties. Any evidence and any document sought to be tendered in evidence in support of allegations other than those included in the pleadings were irrelevant and therefore inadmissible. Learned Counsel referred the Court to CPR 2000 and Part 32.2 and Section 29 of the Evidence Act Cap. 158.

[68] The submissions of the Claimants can be summarized as follows:

(a) The Court must determine the issues between the parties on examination of the pleadings not the witness statements or disclosed documents.

(b) The purpose of pleadings is to identify the issues in dispute between the parties and to mark out the parameters of the case which is being advanced by each party.

(c) Allegations of improper conduct, dishonesty and bad faith and breach of fiduciary duty must be outlined in the pleadings.

(d) CPR 2000 requires a Claimant to set out in his statement of claim all the facts on which he relies and similarly a defendant is required to set out all the facts on which he relies to dispute the claim.

(e) Matters not included in the pleadings could only be advanced if the pleadings are amended. The Defendant sought to do so and permission was not granted, see decision of d'Auvergne JA (Ag) in Civil Appeal No. 3 of 2004 (SVG).

[69] Learned Queen's Counsel referred the Court to the following matters which would fall into this category of being irrelevant because they were not pleaded or are no longer in issue:

(1) Payment to Boyea by Mr. Kingsley Thomas.

(2) Payment of Commission by Antillean to Boyea

(3) Payment of £15,000 from Russell Martin Ltd in December 1994.

(4) Allegations relating to Tropical Produce Ltd or its bank account, and in particular any allegation that W.C. Russell made payments to Tropical Produce Ltd and any allegations relating to payment to Boyea of money originating in account of Tropical Produce Ltd at the Bank of Butterfield in the Cayman Islands.

(5) Any allegation of payments to Boyea by W.C. Russell.

(6) Any claim or allegation relating to payment by Leroy Warren.

(7) Any allegation relating to the Organization of Rural Development.

(8) Any allegation relating to East Caribbean Mariculture Ltd.

(9) Any allegation that Williams or Boyea placed ECFML in breach of foreign exchange regulations of Saint Vincent and the Grenadines.

(10) Any allegation of impropriety in connection with Boyea's transitional ownership of shares in Euro Mills.

(11) Matters concerning Mr. Boyea's dealing with W.C. Russell.

(12) Allegations that Mr. Boyea's interest in Euro Mills was hidden or otherwise improper.

(13) Allegations concerning payment by W.C. Russell of US$2,293 into the account of Tropical Produce Ltd.

(14) Allegations concerning payment of $15,000 by Kingsley Thomas to Tropical Produce Ltd.

(15) Allegations concerning receipt by Mr. Boyea of commissions from Antillean.

(16) Allegation concerning:

- Payment of US$15,000 by Russell Martin in December 1994.
- Payment by Leroy Warner to William Wall in Montserrat
- Breach by Mr. Boyea and or Mr. Williams of exchange control regulation in Saint Vincent and the Grenadines.

(17) Matters concerning:

- The operating of the Tropical Produce Trading Bank Account
- The Organization for Rural Development
- East Caribbean Maricultures Ltd.

(18) All matters not specifically pleaded in the statement of claim or defence and counterclaim.

[70] The submissions on behalf of the Defendant can be summarized as follows:

(a) That in determining what are the relevant issues in this case the Court should not be constrained by the actual pleadings. The Court must look at the pleadings, the witness statements and the documents disclosed including the KPMG Report. The witness statements and the documents were served on the Claimants since September 2003, see The Civil Procedure 2005 Edition at paragraph 16.02, and the case of McPhilemy v Times Newspapers Ltd [1999] 3 AER p. 775.

(b) The Claimants are not prejudiced because they knew what the issues were and they responded to them in their witness statements, see the witness statement of the Claimant Boyea in particular paragraphs 108 – 130, 150 – 155 and 203 -208. The Claimants never sought particulars or further information.

(c) The matters referred to by the Claimants are pleaded in the defence and counterclaim, see paragraphs 4, 6, 13, 25, 30, 52, 53, 55, and 56 of the Boyea defence and counterclaim and paragraphs 4, 6, and 23 of the Williams' defence and counterclaim. The pleadings are extremely wide in their nature and scope. They covered any form of misconduct on the part of the Claimants, any breach of fiduciary duties and any breaches of contract whether of implied terms or express terms. Paragraph 25 is a non-specific list. It states: "these included."

[71] CPR 32.2 reads as follows:

> "Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly."

In effect it is the duty of the expert to give opinion on matters which are in issue before the Court. The expert evidence must not include matters which are not relevant to the issues

in dispute between the parties. Where an expert report contains such matters it is the general duty of the Court to exclude such matters.

[72] Also section 29 of the Evidence Act which deals with the admissibility of expert evidence requires the opinion to be on relevant matters.

[73] The issue for the Court to determine is whether the matters complained of by the Claimants are issues between the parties to be determined by the Court.

[74] In order to make that determination the Court must first determine whether issues between the parties are to be determined on the pleadings as submitted on behalf of the Claimants or on the pleadings, the witness statements and the disclosed documents as submitted on behalf of the Defendant.

[75] A good starting point is CPR 2000. CPR 2000 requires parties to a claim to set out all the facts on which they wish to rely. In relation to Claimants Part 8.7(1) provides:

> "The Claimant must include in the claim form or in the statement of claim a statement of all the facts on which the Claimant relies."

In relation to a defendant Part 10.5 provides:

> "The defence must set out all the facts in which the defendant relies to dispute the claim."

While Part 10.7(1) provides:

> "The defendant may not rely on any allegation or factual argument which is not set out in the defence but which could have been set out there, unless the Court gives permission."

[76] In Civil Procedure (Vol. 1) 2005 Edition at paragraph 16.02 the learned authors in discussing the contents of statements of case stated:

> "In McPhilemy v Times Newspapers Ltd [1999] 3 AER p. 775 Lord Wolf gave the following guidance as to the purpose and importance of statements of case. Statements of case are required to mark out the parameters of the case that is being advanced by each party. It is important that they identify the issues and the extent of the dispute between the parties. They should state concisely the general nature of each party's case."

In McPhilemy Lord Wolf stated at pp. 792 – 793:

"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings, identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

[77] The above passage was quoted with approval in the case of Three Rivers District Council and others v Bank of England (No.3) (2001) 2 AER p. 513 at paragraph 49. This issue was also considered by the Court of Appeal in Kenneth Harris v Sarah Gerald No. 3 of 2003 (Montserrat). Gordon JA said at paragraphs 9 and 10:

"(9) ... In the instant case the Appellant failed to plead any of the elements of estoppel by acquiescence, namely that the Respondent acquiesced in the breach of contract and that the Appellant acted on that basis to his detriment. It cannot be said often enough that the overriding objective is not a plaster to cover all sores of omission. Where CPR places an obligation to act in a particular way, failure to act in that way will in most cases, result in a sanction. The case pleaded by the Appellant was variation of contract a far cry from acquiescence. There is one further point that should be dealt with here. Learned Counsel for the Appellant urged the Court to consider that as the defence of estoppel had been raised in both the witness statements and legal submissions filed on behalf of the Appellant prior to trial, the Respondent could not be heard to say she was taken by surprise .

(10) Part 10.7 of CPR is opposite in this context... What the learned Counsel for the Appellant was attempting to do in my opinion was to gain the benefit of amending his defence without amending his defence. This is not allowable."

[78] The authorities show clearly that the issues are to be determined on examination of the pleadings. I agree with the submissions of Learned Queen's Counsel for the Claimants that the witness statements and the disclosed documents provide details relating to the issues that arise from the pleadings. They do not establish issues between the parties. They provide the details and the evidence that the party has to support the allegations contained in the pleadings. Indeed Lord Wolf stated in the McPhilemy case quoted earlier:

"In the majority of proceedings identification of the documents upon which a party relies together with copies of that party's witness statement will make the detail of the nature of the case the other side has to meet obvious."

[79] Having regard to the provisions of CPR 2000 and the cases of McPhilemy, Three Rivers District Council and Kenneth Harris I am of the opinion that the issues in dispute are those contained in the pleadings and not the witness statements or the disclosed documents.

[80] The next issue to be considered is whether the matters complained of are matters which relate to the issues which arise on the pleadings and are in dispute between the parties or whether they are new allegations as submitted on behalf of the Claimants.

[81] Learned Queen's Counsel for the Claimants submitted that the matters complained of are new allegations of improper conduct, dishonesty, bad faith and breach of fiduciary duty. They are not included in the pleadings.

[82] Learned Queen's Counsel for the Defendant submitted that the matters are pleaded in paragraphs 4, 6, 13, 25, 30, 52, 53, 55 and 56 of the Boyea defence and paragraphs 4, 6 and 23 of the Williams defence. The matters relate to misconduct and breach of fiduciary duty.

[83] It is not disputed that the allegations complained of relate to improper conduct, dishonesty, bad faith and breach of fiduciary duty.

[84] In the Three Rivers case Hope LJ in considering the need for fraud, dishonesty and bad faith to be pleaded said at paragraph 51:

"On the other hand it is clear that as a general rule, the more serious the allegation of misconduct the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud."

At paragraph 52:

"In Wallingford v Mutual Society (1880) 5 Appeal Cas. 685 at 697 Lord Selbourne LC said:

'With regard to fraud, if there be any principle which is perfectly well settled it is that general allegations however strong may be the words in which they are stated are insufficient even to amount to an argument of fraud of which any Court ought to take notice.' "

And at paragraph 55:

"As the Earl of Halsbury LC said in Bullivant v Attorney General for Victoria [1901] AC 196 at 202 where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty it is not open to the Court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence . As Miller LJ said in Armitage v Nurse (1997) 2 AER p. 705 at 715 "it is not necessary to use the word "fraud" or "dishonesty if the facts which make the conduct fraudulent are pleaded but this will not do if language used is equivocal (see Belmont Finance Corporation Ltd v Williams Furniture Limited (1979) 1 AER p 118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars: The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out."

[85] It is quite clear from the provisions of CPR 2000 Part 8.7 that a statement of claim must contain all the facts relied on by the Claimant. The same applies to a counterclaim. Pursuant to Part 10.5 that the defence must contain all the facts on which a defendant seeks to rely to defend the claim. Failure to state the facts would result in the defendant not being able to rely on them - Part 10.7 Also the House of Lords in the Three Rivers case confirmed the well settled principle that allegations of dishonesty, improper conduct, fraud, misconduct must be pleaded.

[86] I will now examine the provisions in the pleadings on which the Defendant relies to determine whether the matters complained of are included in the paragraphs stated by learned Queen's Counsel for the Defendant. As indicated earlier the pleadings in the Williams defence are in similar terms as the pleadings in the Boyea defence. I will therefore only refer to the Boyea defence.

Paragraph 4:

[87] An examination of paragraph 4 shows that it makes a general allegation of misconduct being misappropriation of the Defendant's assets and funds and business opportunities, breach of fiduciary duty and breach of contract.

Paragraph 6:

[88] This paragraph repeats the allegations of misconduct stated in paragraph 4 and makes specific reference to the incorporation and operation of Caricom Rice Mills.

Paragraph 13:

[89] This paragraph deals with the Claimant Boyea incorporation and operation of MML and his ownership of shares in MML directly and indirectly through his ownership of shares in Euro Mills.

Paragraph 25:

[90] This paragraph alleges improper conduct the unauthorized use of the Defendant's funds and it lists specific instances in sub-paragraphs (a) to (h). While paragraph (i) makes a general allegation of other expenditures and write-off of amounts owing by persons related to Boyea. P aragraph 25 sets out an inexhaustive list, the paragraph states "These include..."

Paragraph 30:

[91] This paragraph alleges that the Claimant's conduct was below that expected of a Managing Director when he permitted the Defendant to continue to do business with Sanderson when he knew Sanderson was making a loss. In the last sentence of this paragraph the Defendant alleges that alternatively the Claimant was receiving secret profits or commission for this accommodation.

Paragraph 52:

[92] This paragraph alleges that the improper payments made to the Claimant and the unauthorized expenditures incurred by the Claimant amounted to a conflict of interest and the Defendants are entitled to be reimbursed to the full extent.

Paragraph 53:

[93] This paragraph states that "all of the foregoing improper activities" constitute a breach of the Claimant's Employment Agreement.

Paragraph 55:

[94] In this paragraph the Defendant claims to have a constructive trust over the bank accounts of the Claimant and Corporations owned or controlled by him into which improper payments were made.

Paragraph 56:

[95] In this paragraph the Defendant seeks an order against the Claimant to follow the trail of improper payments.

[96] No mention is made in any of the paragraphs referred to above of any of the allegations complained of. I find that in view of CPR 2000 Part 8.7, 10.5 and 10.7 and the cases of McPhilemy, Three Rivers case and Kenneth Harris the Defendant was required to plead the matters complained of in the defence and counterclaim. The Defendant has not done so and as a consequence cannot rely on them at trial. The Defendant cannot adduce documents to prove them at the trial. To be able to rely on these allegations the Defendant was required to amend its pleadings. In fact the Defendant sought to do so and its application to amend was refused, see decision of d'Auvergne JA (Ag.) in Civil Appeal No. 3 of 2004. The Defendant not having pleaded these matters they are not issues between the parties to be determined by the Court. They are irrelevant. These matters being irrelevant they cannot be included in the expert report. The expert report must be restricted to matters in issue before the Court.

[97] It was submitted on behalf of the Claimants that since the Claimant Boyea in his witness statement addressed the matters complained of the matters were relevant and the Defendant was entitled to cross-examine him on these matters and to produce any document disclosed which deals with the matter. This is permitted under CPR 2000 Part 29.10.

I agree with the submission of Learned Queen's Counsel that a witness may be cross-examined on any or all matters mentioned in his witness statements. However this does not make the matter a relevant issue between the parties. In Phipson on Evidence 12th Ed. Para. 1592 under the heading Object and Scope and Cross-examination the Learned Author stated:

> "...the witness may be asked not only as to facts in issue or directly relevant thereto but all questions which though otherwise irrelevant, impeach his credit in the manner provided..."

See also Blackstone Civil Procedure 2002 Ed. Paragraph 47.59

In Hobbs v Tinling [1929] 2 KB p. 1 Scrutton LJ said at p. 18-19:

> "...When a witness has given evidence material to the issues in the case you can cross-examine him on matters not directly material to the case in order to ask the jury to infer from his answers that he is not worthy of belief not a credible person and therefore that they should not accept his answers on questions material to the case as true. This is cross-examination as to his credibility, commonly called cross-examination to credit. But as it is on matters not directly material to the case, the party cross-examining is not allowed to call evidence-in-chief to contradict his answers... if the jury hearing the answers given by the witness, do not believe him they are entitled to do so, and to use the view thus obtained as to his credibility in rejecting answers given by him on matters material to the case. But rejecting his denials does not prove the fact he denies of which there is, and can be no other evidence. It only destroys his credibility in respect of other evidence."

Documents at Tab 31, 32 and 33

Tab 32

[98] Learned Counsel for the Claimant agreed with the submission of Learned Queen's Counsel for the Defendant that the matter at Tab 32 was specifically pleaded in paragraph 24 of the Boyea defence.

Tabs 31 and 33

[99] It was submitted on behalf of the Claimants that these documents relate to allegations that were not pleaded by the Defendant and are therefore not admissible in support of those allegations.

[100] Learned Counsel for the Defendant submitted that the documents are admissible, the Claimant Boyea having admitted to receiving commissions at paragraphs 112 and 114 of his witness statement which was admitted in evidence and he admitted under cross-examination that commissions were paid by Russell Martin into the bank account of Tropical Produce.

[101] The documents at Tabs 31 and 33 relate to sums of money deposited by Russell Martin to the bank account of Tropical Produce. Having examined the pleadings I find that these matters were not pleaded in the defence and counterclaim. I find therefore that the Defendant cannot use these documents in support of an allegation of improper receipt of funds. The matters are addressed in the witness statement of the Claimant Boyea and his witness statement has been admitted in evidence. I agree with the submission of learned Counsel for the Defendant that pursuant to CPR 2000 Part 29.10 the Defendant may cross-examine a party on any matter contained in his witness statement. I find that while the documents cannot be used to support an allegation not contained in the pleadings the Defendant is entitled to use the documents to cross-examine the Claimant Boyea since those matters are mentioned in his witness statement.

[102] As indicated earlier in this ruling Learned Queen's Counsel for the Defendant urged the Court to leave the question of admissibility of the KPMG Report to be determined at the time of considering the judgment and the Court should simply not rely on those parts that are not admissible. The Court should adopt the approach of Evans-Lombe J in the Liverpool Roman Catholic case where he reserved the question of admissibility of the expert report until considering the judgment.

I have decided not to adopt this approach since in my view it would reduce costs and time if matters that are not relevant to the issues to be determined are excluded at the commencement of the trial. Indeed both parties agreed that the question of admissibility of the expert report should have been dealt with at Case Management.

Conclusion:

[103] In conclusion I make the following findings:

(1) The Karl Hudson Phillips Report is inadmissible.

(2) The KPMG Report and the witness statement of Mr. McAuley are admissible.

(3) The following statements which amount to hearsay evidence are excised from the KPMG Report:

(a) We understand that RML's duties as detailed in the June 21, 1997 letter and the March 1998 contracts are not different in any substantive way from RML's activities from 1992 to 1997 (**para. 4.1.1 at page 31**)

(b) We understand that Ms. Ashante Infantry is apparently a social acquaintance of Mr. Boyea's from Toronto...(**para. 10.4 (e) at p. 119**)

(c) We note that a handwritten notation on the June 21st 1997 letter from RML to Mr. Davy stated 1% of C & F value per unit. This indicates the level of commission to be paid to Mr. Don Martin that was set almost immediately after Mr. Boyea's termination (**para 4.1.1 at pg. 31**).

(d) Accounting staff of ECFML stated that ECFML's electricity bill would include an amount related to the electricity consumed by the refrigeration containers. They also stated that, to the best of their knowledge no amount had ever been allocated to either KFC or Mr. Boyea in respect of the electricity cost of these containers ...(**para 10.3 (2) pg. 112**).

(e) Between November 1994 and May 1995, Antillean apparently had discussions with Mr. Boyea concerning the provision of services by Antillean to MML. (**para. 6.1.1. at page 81**).

(f) Statements attributed to Mr. Martin Labourde at an interview conducted 18th April 1997 (**para. 6.1.2 at pg. 83**).

(g) Statement attributed to Mr. Boyea at interviews conducted 21st April 1997, 22nd April 1997 and 25th April 1997; (**para. 4.6 (2) at pg. 40, para. (b) & (c), para. 4.6.4 at pg. 45, para. 4.7.1 at pg. 46, para. 4.7.4 at pg. 55, para. 4.7.5 at pg. 56, para. 4.7.5 at pg. 58 – 59, para. 4.75 at pg. 60, para. 5.1. at pg. 65**).

(h) Statements attributed to Mr. Atherton Martin in telephone conversation allegedly conducted on May 9th 1997 and July 23rd, 1999 (**para. 4.7.5 at pg. 57-58**).

(i) Statements attributed to Mr. Leroy Warren (**para. 9.5 at pg. 105**).

(j) Mr. Robert Maldonado of Aventi Rice (**para. 4.6.(2) at pg. 39**)

(k) Mr. John Benjamin of Antigua Commercial Bank (**para. 4.4.5 at pg. 61**)

(l) Mr. Joseph Davis by telephone on June 24, 1999.

(m) Mr. Marius St. Rose of CDB on June 24th 1999 (**para. 4.7.5 at pg. 61**)

(n) Mr. M. Van Aremvonk by telephone on June 28th 1999

(o) Mr. Turhane Doerga by telephone on June 25th 1999

(p) Mr. Ramon Daubon on June 30th 1999 (**para. 4.7.5 at pg. 61**)

(q) Ms. Zita Jolie Steglich June 29th 1999 and July 1st 1999 (**para 4.6.4 at pg. 44 – 45; para 10.4(a) and (b) at pg. 119**).

(r) Mr. Phillip Foster on July 23rd 1999 (**paragraph 4.7.5 at pg. 61**)

(s) Mr. Kingsley Thomas May 30th 2000 (**para. 8 at pg. 97**)

(t) Mr. Jai Bennie on April 13th 2000 (**para. 4.6 (2) at pg. 39 to 40**)

(u) Mr. Felix Mathurin on June 23rd and 29th (**schedule 11 (d) at pg. 2 of 7**)

(4) The following documents amount to hearsay evidence and are inadmissible and are excised from the Report:
Nos. 558, 560, 562, 565, 577, 662, 663, 664, 665, 666, 668, 669, 670, 671, 673, 674, 676, 677, 678, 684.

(5) The following matters are irrelevant and are excised from the KPMG Report:

(1) Payment to Boyea by Mr. Kingsley Thomas

(2) Payments of Commission by Antillean to Boyea

(3) Payment of $15,000 from Russell Martin Ltd in December 1994

(4) Any allegations relating to Tropical Produce Ltd or its bank account, and in particular any allegation that W.G. Russell made payments to Tropical Produce Ltd or any allegations relating to payment to Boyea of money originating in account of Tropical Produce Ltd at Bank of Butterfield in the Cayman Islands.

(5) Any allegations of payments to Boyea by W.G. Russell.

(6) Any claims or allegations relating to payment by Leroy Warren to a Williams Wall in Montserrat.

(7) Any allegations relating to the Organization of Rural Development

(8) Any allegation relating to East Caribbean Maricultures Ltd

(9) Any allegation that Williams or Boyea placed ECFML in breach of foreign exchange regulations of St. Vincent

(10) Any allegation of impropriety in connection with Boyea's transitional ownership of shares in Euro Mills.

(11) Matters concerning Mr. Boyea's dealings with W.G. Russell (**para. 4 pgs. 30, 32, & 35**).

(12) Allegation that Mr. Boyea's interest in Euro Mills was 'hidden' or otherwise improper (**para. 4.7.3**).

(13) Allegations concerning payment by W.G. Russell of US$2,293 into account of Tropical Produce Ltd (**para. 4.3 at pg. 34-35**).

(14) Allegation concerning payment of $15,000.00 by Kingsley Thomas to Tropical Produce Ltd (**para 8 at pg. 96-97**).

(15) Allegation concerning receipt by Mr. Boyea of commissions from Antillean (**para. 6.2 at pg. 86 – 88**).

(6) The matters in documents Tab 31 and 33 were not included in the pleadings and therefore the documents cannot be used in support of those allegations.

[104]. I make no finding at this stage of the trial in relation to matters that were not specifically identified by the Claimants in their application.

[105] The Claimants shall pay the costs of this application. Costs to be assessed if not agreed.

.....
Gertel Thom
HIGH COURT JUDGE