



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION  
(COMMERCIAL COURT)**

**2020: No. 132**

**BETWEEN:**

**NOESIS CONSULTING LIMITED**

**Plaintiff**

**- and -**

**SATURN SOLAR DEVELOPMENTS LTD.**

**Defendant**

**RULING**

*Application for leave to adduce expert evidence*

**Date of Hearing: 4 May 2022**

**Date of Ruling: 7 July 2022**

**Appearances: Jaymo Durham, Amicus Law Chambers Ltd., for the Plaintiff  
Nicholas Howard, Walkers (Bermuda) Limited, for the Defendant**

**RULING of Mussenden J**

**Introduction**

1. This matter in respect of an application for leave to adduce expert evidence pursuant to Order 38, rule 36 came before me by the Plaintiff's Summons for Directions dated 24 August 2021. At the first hearing on 14 October 2021 I made an Order in the following terms "*2. The parties shall identify and settle the terms of the expert witness' evidence on or before 16 December 2021.*"
2. The parties made efforts to agree the terms of the expert witness' evidence but failed to do so. Thus, a Consent Order dated 16 December 2021 directed the matter be set down for a hearing.
3. The Defendant opposes the application to adduce expert evidence.

### **Background to the Matter**

4. The Plaintiff is a contracting firm, engaged in the supply of construction services.
5. The Defendant is a project management company and a general contractor.
6. The Plaintiff and Defendant entered into two agreements as follows: (a) by a first contract dated 13 May 2019 (the "**Interconnect Contract**"), for the Plaintiff to supply and install a submarine combined power and fibre optic cable from the switchgear at "The Finger" in St. David's to the cable vault at the helipad in St. George's and a similar cable from that vault to the BELCO substation at the new L.F. Wade International Airport; and (b) by a second contract dated 13 May 2019 (the "**Solar Farm Contract**"), for the Plaintiff to construct and for the Defendant to support the build of a 6MW Solar Photovoltaics Facility at The Finger ("**the Solar Farm**").
7. Disputes have arisen between the parties and the Plaintiff filed and served a Specially Indorsed Writ of Summons issued 10 May 2021 claiming damages in the amount of

\$1,347,386.17 (“**the Claim Amount**”). The Defendant filed a Defence and Counterclaim dated 19 July 2021.

### **The RSC and Law on Expert Evidence**

8. RSC Order 38 rule 36 provides:

*“38/36 Restrictions on adducing expert evidence*

*(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence has applied to the Court to determine whether a direction should be given under rule 3, 38, or 41 (whichever is appropriate) and has complied with any direction given on the application.*

*(2) ...*

9. Subair Williams J considered the legal framework applicable to expert evidence in *Derk Koole v HG (Bermuda) Ltd.* [2019] SC (Bda) 89 Civ where she stated:

*“22. Evidence of opinions, whether it be the views of an individual or the reputed beliefs of any group of persons in a community, is generally irrelevant and inadmissible in a trial of facts even if the subject-matter of the opinion is relevant to the material facts of the case.*

*...*

*24. However, the main exception to the rule against opinion evidence enables a competent and skilled expert witness to state opinions on a subject-matter on which they have acquired such expertise through the study of a recognized discipline containing a suitable body of information.”*

10. Subair Williams J referred to English law under the CPR to formulate a three stage assessment in considering whether to grant leave to introduce and rely on expert evidence:

*“(i) whether there is a need for expert opinion evidence in order to resolve any one or more of the relevant issues and (ii) if the opinion evidence does not meet the necessity threshold, whether, having regard to the Overriding Objective in the*

*context of the proceedings as a whole, the opinion evidence would reasonably assist the Court in fairly and expeditiously resolving the proceedings as a whole and (iii) the competence of the proposed witness to give such expert evidence.”*

11. Subair Williams J also found that the Overriding Objective in Order 1A rule 1 and the Court’s case management duties were in important considerations in determining whether to grant leave to adduce expert evidence.

*“1A/1 The Overriding Objective*

*(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*

*(2) Dealing with a case justly includes, so far as is practicable—*

*(a) ensuring that the parties are on an equal footing;*

*(b) saving expense;*

*(c) dealing with the case in ways which are proportionate—*

*(i) to the amount of money involved;*

*(ii) to the importance of the case;*

*(iii) to the complexity of the issues; and*

*(iv) to the financial position of each party;*

*(d) ensuring that it is dealt with expeditiously and fairly; and*

*(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”*

### **The Plaintiff’s Application to adduce expert evidence**

12. The Plaintiff’s application is based on several grounds as set out below.

a. First, the Defendant pleaded at paragraph 23.9 of the Defence and Counterclaim that *“It was an implied term of the Agreements that the Plaintiff would exercise reasonable skill and care in the performance of its services under the Agreements.”*

b. Second, the Defendant pleaded at paragraph 64 of the same that the Plaintiff *“did not undertake the Interconnection Works to the standard of care to be expected of a reasonably skilled and competent sub-contractor.”*

- c. Third, the Defendant pleaded at paragraphs 130 and 139 of the same that the Plaintiff had acted in fundamental breach of the Agreements, and/or in breach of its duty of care in that the Plaintiff failed to exercise reasonable skill and care in undertaking and discharging its contractual obligations.
  - d. Fourth, the Plaintiff relies on the doctrine of *force majeure* in relation to delays incurred in the installation of the fiber optic underground cable. Section 12(4)(v) of both Solar Farm Contract and the Interconnect Contract required the party seeking to rely on *force majeure* to prove that they acted in compliance with ordinary industry standards.
13. The Plaintiff argued that in order to prove its claim, it will have to substantiate that it indeed exercised the requisite skill and care to be expected of a reasonably skilled and competent sub-contractor in the performance of its services under the Agreements. Thus, it argued they would require the evidence of an expert in the field of fibre optic cable installation, as well as project management. Further, as the Plaintiff relied on *force majeure* then it can only prove that it did so with the aid of expert testimony.
14. In essence, the Plaintiff argued that there was a pronounced need for expert opinion evidence which would reasonably assist the Court in resolving the issues in light of the complexity of the work, the *force majeure* issues and the allegations of negligence.

### **The Defendant's Objections to the application**

15. The Defendant objected to leave for several reasons as set out below.
- a. First, the Plaintiff had indicated relevant areas where expert opinion evidence was required which included submarine fiber optic cable installation, cable trench and design project management. However, upon request, the Plaintiff provided further particularisation in a letter dated 8 December 2021 (the “**December Letter**”) but failed to identify the scope of the proposed expert evidence or any particular expert, expertise or specialty.
  - b. Second, the Defendant submitted that the issues raised by the Plaintiff relate to the terms of the contracts between the parties and the actions taken by both parties in

furtherance of those contracts. These were matters of interpretation and fact that fell within the Court's role and expertise. Thus, no expert evidence is required.

- c. Third, permitting the introduction of evidence on the basis of the Plaintiff's application would serve only to unnecessarily expand the time, costs and complexity involved in the proceedings.
  - d. The application was insufficient and contrary to the overriding objective.
  - e. Expert Evidence was not necessary or helpful in the case.
16. The Defendant referred to various express terms of the Agreements including that (a) the scope of work was defined; (b) the work was to be completed in a good and workmanlike manner; (c) substantial completion of the work was expected by the substantial completion date and the Plaintiff could claim a justified extension of the same with a change order requested in respect of a delay for specified causes; (d) the Plaintiff represented that it had the ability skills, experience and capacity to perform the work in a timely and professional manner; (e) time was of the essence; and the Plaintiff owed the defendant a duty of care in undertaking the work to the standard specified in the Agreements.

### **Analysis on the Plaintiff's Application for leave to adduce Expert Evidence**

17. In my view, I should grant the Plaintiff's application to adduce expert evidence. First, in my judgment there will be a need to have expert opinion evidence in order to resolve relevant issues arising in the case in respect of both Contracts as set out above in the Plaintiff's submissions, namely the exercise of reasonable skill and care in the performance of its services and the standard and duty of care to be expected of a reasonably skilled and competent sub-contractor. There will also be a need for expert opinion evidence to resolve the issues about delay and the reliance on the *force majeure* provision. I note that the Defendant argued that the case is about a breach of contract for the non-payment of liquidated damages and not for standalone negligence or breaches of extra-contractual standards, thus there is no need for expert opinion. The Defendant also states that the case is not about industry standards but about the duties imposed by the Contracts. However,

the Defendant has pleaded breaches of the standard and duties of care. In my view, expert evidence will be of assistance to the Court in resolving these issues.

18. Second, I disagree with the Defendant that the matters set out above are matters of interpretation and fact that fall within the Court's expertise. As a start, the Court will indeed have the role of the consideration and resolution of factual matters. However, the Court is being asked to consider the issues of duty, standards and reasonable care set out in the preceding paragraph but the Court is not an expert in those areas. I rely on the case of *Derk Koole v HG (Bermuda) Ltd.* as cited as I anticipate that the Court will be able to form broad views on the issues but a more clinical examination of the issues is likely to be required. Upon a review of the pleadings in the case, I anticipate that there will be significant argument about industry standards and reasonableness.

19. Thus, in my view, the court will require expert assistance to resolve them. I disagree with the Defendant's submissions that expert evidence is not necessary or helpful in the case. I rely on *Avondale Exhibitions Limited and Arthur Gallagher Insurance Brokers Limited* [2018] EWHC 1311 (QB) where the Court stated that "*The standard of skill and care required of a professional person is to be determined by the court by reference to the profession concerned ...*" and "*It is usual for a court to require expert evidence as to the standards ordinarily observed within a profession before it will find that a professional's conduct amounts to negligence.*" That judgment cited the case of *Sansom v Metcalfe Hambleton and Co* [1998] P.N.L.R 542 where Butler-Sloss LJ stated "*A court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard.*"

20. Third, in respect of consideration of the Overriding Objective, the claims of both parties are significant claims. Further, expert evidence will assist the Court in dealing with the case expeditiously and fairly as the evidence of the experts, on the basis that both parties produce an expert, could identify where there is agreement and where there are issues to be resolved. Also, I have considered the Defendant's submissions on the likelihood of

increased costs by adducing expert evidence. I accept that there will be an increase in costs by adducing such expert evidence but in my view such costs are justified in respect of the amount of damages being sought by the parties and the assistance to be rendered to the Court in dealing with the matter expeditiously and fairly.

21. Fourth, I am bound to address my mind to the competence of the proposed expert witness. Mr. Durham submitted that at this stage the Plaintiff had not yet identified an expert as they wished to resolve the issue of the questions for the expert first. In my view, this is a reasonable approach and the parties can always avail themselves of the Court's assistance if the selection of the proposed expert witness requires further consideration and determination.

### **Conclusion**

22. For the reasons above, I grant the Plaintiff's application for leave to adduce expert evidence on the following areas:
- a. Fibre Optic Underground Cable Installation as it pertains to the issues identified in this case;
  - b. Project Management as it pertains to the issues identified in this case and relevant sections of the Particulars of Claim including *force majeure*, the sections entitled "Rack Parts Missing, Balance of Modules Replacement, and Inverter Supports."
23. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that for this application costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 7 July 2022

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**HON. MR. JUSTICE LARRY MUSSENDEN  
PUISNE JUDGE OF THE SUPREME COURT**