

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ST. CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

Claim No. NEVHCV2020/0023

Between:

CLYDE MAYNARD

Claimant

and

S.L. HORSFORD CO. LTD.

Defendant

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances: (via Zoom):

Mr. Eustace Nisbett of counsel for the claimant

Ms. Danni Maynard of counsel for the defendant

Parties: (Via zoom)

Mr. Clyde Maynard being present

Mr. Joel McEachrane, representative of the defendant being present

2021: March 15;
December 21;

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]**: In December 2015, Mr. Clyde Maynard (“Mr. Maynard”) purchased a 2015 Nissan X-Trail (“the vehicle”) from S.L. Horsford Co. Ltd. (“SLH”) for XCD\$111,000.00. The terms of the purchase included a 30K

miles/50k kms or two-year warranty on the engine and gear box component as well as 4 free services of the vehicle. Around May and June 2018, after being returned from a service, Mr. Maynard noticed that the vehicle was moving sluggishly. A few days later, the vehicle stopped working totally. Diagnostic testing revealed that this was due to transmission failure.

- [2] In March 2020 Mr. Maynard instituted proceedings against SLH seeking damages for breach of contract, statutory breach and negligence. By a Defence and Counterclaim filed on 7th April 2020, SLH disputed any alleged negligence, breach of statutory duty and breach of contract and any consequential loss or damage suffered by Mr. Maynard as a result of the alleged breaches.
- [3] The main issue in dispute between the parties is the cause of the vehicle's transmission's failure. On 10th February 2021 Mr. Maynard filed a Notice of Application for the court to appoint Mr. Sylvester Liburd and Mr. Pablo Wilson as expert witnesses. On 1st March 2021, SLH also filed a Notice of Application for permission to adduce expert evidence from Mr. Hezron Liburd. Both applications have been opposed. It is these applications which have engaged the court presently.
- [4] The Civil Procedure Rules makes it pellucid that the expert report should be admitted by the court, only if the court is of the view that it is reasonably required to resolve the proceedings fairly. From the outset it must be stated that the parties agree that as it stands there is insufficient evidence before the court to determine the cause of the transmission failure. Both parties also agree that given the nature of the dispute, expert evidence would be required to assist the court in resolving the dispute. However, the heart of the disagreement in relation to these applications lies in the view of the parties as to which experts should be appointed to assist the court. I will take each application in turn.

Mr. Maynard's application

- [5] In his application filed on 10th February 2021, Mr. Maynard is asking that the court appoint Mr. Sylvester Liburd and Mr. Pablo Wilson as expert witnesses. Mr. Maynard avers that it is essential that the court has expert evidence for two reasons: firstly to state and value the vehicle at the time that SLH took possession and the current state and value of the vehicle, and secondly for a transmission specialist to determine the cause of the transmission failure.
- [6] Counsel for Mr. Maynard, Mr. Nisbett explained that given the specialized type of transmission which the vehicle contains, assistance was sought from a specialist outside of the Federation. This effort however proved futile as this person was reluctant to travel because of the pandemic and the quarantine specifications attendant to travel at this time. On this basis Mr. Maynard has proposed experts in the persons of Mr. Sylvester Liburd and Mr. Pablo Wilson, both resident in the Federation of St. Christopher and Nevis.
- [7] It is Mr. Maynard's submission that Mr. Sylvester Liburd who is an expert in his field of auto mechanic and vehicle appraisals would be a fit person to provide expert evidence in this matter. In an affidavit filed in support of his application, Mr. Maynard deposed that he has been advised, and verily believed that Mr. Sylvester Liburd has over 35 years experience with vehicle mechanics and appraisals and that during that time he has repaired hundreds of vehicles and has produced in the range of 24 – 48 evaluations per year for insurance purposes.
- [8] In that same affidavit, Mr. Maynard deposes that Mr. Pablo Wilson is also a fit person to provide expert evidence as he is advised and verily believed that Mr. Wilson is a transmission specialist with over 30 years experience in transmission diagnostic, repairs and transmission building. He further avers that he has been advised and believed that Mr. Wilson has diagnosed and repaired over 500 transmissions and has built over 400 units during this 30 year time span and performs transmission services for the majority of mechanics within Saint Christopher and Nevis.

- [9] The first point that SLH takes issue with is the statement by Mr. Maynard in his affidavit that expert evidence is required “to deal with the state and value of the vehicle at the time that SLH took possession”. Counsel for SLH avers that Mr. Maynard has failed to adduce any evidence before the court to indicate that either of his proposed experts can elicit this information. SLH goes further to state that Mr. Maynard’s affidavit in support of his application does not state that either of the proposed expert witnesses examined the vehicle “at the time SLH took possession”, shortly before, or after and consequently counsel is mystified as to how Mr. Maynard’s proposed experts can speak to the state and value of the vehicle at that time when there is nothing to suggest that they have examined or have ever worked on the vehicle.
- [10] SLH contends that the information deposed by Mr. Maynard is not stated as firsthand knowledge as he repeats that he is advised and so believes. Further, at no point in his affidavit does Mr. Maynard state the source of any matters of information and belief in relation to the expertise of the proposed witnesses. This, SLH argues, is in contravention to Rule 30.3(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

Analysis

- [11] Section 78 of The Evidence Act 2011 speaks to opinions based on specialised knowledge. It states:
- “Where a person has specialised knowledge based on the person’s training, study **or experience**, the opinion rule shall not prevent the admission or use of evidence of an opinion of that person that is wholly or substantially based on that knowledge.” **(My emphasis)**
- [12] From the construction of this section of the Evidence Act, it is pellucid that an expert need not possess formal study or certification in an area to give expert evidence in it, and can be appointed to give expert evidence based on their experience in that field or area. However, in order for the court to make an assessment as to whether a proposed expert should be appointed in accordance with Part 32, it must have

before it, among other things, sufficient evidence of the level of expertise of the proposed expert.

- [13] In this case the court is asked to appoint two experts. However, other than an affidavit with information, the source of which is unidentified, there has been no other evidence produced to show the extent of the proposed experts expertise.
- [14] Mr. Maynard's affidavit gives a glowing commendation for both Mr. Sylvester Liburd and Mr. Pablo Wilson. However the difficulty faced by Mr. Maynard is that he has failed to submit resumes for either of these proposed experts along with his application. In his submissions Mr. Nisbett rationalized that this was unintentional and could not be avoided as the proposed experts do not possess formal education and therefore cannot produce certificates of training.
- [15] Mr. Maynard has exhibited a copy of Mr. Sylvester Liburd's business licence in support of his application to have him produce an expert report. In taking issue with this, SLH contends that the production of a business licence only serves to inform the court that Mr. Sylvester Liburd is authorized to operate as a Mechanic and Vehicle Repairer. The business licence does not substantiate Mr. Sylvester Liburd's level of expertise in this field as owning and operating a vehicle repair shop does not necessarily equate to expertise in that field.
- [16] Mr. Maynard's submission of the business license for Mr. Sylvester Liburd can be taken to infer that as an owner of a vehicle repair shop he has some measure of expertise in vehicles, however is it not sufficient to substantiate the purported expert's level of expertise in this field, particularly in relation to transmissions which is the specific area in which the court could benefit from expert advice. I am in agreement with counsel for SLH Ms. Danni Maynard that owning and operating a vehicle repair shop does not equate to expertise in that field.

- [17] To support Mr. Pablo Wilson's purported specialty in transmissions, a copy of the business licence of Mr. Andrew Clarke has been exhibited. It must be stated that Mr. Andrew Clarke is not a proposed expert but rather is Mr. Pablo Wilson's employer. I agree with counsel Ms. Maynard that a copy of Mr. Clarke's business licence only serves to inform the court that a person by the name of Andrew Clarke is authorized to operate as a Mechanic and Vehicle Repairer. It can be used for no further purpose, not even as evidence that Mr. Pablo Wilson is employed there.
- [18] An expert's role in any proceeding is limited to providing expert evidence to assist the court in matters outside of the court's knowledge which are relevant to the issues for determination. I am of the view that that the issue relating to transmissions is a specialized area which is outside of the court's expertise. Having an expert to give evidence in relation to the specifics of this transmission, would no doubt require a person who has expertise in such matters. Additionally, this person would have to be confined to the requirements of Part 32 and would have to be able to provide an independent and impartial report to the court on the areas in dispute.
- [19] I am of the view that there may not be many persons on island who possess the expertise in this area. It is therefore even more critical that the court ensure that it secures the assistance of experts with the necessary expertise in this field so that the matter is disposed of justly.
- [20] Mr. Maynard however has not afforded the court the benefit of providing sufficient evidence to make a proper assessment as to the expertise of both men to provide expert evidence on transmissions.
- [21] In the submissions and arguments by counsel for SLH, the gravamen of the opposition is that there is nothing before the court to indicate that Mr. Maynard's proposed experts have the relevant expertise. I agree that this is a good basis for objection as Mr. Maynard has not provided any documentation to verify the level of

expertise of his proposed experts, particularly in relation to their specialty in transmissions.

[22] Taking all of the circumstances of this matter into consideration, as well as the overriding objective of the Rules, I am of the view that, to do justice to this matter, Mr. Maynard should be afforded the opportunity to put before this court further evidence in support of his application. I note Mr. Nisbett's explanation for not submitting resumes of the proposed experts, however under these circumstances there was nothing preventing the submission of any other evidence which speaks directly to the experience of the proposed experts in the related field. I am of the view that such an order would not prejudice SLH as they would be given the opportunity to consider and respond to the evidence once placed before the court.

[23] In light of the above I make the following order:

- (1) The claimant is granted leave to file further evidence in support of the application to appoint Mr. Pablo Wilson and Mr. Sylvester Liburd on or before 31st January 2022.
- (2) The application shall thereafter be placed for consideration before the master.
- (3) If the claimant fails to provide further evidence in compliance with this order, this application shall stand dismissed without further order.

SLH's application

[24] SLH seeks the court's permission to have Mr. Hezron Liburd produce an expert report to assist the court in resolving these proceedings. SLH submits that Mr. Hezron Liburd is a competent witness to give expert evidence in these proceedings, as proven by his resume and certifications which were exhibited for the court's consideration. Also exhibited were certificates which show various certifications held by Mr. Hezron Liburd particularly in relation to mechanics and automatic

transmissions. SLH therefore submits that Mr. Hezron Liburd possesses the requisite expertise to assist the court with this specific issue raised in the claim.

[25] SLH has disclosed to the court that Mr. Hezron Liburd is an employee of SLH, holding a senior position with the company. However, counsel for SLH submits that, although Mr. Liburd is an employee of SLH, he can offer and provide impartial evidence to assist the court.

[26] Mr. Maynard contends that Mr. Hezron Liburd is not a suitable expert and opposes SLH's application on the following grounds:

- (1) Mr. Hezron Liburd will have an actual or apparent or perceived bias as his independence is compromised.
- (2) Mr. Hezron Liburd is not an expert with regards to the dispute before the court.
- (3) The application seeks not for an inspection of the transmission but rather a report on what could be the possible causes of the transmission failure whereas the issue before the court is what caused this particular transmission failure.
- (4) SLH has diagnosed the transmission internally; and
- (5) SLH has sought an independent inspection and report of the cause of this transmission failure.

[27] Counsel Ms. Maynard relied on the authority of **Fields v Leeds City Council**¹ to bolster her application. In that case the question before the court was whether permission should be granted to allow a surveyor employed by the City Council to give expert evidence. Counsel opposite opposed the application on the basis that the surveyor could not bring the necessary objectivity needed to expound on the

¹ [2000] 1 EGLR 54.

issues in the case. The court held that the surveyor could not be an expert witness in the proceedings.

[28] What is noteworthy from that case is that the court further held that there was no assumption that an employee could not be an expert witness. The court posited that a judge must not only be satisfied that the proposed witness was qualified to give expert evidence in an area in issue in the case but also it is necessary for a judge to satisfy himself or herself that the proposed expert has demonstrated that he or she is aware of their primary duty to the court if they give expert evidence and the need for objectivity. The court agreed that if an expert is properly qualified to give evidence, then the fact that he is employed by a party to the matter would not disqualify him from giving evidence.

[29] SLH therefore submits that in the present circumstances, Mr. Hezron Liburd possesses the relevant qualifications and expertise given and he may serve as an expert once he is made aware that his primary duty rests with the court. Furthermore, it is submitted that any concerns arising from the potential conflict of interest can be properly addressed having regard to the safeguards outlined in the Civil Procedure Rules.

[30] SLH avers that, considering that none of the proposed witnesses has previously examined the subject vehicle, there is no direct evidence as to what caused the transmission failure. Therefore, by providing credible trained knowledge of possible causes of transmission failure, the court can then, on the facts before it as presented by each side, determine the cause for transmission failure which is relevant to the issue of liability.

[31] I am of the view that the concern expressed by counsel Mr. Nisbett about Mr. Liburd's suitability is a valid concern. In considering his resume, although it is noted in the body of the resume that Mr. Hezron Liburd has experience with Nissan Engines and Transmissions, in none of the certificates exhibited by SLH does any

speak specifically to certification in Nissan Transmissions. I note the certificate evidencing Mr. Hezron Liburd's attendance at a training course in Trinidad and Tobago with Nissan Mexicana, S.A. de C.V. the course stated here is "Consult III". There is no specification as to what sort of certification that is. The court has no way of confirming this fact either. I do note however that there is a certificate for what appears to be a "Hezron Liburd" who has completed a one day training course in Automatic Transmissions in June 2010.

[32] This however does not automatically disqualify Mr. Hezron Liburd from being an expert witness. From his resume, it can be gleaned that Mr. Hezron Liburd has some level of expertise with transmissions, however SLH has not provided the court with sufficient or any verifiable information as to whether he is an expert with specialization in Nissan transmissions as indicated by counsel for SLH.

[33] As highlighted by the Civil Procedure Rules not only must an expert have expertise and experience which is relevant to the issues to be decided but he or she must be impartial and independent. Given the fact that Mr. Hezron Liburd is employed with SLH this court is faced to consider the issue of a conflict of interest.

[34] The case of **Toth v Jarman**² is very instructive on the consideration which must be given by the court when dealing with the issue of a conflict of interest. In considering the issue, the court posited as follows:

"Does the presence of a conflict of interest automatically disqualify an expert? In our judgment, the answer to that question is no: the key question is whether the expert's opinion is independent. It is now well established that the expert's expression of opinion must be independent of the parties and the pressures of the litigation. Authority for this can be found in paragraphs 1 and 2 of the guidance which Cresswell J gave in *National Justice Compania Naviera SA Prudential Assurance Co Ltd* ("the Ikarian Reefer") [1993] 2 Lloyd's Rep.68 as summarised on pages 938-9 of Civil Procedure (2006): "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (*Whitehouse v Jordan* [1981] 1 W.L.R. 246, HL, at 256, per Lord

² 2006] EWCA Civ. 1028.

Wilberforce). 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Pollivitte Ltd v Commercial Union Assurance Company Plc* (1987) 1 Lloyd's Rep. 379 at 386, per Garland J., and *Re J* (1990) F.C.R. 193, per Cazalet J. ..."³

[35] Part 32 of the Civil Procedure Rules sets out the regime in relation to expert evidence. Under rule 32.2, expert evidence must be restricted to what is reasonably required to resolve the proceedings justly.

[36] Rule 32.3 of the Civil Procedure Rules states that it is the duty of an expert witness to help the Court impartially on the matters relevant to his or her expertise. The rule goes on to state that this duty overrides any obligation to the person by whom he or she is paid. In **Whitehouse v Jordan**⁴ Lord Wilberforce opined:

"It is necessary that expert evidence presented to the Court should be, and should be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation".

[37] The Civil Procedure Rules has since confirmed this sentiment in rule 32.4(1) and (2) which states:

"(1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation'.

(2) An expert witness must provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the witness' expertise."

[38] It is clear that the Civil Procedure Rules require a report to be unbiased, uninfluenced and truthful, first and foremost making the effort to resolve the matter justly of great significance. As an employee of SLH, it calls into question whether Mr. Hezron Liburd is able to give an unbiased report on the failure of this transmission. While he may be qualified to do so, there is a real concern as to

³ Ibid at paragraph 100.

⁴ [1981] 1 WLR 246 at p.256.

whether the evidence which he will give could be regarded as independent and unbiased.

[39] Mr. Hezron Liburd has been an employee of SLH from 2004 to present. From 2004 to 2020 he served in the capacity of Service Mechanic. Since 2020 he has been serving as the Service Foreman. In his statement of claim, Mr. Maynard alleges a number of breaches which he has particularized, many of which are concerned with the servicing of the vehicle and the overall fitness of the vehicle. Mr. Maynard is also alleging that SLH, its servants or agents were negligent and breached their duty of care to him. To my mind this raises a serious conflict of interest which is significant in nature as distinct from one which was obviously immaterial as counsel for SLH Ms. Maynard has urged this court to accept. This must therefore be assessed careful against the weight of the issue which the expert is required to assist the court in resolving.

[40] Although counsel Ms. Maynard in her oral submissions posits that the proposed expert has never worked on the vehicle, she has not pointed us to any pleading or filing where this was put into evidence. Ms. Maynard contends that Mr. Hezron Liburd's evidence is not to speak to the specific vehicle as he has never worked on it but instead to speak to Nissan transmissions on which he has relevant expertise.

[41] While after 17 years of service Mr. Hezron Liburd may very well be in a position to speak to the issue at hand, the other limb as to whether he can do so independently must equally be satisfied. The vehicle was sold to Mr. Maynard by SLH. The vehicle was thereafter serviced by SLH, a number of times, including up to the most recent period before it stopped working. Mr. Hezron Liburd is not only a senior and longstanding member of staff of the company but he is also the Service Foreman for the company SLH. In his statement of claim, Mr. Maynard alleges a number of breaches against SLH, including allegations of breaches in relation to the servicing of the vehicle. Bearing in mind that under rule 32.3 of the Civil Procedure Rules it

is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise, I am of the view that this is enough to show how closely connected Mr. Hezron Liburd is to the dispute and raises a serious concern as to his ability to be an independent and impartial expert. The court cannot take such a concern lightly, even though a proposed expert has the relevant expertise as having the relevant expertise is not enough to allow the court to appoint someone as an expert witness.

[42] Taking all the circumstances into consideration and for the reasons stated above I have formed the view that Mr. Hezron Liburd is too closely connected to SLH and the conflict of interest which this creates is overwhelming and cannot be overlooked. The application must therefore be refused.

[43] I hereby make the following order:

1. The application to appoint Mr. Hezron Liburd as an expert witness is refused.
2. Costs are awarded to the claimant in the sum of \$750.00 to be paid on or before 17th January 2022.

[44] I am grateful to the parties for their most helpful submissions in this matter and deeply regret the delay in the delivery of this judgment.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar