In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2016 No: 459

BETWEEN:

DERK KOOLE

Plaintiff

And

HG (BERMUDA) LTD

Defendant

JUDGMENT

Date of Hearing: Wednesday 16 October 2019
Date of Ruling: Tuesday 17 December 2019

Counsel for the Plaintiff: Ms. Lilla Zuill (Zuill & Co)
Counsel for the Defendant: Mr. Christian Luthi (Conyers Dill & Pearman Limited)

Objection to use of Expert Opinion Evidence –Legal Principles on the Admission of Expert Opinion Evidence- Dispute as to the Plaintiff's claim to a Contractual entitlement to exercise a Company Warrant to convert unpaid Share Redemption – Non-compete Clause in Bye-Laws

JUDGMENT of Shade Subair Williams J

Introduction and Summary of Facts:

1. On 14 February 2017, the Plaintiff, Mr. Derk Koole, filed an Amended Generally Indorsed Writ of Summons against the Defendant, an exempted company incorporated in Bermuda (also referred to as "the Company").

2. On or about 23 September 2015, HG (Luxembourg) S.à.r.l., a wholly owned subsidiary of the Company, was sold to a Delaware corporation, namely Korn/Ferry International ("Korn/Ferry"). The sale of the Company ("the sale") is governed by a Stock Purchase Agreement. Prior to the sale, the Company was the ultimate holding company for the "Hay Group" human resource and management consultancy businesses. I will hereinafter refer to the Hay Group as "the KFHG".

3. The Plaintiff's claim is made in his capacity as a retired employee and shareholder of the Company. On his pleaded case, he has a contractual entitlement under Clause 3.7 of the Company's Bye-laws to the benefit of a warrant ("the Warrant) which was triggered by the sale. The exercise of the Warrant would result in the conversion of any unpaid redemption of his preferred shares in the Company. The Warrant provided:

   "*Effective beginning October 1, 2012, a Previous Shareholder who has not elected to exercise any Retirement Option under the grace period transition rule set forth in Bye-law 3.11 and who has not received his or her Final Redemption payment shall have a warrant to convert his or her unpaid redemption payments into the consideration that such Previous Shareholder would have received as a holder of Preferred Shares of the Company in any sale transaction (as defined below) on a pro rata basis, as of September 30 following the year of his or her Employment Cessation, provided that such warrant may only be exercised upon the sale or other disposition by sale, amalgamation, merger, consolidation or otherwise, of more than 50% of the shares or assets of the HG Group taken as a whole to an entry that is not part of the HG Group (any such transaction, a "Sale Transaction"), the closing of which transaction occurs by September 30 of the third anniversary of the Previous Shareholder's effective date of Employment Cessation*."

4. It is common ground between the parties that on or about 1 December 2015 the sale was effected, in that Korn/Ferry paid the Defendant approximately $475,000,000.00 in consideration for the transfer of the Company's shares which constituted more than 50% of the shares or assets of the HG Group taken as a whole. Mr. Koole says that at the time of his retirement, his shareholding accounted for approximately 0.4% of the Company's share capital, at US$0.01 per share.

5. The Defendant, however, disputes that Mr. Koole has any lawful entitlement to the benefit of the Warrant. On its pleaded case, Mr. Koole breached the 'good standing' requirement for the exercise of the Warrant. Specifically, the Company says that the Plaintiff, having acted as a consultant to a competitor company (namely, Bright & Company ("B&C")), was in breach of a non-compete obligation to the Company prescribed by Bye-law 78.1.

6. In the Plaintiff's Reply pleadings he explains that since 1 September 2015, he has been employed by K2M B.V., which acts as a consultant to B&C in the Netherlands. Under the Plaintiff's averments, B&C operates as a boutique consultancy business on HR related topics. The Plaintiff says that B&C is not a competitor and that it '*advises solely Dutch clients on, and offers bespoke solutions to, issues of people strategy, organization transformation, human capital analytics and HR organization effectiveness*'. The alternative case advanced on behalf of the Plaintiff is that Bye-law 78.1 is an unlawful restraint of trade.

7. Mr. Koole accordingly seeks, *inter alia*, a Court declaration confirming his entitlement to the benefit of the Warrant upon the closing of the sale to Korn/Ferry in addition to an accounting of the sums due to him and a direction from the Court as to how such sums should be calculated.

The Application

8. The Parties have come before me with opposing positions on the scope of the expert evidence which ought to be allowed at the trial of this action.

9. By a summons for directions filed by the Plaintiff on 18 July 2019 the Plaintiff proposed the following direction to be made by the Court:

   "*The Parties have leave to adduce a single expert report each pertaining to the human resources market in the Netherlands, the business of Bright & Company and the business of the Hay Group. Each Party's expert evidence shall be limited to that of the single written report and oral expert evidence shall not be adduced. Neither Party's expert shall be required to attend for cross-examination*."

10. Having heard from Counsel for both parties, on 15 August 2019 I directed:

    "*This matter be set down for 16th October 2019 for an estimated two-hour hearing in respect of the Plaintiff seeking leave for the Parties to each adduce a single expert report pertaining to the human resources market in the Netherlands, the business of Bright & Company and the business of the Hay Group (the Hearing).*"

The Proposed Expert Report

11. The Plaintiff proposes to rely on an expert report ("the Report") prepared by ALM Intelligence of ALM Media LLC ("ALM"), a copy of which was placed before this Court under a cover letter by ALM to the Plaintiff's attorneys, dated 5 July 2018.

12. In the letter, ALM introduces itself as follows:

Enclosed herein, please find ALM Intelligence's (ALM) report on the Human Resources (HR) consulting market in the Netherlands. This analysis compares the businesses and capabilities of Korn Ferry Hay Group (KFHG), and B&C (Bright).

ALM is the global market leader in information for and about advisory and consulting firms, and has an extensive benchmark database complied over 20+years of surveys an syndicated research. As part of its research agenda, ALM conducts ongoing collection data on all aspects of advisory firms' operations and possesses an existing knowledge base on engagement structure and fee levels.

As a result of its continuous coverage of global consulting markets, ALM possesses an unparalleled knowledge base of providers that have been collected over the last 20+ years. Beyond its own analyses, ALM sources additional information through several channels, including:

- *Buyers of consulting, and advisory services (e.g. procurement, sr executives)*
- *Senior provider executives knowledgeable of pricing and P&Ls inside professional services*

13. ALM's Vice President and Managing Director of Advisory Services, Mr. Tom Rodenhauser, is the author of the Report. At the final page of the Report there is a bio disclosing a short summary of Mr. Rodenhauser's 25 years of industry experience and knowledge and his network familiarity. His expertise on management and IT consulting industry trends is also explained by reference to the wide audience he addresses through globally leading media sources and frequent public speaking.

14. The Report itself is divided into two parts. The first part covers the size and composition of the Dutch HR consulting market. This area of the Report is not opinion-based and did not conjure any objections from the Defendant. However, Mr. Luthi objected to the admissibility of all of the opinion evidence contained in the second part of the Report which provides an analysis of the practice differentiation between KFHG and B&C.

The Competing Arguments

15. The two broad grounds of objection from the Defendant are stated in Mr. Luthi's written submissions at paragraphs 3 and 4:

3. Firstly, expert evidence is not admissible and in any event simply not necessary in order to determine the issues in this case.

4. Secondly, even if such evidence was admissible, the evidence is clearly not being adduced with the requisite degree of independence required of an expert witness.

16. Mr. Luthi argued that the Report seeks to resolve one of the principal issues in dispute: whether the Plaintiff was in breach of Bye-law 78.1 by undertaking an activity in competition with the Company. Mr. Luthi contended that the factual information on the market in the Netherlands is admissible but maintained that the opinion evidence in the Report usurped the Court's role of judging the facts.

17. Ms. Zuill, on the other hand, criticized Mr. Luthi's proposals to redact the Report as an attempt at cherry-picking so as to remove the parts of the Report which might be construed as being critical aspects of the business model of the group of companies to which the Defendant belongs. On her arguments, it would be impossible to distinguish between pure fact and opinion out of the expert's conclusions.

18. Mr. Luthi pointed to nearly a dozen separate statements of opinion in the Report which deemed to be in breach of the legal boundaries of expert opinion evidence, particularly because they all related to a subject matter that did not require the assistance of any special knowledge or expertise in order for the Court to reach a sound decision on the issues in question.

19. Ms. Zuill submitted that expert evidence is needed to determine whether B&C is in competition with the Plaintiff or whether the Ownership Board of the Company ("the Board") reasonably concluded that it was. She argued that if the Board is found to have properly decided that B&C was a competitor, then the expert evidence would then be necessary to further determine its alternative case that the non-complete clause is unreasonable and thus void.

20. Ms. Zuill described the Dutch HR market as sufficiently complex in light of various intricacies of the market. In her written submissions, she noted; '…*although both the Defendant and B&C provide human resource consultancy services, the services in question are sufficiently different so that they are not actually in competition; similarly the size of the companies' operations may mean that customers of the Defendant would not consider using the services of B&C and vice versa*.' She submitted that this is not the kind of knowledge that would readily be within the Court's knowledge or that of the parties' individual knowledge. This is the basis for her application before this Court for leave to adduce opinion evidence from a witness who has expert knowledge of the Dutch HR market.

21. As to the distinction between the factual and opinion evidence, Ms. Zuill accepted in her written submissions that the Report would include a mix of factual and opinion evidence. Surprisingly, however, in her oral submissions, Ms. Zuill appeared less willing to agree that the objectionable portions of the Report constituted statements of opinion.

Analysis of the Law on Expert Opinion Evidence

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.

23. One exception to this general rule allows for a witness to fully convey any matter personally perceived by him. For example, a person may describe a noise heard by him or her directly as disturbing or unpleasant. For further illustration, a witness would not likely offend the general rule against opinion evidence in describing a person as 'beautiful' or 'well-dressed' in giving relevant identification evidence.

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.

25. The governing provisions on the admission of expert opinion evidence are to be found in the Evidence Act 1905 ("the Evidence Act") and in the Rules of the Supreme Court 1985 ("RSC").

26. Section 27L states the rule on the admission of expert opinion evidence and certain expressions of non-expert opinion:

27L (1) Subject to any rules of court made in pursuance of Part IIA or this Part, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) Where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section "relevant matter" includes an issue in the proceedings in question.

27. RSC Order 38/36(1) provides that expert evidence may only be adduced with the leave of the Court or where the parties are agreed:

38/36 Restrictions on adducing expert evidence
36 (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 …

28. When read with section 27L, this Rule broadly empowers the Court to allow expert opinion evidence on any relevant matter on which the witness in civil proceedings is qualified to give expert evidence. Otherwise, there are no statutory restrictions on the admission of expert opinion evidence.

29. I was invited by Counsel for both sides to consider persuasive English case law for assistance on how the Court ought to exercise its powers in admitting or excluding expert opinion evidence.

30. Of course, in England, the admissibility of expert evidence is decided under the framework of section 3 of the Civil Evidence Act 1972 which parallels section 27L of the Evidence Act. Section 3 provides:

3. Admissibility of expert opinion and certain expressions of non-expert opinion
(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section "relevant matter" includes an issue in the proceedings in question.

31. Modern English case law is also decided against the backboard of Part 35 of the Civil Procedure Rules 1998 which restricts the admission of expert evidence to '*that which is reasonably required to resolve the proceedings*'. This restriction under Rule 35.1, no doubt, is purposeful in the Court's execution of its case management duties.

32. Mr. Justice Hildyard, sitting with Chief Master Marsh in the Chancery Division of the English High Court, stated the following in his judgment delivered in *The RBS Rights Issue Litigation [2015] EWHC 3433 (Ch)* at para 10:

"*Even where the parties are agreed, and a fortiori when they are not, it is for the Court to determine whether to give permission for particular expert evidence.*"

33. However, RSC Order 38/36(1) seemingly contemplates that parties to an action are permitted to agree to the admission of expert evidence without the interference of the Court. More so, RSC Order 38/36(1) does not expressly state a 'reasonable' test as is stated under CPR Rule 35.1.

34. Notwithstanding, this Court will have regard to the Overriding Objective and its own case management duties prescribed by RSC Order 1A in deciding whether or not to allow the admission of expert evidence. Order 1A/1 is of particular relevance:

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 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

35. So, although parties may agree to the admission of expert evidence under RSC Order 38/36(1), the Rule is subject to the Overriding Objective to enable the Court to deal with cases justly. Dealing with a case justly may sometimes entail restrictions or directions imposed by the Court on the admission of expert evidence so to give proper effect to the considerations outlined under RSC O.1A/1. These considerations pool together to form a customized 'reasonable' test in its own right which is sufficiently comparable, although not entirely, to the 'reasonably

required' test stated under CPR Rule 35.1. It is for this reason that English case law may be subject to some limitations in its general persuasive effect.

36. In Darby Properties Limited, Darby Investments Limited v Lloyds Bank Plc [2016] EWHC 2494 Warren J in British Airways Plc v Spencer [2015] EWHC 2477 (Ch) at para 68 was cited for his assessment of the 'reasonably required' test:

    (a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

    (b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it…

    (c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings. In that case, the sort of questions I have identified in paragraph 63 above will fall to be taken into account. In addition, in the present case, there is the complication that a particular piece of expert evidence may go to more than one pleaded issue, or evidence necessary for one issue may need only slight expansion to cover another issue where it would be of assistance but not necessary.

    Further, although CPR 35.1 does not refer to issues, but only to proceedings, if evidence is not reasonably required for resolving any particular issue, it is difficult to see how it could ever be reasonably required for resolving the proceedings. I therefore see a test directed at issues as a filter. That, at least, is an approach which can usefully be adopted.

37. Paragraph 63 of Warren J's judgment is restated by Master Matthews as follows:

    A judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed. In striking that balance, the court should, in my judgment, be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date.)

38. On Warren J's reckoning of the 'reasonably required' test in the *British Airways* case, the general rule is that expert opinion evidence which is needed (as opposed to just helpful) must be admitted. If the expert evidence is not necessary to resolve the issue in question then the Court must consider if it is reasonably required to resolve the proceedings overall, having regard to the type of factors listed under the Overriding Objective.

39. Ms. Zuill relied on the judgment of the UK Supreme Court in *Kennedy v Cordia (Services) LLP [2016] 1 WLR 597* where their Lordships and Her Ladyship were hearing an appeal from Scotland. The Supreme Court was unanimously agreed with King CJ's remarks reported in the Australian High Court decision in *R v Bonython (1984) 38 SASR 45* on the admissibility of expert opinion evidence. Paragraphs 46 and 47 of his statement were repeated in *Kennedy v Cordia* as follows:

   '*Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court*.'

40. In *Kennedy v Cordia* the Scottish Court of Session sitting in the first instance was concerned with the question of an employer's liability for the personal injury suffered by an employee caregiver, Ms. Tracey Kennedy, who had slipped on an icy patch on a public street pavement while on her way to visit an elderly person in the course of her employment. Ms. Kennedy's case was that her employer, Cordia (Services) LLP ("Cordia"), owed her a duty of care and failed in that duty by omitting to provide her with shoe attachments for enhanced grip on the snow and the ice.

41. Ms. Kennedy adduced contentious expert evidence before Lord Ordinary from a health and safety expert, Mr. Lenford Greasly. Mr. Greasly was a consulting engineer who had a degree in engineering and a diploma in safety and hygiene. He was also a chartered member of the Institute of Safety and Health and an associate member of the UK Slip Resistance Group. Mr. Greasly's many years of experience went beyond this summary description and included carrying out and revising slip test risk assessments.

42. Mr. Greasly was permitted to give factual and expert opinion evidence in a report on Cordia's approach to a slip and fall risk assessment. This included opinion evidence on whether Cordia should have selected and provided personal protective equipment to Ms. Kennedy as its employee. Mr. Greasly also referred to relevant legislation which included a narrative about regulation 4(1) of the Personal Protective Equipment at Work Regulations 1992.

43. On appeal, an Extra Division comprising Lady Smith, Lord Brodie and Lord Clarke, found that the expert evidence was inadmissible because the Court did not require the assistance of an expert to decide whether an employer was under a duty to take a particular caution. The appellate Court further determined that 'health and safety' was not a recognized discipline. However, their principal concern which led to allowing the appeal was that the expert opinion evidence entailed questions of law which were for the Court's determination alone.

44. Ms. Kennedy appealed to the UK Supreme Court before Baroness Hale and Lords Wilson, Reed, Toulson and Hodge, at which stage Counsel for Cordia conceded that the practice of health and safety could properly be the subject of expert evidence. In the leading judgment delivered by Lords Reed and Hodge, the Supreme Court held that the expert's factual evidence was admissible, recognizing the field of health and safety to contain a suitable body of knowledge and experience. Accordingly, they determined that Lord Ordinary would have been assisted by a reasoned view on how the expert witness would have gone about the rating of risks within the employer's risk assessment.

45. As for the opinion evidence trespassing on points of law, their Lordships and Her Ladyship found that while some of the opinions stated were capable of being interpreted as a legal opinion, an experienced judge could readily treat such opinions as those belonging to a skilled witness of health and safety and make up his or her own mind on the questions of law to be determined, as they concluded Lord Ordinary did.

46. These principles are not dissimilar from those confirmed in *Haynes and Doman [1899] 2 Ch 13* and *Bridge v Deacon [1984] 2 ALL ER 19* where an expert opinion on the reasonableness of a contract was rejected as inadmissible. In the English Chancery Court judgment of Evans-Lombe J in *Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others and Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others [2001] ALL ER (D) 110 (Feb)* it was held that otherwise admissible expert evidence could nevertheless be excluded if the issue to be decided was one of law or was otherwise one on which the Court was able to come to a fully informed decision without hearing such evidence.

47. Evans-Lombe J also referred to the judgments of Jonathan Parker J and the Court of Appeal in *Re Barings plc (No. 5)* where the expert evidence proposed was directed to the standard of competence to be shown by a director in a case dealing with applications under the Company

Directors Disqualification Act 1986. The expert in that case, Sir John Craven, was intended to give evidence establishing that the conduct of an officer of the company had not been of a kind as would justify his disqualification under section 6 of that Act. The expert evidence was ruled out as irrelevant on the basis that the standard of competence to be shown by a director was a question of law for the Court.

48. Mr. Luthi pointed to the ruling of Master Matthews sitting in the Chancery Division of the English High Court in the *Darby Properties* case over the UK Supreme Court judgment in *Kennedy v Cordia* as the more persuasive analysis on the applicable test for the admission of expert opinion evidence. This presumes an incompatibility between the principles stated in these two cases, which I do not consider to be correct.

49. Relying on Warren J's decision of concurrent jurisdiction, Master Matthews endorsed the 'reasonably required' test stated in the *British Airways* case. This test identified a starting point when expert evidence must be admitted: when the expert opinion is needed to resolve any one issue. That was not to say that expert evidence will not be admitted simply because it is not necessary to resolve any one particular issue. The Court will go further and look to the issue of costs and proportionality and other similar factors listed under the Overriding Objective in the context of the proceedings as a whole, in order to decide if the expert evidence is reasonably required to resolve the proceedings as a whole.

50. I reject Mr. Luthi's contention that *Kennedy v Cordia*'s application under English law on opinion evidence is doubtful or to be distinguished in any broad sense. The test required for the admissibility of expert factual evidence (as opposed to opinion evidence) is the subject of the distinction between Scots law and English law in Master Matthews' analysis of *Kennedy v Cordia*. Section 27L in the Evidence Act (like section 3 of the UK Civil Evidence Act 1972) is not engaged by the question of admissibility of factual evidence, even if it is given by an expert. The admissibility of factual evidence falls to be decided under the general rules of evidence applicable to any witness, whether it be an expert witness or a non-expert witness. However, the factual expert evidence is seemingly recognized as a distinct class of evidence under Scotts law. This unique feature under Scots law does not in any way undermine the principles stated by the UK Supreme Court on the admissibility of expert opinion evidence.

Decision and Reasons

51. The expert evidence in this case is about the HR Industry in the Netherlands. The Report composes of a compilation of industry facts and statements of expert opinion as to whether B&C was a competitor of the KFHG. As stated in the ALM 5 July 2018 cover letter, the Report offers an analysis comparing the businesses and their respective capabilities.

52. In the factual portions of the Report, Mr. Rodenhauser explains that the market for HR consulting services in the Netherlands is estimated at over US$206,000,000.00 with approximately 990 full time employee (FTE) equivalents comprising of local and non-local staff. It is reported that the compound annual growth rate (CAGR) between 2012 and 2017 is 2.5%. Non-contentiously, the expert opines that the Netherlands exhibits all the characteristics of a mature and stable consulting market.

53. In its definition of HR consulting, ALM includes Rewards Management, Talent & Workforce and HR Operations in its heads of service but does not include services such as executive search, coaching or employee training. So, its references to the HR market size and its growth are without regard to these broader classes of service.

54. The Report also explains the dominant presence of large global service providers and ranks KFHG amongst the top ten largest HR consulting service providers in the Netherlands. B&C does not feature on this esteemed list. In distinguishing between two major types of service providers, the Report refers to global multi-service providers which develop and deliver across all types of service categories on the one hand and specialist or niche providers on the other hand.

55. It has not been suggested that the field of HR consulting is absent of a suitable body of knowledge and experience. It is clearly an established discipline and a Bermuda Court could not be expected to possess any real knowledge of the HR Industry in the Netherlands. The obviously needed factual evidence of the HR market is not objectionable nor is it caged by the evidential restrictions applicable to opinion evidence. Thus, it requires no further judicial scrutiny beyond this point.

56. In this case, I must address my mind to the following triad of factors: (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.

57. So, the first question to consider is whether the Court needs the opinion evidence on top of the available factual evidence in order to determine whether B&C was a competitor of the KFHG businesses. Could the Court reach a sound decision on this issue without the benefit of expert opinion evidence? Arguably, it could.

58. The factual evidence describes different categories of HR consulting services and distinguishes between service providers of a multi-global size which deliver on the entire gambit of available

HR services and the smaller boutique type providers which target a particular genre of clientele.

59. Mr. Rodenhauser explains that the KFHG businesses are a public group of companies founded in 1943 with office presence in Amsterdam and Enschede. He states that the business is '*largely around executive compensation and leadership development*' and discloses that in 2016 the group generated approximately $500,000,000.00 in global consulting fees and $230,000,000.00 from its practice in (i) strategy execution & organization design; (ii) talent and workforce management; (iii) rewards and benefits; and (iv) leadership development. The Report also refers to a 10% profit increase in the December 2017 quarter for the KFHG Group's European branch of businesses.

60. By contrast, the Report describes B&C, a private company founded in 2005, to differ in scale and breadth of services. B&C is said to employ only 3 full time and 3 freelance consultants and is said to focus more on strategy than execution, unlike the KFHG businesses.

61. On my assessment of the factual evidence, a trial judge might reasonably be expected to be capable of forming a broad view as to whether B&C is a competitor of the KFHG businesses, absent expert opinion evidence. It follows that the Court could theoretically resolve the proceedings and reach a sound decision without the input of expert opinion evidence, even if the task proves to be of some difficulty. However, this does not end the matter.

62. I must go on to ask myself the second question: whether, having careful regard to the Overriding Objective in the context of the proceedings as a whole, the opinion evidence would reasonably assist the Court in resolving the action in a fair and expeditious manner. This part of the test is decidedly less stringent than the test expressly stated under the English CPR Rule 35.1: '*reasonably required to resolve the proceedings*' which is not duplicated under Bermuda law where the Court's powers to admit expert opinion evidence are wider.

63. At this stage the Court must embark on a more in-depth assessment of the case management needs of the proceedings: How would the admission or exclusion of the opinion evidence support the Court's duty to ensure that the parties are on equal footing? Would the exclusion of the opinion evidence from the factual evidence save any considerable time or expense or off-throw the proportionality in how the case is dealt? Would the admission of the expert opinion evidence assist the Court in resolving the proceedings expeditiously and fairly?

64. In my judgment, the admission of expert opinion evidence will not adversely impact on the Court's duty to manage time, expense and resources. The arguments as to if and how the Report should be redacted do not trigger any costs or time concerns of note. As it is my duty to ensure that the parties are on equal footing, I am necessarily mindful that the Plaintiff is in the seat of

David in his claim against the Defendant Company which might be described as a Goliath through his lenses, at least fiscally speaking. In all of the circumstances, fairness demands that the Plaintiff be permitted to adduce any admissible expert opinion evidence he has which may reasonably assist him in proving his case against a litigant who does not appear to be short on resources in defending the action. At this point, the evidence will be admissible if it is found that its admission will be helpful in resolving the proceedings fairly.

65. The proposed expert analysis, facts and opinions included, would be of obvious assistance to the Court. This is because the opinion evidence draws on the professional knowledge and experience acquired by Mr. Rodenhauser through his study of a pool of information which is beyond the knowledge of an ordinary person.

66. The opinion evidence does not trespass on the Court's supreme governance over questions of law. It is a factual issue upon which the expert proposes to opine. At paragraph 10 of the Defendant's 29 August 2017 written submissions on expert evidence, it was not only accepted but asserted that the issue on whether or not there has been a breach of the restrictive covenant is purely a question of fact. I see no reason grounded in legal principle as to why an expert should be excluded from opining on questions of fact that are relevant and within his expertise.

67. The Report does not opine on whether or not Bye-law 78.1 is reasonable, nor does the Report offer any position on whether or not the Ownership Board's decision was a bona fide proper exercise of discretion. Further, there is no attempt in the Report to exercise an opinion on whether or not the Plaintiff was in breach of his contractual duties. Instead, Mr. Rodenhauser offers an expert analysis on the factual evidence dealing with the question of competitiveness between the two business groups, the same factual evidence which both parties agree is needed by the Court.

68. I do not accept that expert opinion evidence is rendered inadmissible merely because the opinions stated encroach on facts for the ultimate determination of the Court. Both the criminal and civil jurisdictions of this Court have a long established history of accepting expert opinion evidence which offers a view on factual issues which fall to be determined by the tribunal of fact. For example, in a criminal matter involving charges of drug possession with intent to supply, opinion evidence is traditionally heard from a narcotics expert as to whether or not the drugs in question were intended for supply. Another illustration may be sampled from civil proceedings in personal injury claims involving an allegation of professional negligence of a health care provider. In such cases evidence is routinely heard from a medical expert as to where fault may lie.

69. This does not mean, however, that the Court is bound to accept that expert opinion evidence. The Court, as tribunal of fact in this context, is required to apply its own general knowledge

and intelligence in deciding the facts. In criminal proceedings a jury panel would be directed by the trial judge that they may pay due regard to the expert opinion evidence as being worthy of credit, but that they are not bound to accept that evidence. In civil proceedings, the judge is expected to direct him or herself in similar terms. This is particularly important where the Court receives conflicting expert opinion evidence and is required to decide which opinion finds its favour.

70. I do not consider it necessary to engage in a detailed narrative on the third factor for my consideration which goes to the competence of Mr. Rodenhauser as an expert witness in this field. His competence was not challenged by the Defendant in any serious way and I see no reason to doubt it having regard to page 13 of the Report which outlines his professional experience.

71. I have also reflected on Mr. Luthi's written argument that the proposed expert evidence is not being adduced with the requisite degree of independence required of an expert witness. This part of his objection remained mostly behind the curtains and was unsubstantiated in my judgment. The expert witness clearly and expectedly formed his opinions which were stated in the Report. Those opinions do not disavow Mr. Rodenhauser of the independence required of an expert, albeit that they are adverse to the Defendant's case.

72. A further argument, which I reject, is that Mr. Rodenhauser cannot be a witness of both fact and opinion. Where the facts are, for the most part, non-contentious, I see no reason why the opinion evidence should be excluded. In *Kennedy v Cordia*, reference was made to the factual evidence that a science or medical expert might give in identifying the existence and location of various parts of the human anatomy before going on to proffer an expert opinion on the issues in question. Likewise, I see no reason why Mr. Rodenhauser should be disregarded for the expertise of his opinions merely because he has described in general terms the layout of the HR market in the Netherlands.

73. For all of these reasons, I find that the proposed opinion evidence is admissible, save only where Mr. Rodenhauser states at the first commencing paragraph on page 8 of the Report:

   "*…The methodology and tools related to these services create very sticky relationships with organizations around the world that have been using them for decades, and some complain that they cannot break away from KFHG for this reason. There also have been complaints from clients that the methodology is overly complex and outdated in terms of what organizations need to manage their workforce in the digital age. KFHG has responded by simplifying the methodology and strengthening the value proposition of its data capabilities*."

74. I find the above statement to be irrelevant and unhelpful in the Court's potential task of assessing whether the businesses were competitors. I say 'potential' so not to prejudge the merits of the argument between the parties as to whether the determination by the Ownership Board brought an end to matters. Only at trial will this Court come to consider the Defendant's argument that the Board's determination may only be interfered with by the Court where the Court holds that the decision was not a *bona fide* proper exercise of discretion.

Conclusion

75. I have allowed the admission of the Report save for the portion at the first commencing paragraph on page 8 of the Report.

76. The Plaintiff's 18 July 2019 summons application is granted only to the extent that each party has leave to adduce a single expert report. Unless the parties agree otherwise or unless the parties wish to be further heard on the subject of oral expert evidence, I direct that each expert witness attend the trial to be cross-examined on their respective reports.

77. Unless either party, wishing to be heard on costs, files a Form 31D within 14 days of the date of this Ruling, I award costs in favour of the Plaintiff, to be taxed on a standard basis, if not agreed.

Dated this 17th day of December 2019

____

HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT