The Republic of Trinidad & Tobago

In the High Court of Justice

Claim No. CV2008-00215

BETWEEN

AMERICAN LIFE INSURANCE COMPANY

FIRST CLAIMANT

and

AMERICAN LIFE AND GENERAL INSURANCE COMPANY LIMITED

SECOND CLAIMANT

AND

RBTT MERCHANT BANK LIMITED

DEFENDANT

Before the Honourable Mr Justice James Christopher Aboud

Dated: 30 July 2012

Representation:

- Mr Martineau SC leading Mr Morgan instructed Ms N. Kangaloo of the firm of Fitzwilliam, Stone, Furness-Smith, & Morgan for the claimants
- Mr Christopher Hamel-Smith SC leading Mr Walker instructed by Ms Ramnarine of the firm of M. Hamel-Smith & Co for the defendant

JUDGMENT

1. The issue before me concerns the admissibility of certain evidence contained in witness statements that is said to be inadmissible opinion evidence. Since permission was not previously sought to adduce such evidence under part 33 CPR, I am asked to strike it out.

2. The claimants are suing the defendant for breach of contract, negligent and fraudulent misrepresentation and damages. The claim arises out of a transaction involving certain bonds issued by the Commonwealth of Dominica. In 1999, the defendant issued a

prospectus describing a type of bond investment and invited participation from various investors, among them the second claimant (an issue on the pleadings is the extent to which, if at all, the first claimant was involved in the transaction). The claimants allege that the defendant represented and promised that the bond was collateralized by, among other things, the assignment of Dominica's shareholding interest in two publicly traded companies, the assignment of the dividend stream associated with those shareholding interests and the assignment of certain associated tax payments. The claimants say they later discovered that the securities were not direct sovereign undertakings of Dominica but represented some form of secondary undertaking other than a direct sovereign undertaking. The Commonwealth of Dominica defaulted and the claimants, deprived of the security to which they allege they subscribed, claim damages from the defendant of over US $7 million.

3. Insofar as the subject matter of the dispute is technical (a topic which I discuss below) it concerns the methods by which an agent of a sovereign nation (in this case the defendant) invites external investors to participate in a bond issue. The defendant says there are two methods. Firstly, it says it may invite the investor to directly subscribe for the bond. Secondly, it may securitize the bond by itself holding the legal title to it and, depending on the sovereign government's repayment terms (or cash flow obligations) under the bond, it may sell a beneficial interest in this income stream to the investors. There are certain advantages and disadvantages to both methods. If the first method is selected the investor is said to be the bond holder. If the second method is used the agent is said to be the bond holder and the investor is issued a certificate entitling it to a share in the income streams generated or pledged by the sovereign government to the actual bond holder. The claimant's case is that it was invited to participate in the first type of investment and not the second, and that the defendant falsely represented the type of investment and/or wrongfully withheld crucial information about the nature and true characteristics of the investment, which turned out to be the second type of investment. When the Commonwealth of Dominica defaulted the claimants say they thereby suffered substantial losses. In answering the question as what security was the subject matter of the transaction the contract documents and a host of letters will need to be examined. In

addition, certain representations of the defendant as to the financial strength of the Commonwealth of Dominica will need to be evaluated. One of the real or ultimate issues in the case is the nature of the financial product that the claimants say they invested in and the nature of the product that the defendant actually delivered. This is a question to be determined by an examination of the representations flowing between the parties, as both products are not identical.

4. In accordance with the trial directions issued by the judge to whom this case was previously docketed, the parties filed and exchanged witness statements. The claimants and the defendant filed notices of evidential objections to parts of the witness statements of each other's proposed witnesses. The grounds of the objections are that the paragraphs or sentences under attack are inadmissible opinion or expert evidence because it was not adduced in accordance with CPR Part 33.

The claimants' evidential objections briefly stated

5. The claimants object to parts, and not the whole of the witness statements of the defendant's Darryl White and Lyndon Guiseppi. I note that parts of their witness statements are therefore considered as inoffensive to CPR Part 33. In a nutshell, the claimants say that the impugned paragraphs are "in the nature of expert evidence and/or based on and contain inadmissible opinion evidence". There are other objections; they are fully set out below. It is important to understand these witnesses' experience and understanding of the dispute or of its underlying subject matter.

Qualifications and experience of the defendant's Mr White

6. Mr White describes himself as an investment banker employed by the defendant as "Head-Investment Banking". He says he is responsible for the merchant banking arm of the defendant and, in particular, capital market transactions such as the issuing, arranging and securitization of bonds and the sale of those bonds or other derivative products to third party investors. He says he has access to all the records of the defendant. He has 20

years' experience as a banker and joined the defendant in 2004. In 2008, he was appointed "Head-Investment Banking". He holds a BSc degree in Industrial Management from the University of the West Indies as well as a Master's degree in Business Administration from the University of Warwick. In addition, he is a qualified member of the Chartered Institute of Financial Services, UK. He attached his *curriculum vitae* as an exhibit to his witness statement. It describes in greater detail his work experience as a banker. Among his many self-described achievements and duties, past and present, are those related to capital market transactions involving bonds, notes, syndicated loans and commercial paper, and sales of structures including asset securitizations and derivatives. He says that he has, during his career, been involved in more than 40 capital market transactions that involved, amongst others, the issuing and securitization of bonds.

Qualifications and experience of the defendant's Mr Guiseppi

7. Mr Lyndon Guiseppi is, at present, the Chief Executive Officer of a Belizean Bank. Unlike Mr White, he was employed by the defendant in an executive position at times material to the events narrated in his witness statement. He was employed by the defendant from 1998 to 2008. His tenure spanned two periods, the first being from 1998 to 2002 and the second from November 2004 to May 2008. During the first period he held the position of Senior Manager, Government and Corporate Business Development, with responsibilities that included the sale of capital market products to third party investors. During the second period he held the position of Managing Director of the defendant. He says that during the first period he was responsible for sourcing investors to provide financing to the government of the Commonwealth of Dominica that was proposing the issue of US $35 million fixed rate (9%) bonds, the bond issue that is the subject of this action. Most of his evidence narrates events in which, more or less, he was a participant. His *curriculum vitae* is annexed as an exhibit. It sets out various roles he has played both as a banker and as a member of various government committees, and his experiences in the capital markets industry. No objection is taken to this exhibit.

The defendant's evidential objections to the claimants' Mr Murray: analysis and ruling.

8. The defendant objects to only one paragraph of the witness statement of the claimants' Mr Russell Murray. Mr Murray is the first claimant's Vice-President, Finance, a position he has held since January 2004. He has overall responsibility for the accounting and investment records of the first claimant, and the records of the second claimant in the Caribbean. He is also responsible, among other things, for the financial investments of both claimants in the Caribbean. He compiles and has custody of their files. Mr Murray says that he has carried out a thorough review of the files and papers that relate to these proceedings including all the voluminous exhibits attached to the statement of case. It is better that I deal with the objections to his evidence first, as they can be dealt with more quickly.

9. The defendant has applied, by their notice of application of 20 September 2011 to strike out paragraph 15 of Mr Murray's witness statement. This is the offending paragraph:

> "15. On the basis of my experience in the financial sector, I consider that reasonable rates of interest in the case of the sums paid by the claimants to [*the defendant*] that were intended to be used for the purchase of the Tranche A and B bonds are 10 and 11 per cent *per annum* respectively, in each case capitalised half-yearly with the interest being calculated on the basis of a 30-month and a 360-day year, those being the interest terms that [*the defendant*] represented as being payable on the Dominica Bonds in the case of Tranche B and which would have resulted upon the claimants' re-investment of the interest earned in the case of Tranche A."

10. The defendant objects to this paragraph on the ground that it "amounts to opinion evidence as to what would be considered reasonable rates of interest"; that "opinion evidence is not admissible save for expert evidence admissible pursuant to CPR Part 33 "; and that the claimants "have not complied with the provisions of Part 33 in relation to the

said evidence". In response to the objection the claimants filed a one paragraph submission:

> "It is accepted that the whole of the first line of paragraph 15 of the witness statement of Mr Murray, except for the definite article "the" may be excluded on the ground of opinion. If this is done then the paragraph is purely factual and relevant".

11. With the deletion, the revised opening sentence would read as follows:

> "The rates of interest in the case of the sums paid by the claimants to (the defendant) that were intended to be used for the purchase of the Tranche A and B bonds are 10 and 11 per cent per annum respectively ... etc. etc."

12. In light of Mr Murray's current occupation and responsibilities within and on behalf of both claimants, and taking into account the various positions he has held in the financial sector, I am satisfied that the revision cures any potential defect that is said to arise out of non-compliance with CPR Part 33. The revised paragraph is rendered now as a statement of fact, made by a person who can speak to matters within or allegedly within his personal knowledge of the transaction and the sector within which such transactions occur. Its truthfulness or untruthfulness is another matter, and can be tested in cross-examination. A fuller discussion of my reasons for allowing this evidence (with the deletion proposed by the claimants) is set out later in this judgment. I therefore strike out the whole of the first line of paragraph 15 of the witness statement of the claimants' Mr Murray, save for the definite article "the". In the circumstances, the opinion evidence issue will not arise.

13. The disputed paragraphs in Mr White's and Mr Guiseppi's witness statements are more problematic.

Disputed evidence of Mr White

14. As a matter of convenience I will set out all the disputed evidence.

> 5. During my career as an investment banker I have been involved in more than 40 capital market transactions which involved amongst others the issuing and securitization of Bonds. Many of these transactions (by reason of their

size, complexity and multi-jurisdictional nature) were analysed and reviewed by legal and professional advisors for both the issuer and the arranger.

6. Generally, a Bond is a promise to repay a principal sum on or by a specified date. At the heart of the instrument is therefore a covenant by the issuer to repay. Bonds are capital market transactions meaning that funds are raised by the Issuer from external investors to fund the transaction. In some cases the Bond may be unsecured, in which case investors are asked to rely on the quality of the covenant given by the Issuer and indeed the quality of the issuer itself. In other cases security may be provided, in which case, in addition to the covenant provided by the issuer, an investor may rely on the quality and effectiveness of the security that has been provided.

7. Where a financial institution such as RBTTMB arranges a Bond issue there are 3 main options for sourcing the funds from investors, in that it may either arrange for external investors for 100% of Bond; or it may subscribe for 100% of the Bonds for itself, or it may have a blend of both of these by selling a portion of the Bond to external investors and retaining the balance for itself.

8. Where a financial institution such as RBTTMB decides to invite external investors to participate in a Bond issue (whether for 100% of the Bonds or in relation to a portion of the Bonds) it may ask the investors to subscribe for the Bonds directly. Alternatively, it may instead securitize the Bond by re-packaging the income streams which are derived under the transaction and selling an interest in these receivables to the investors. Securitization is an international practice. Local financial institutions including RBTTMB have adopted structures and models used internationally including the securitizing of bonds as was done in this case. If it takes the approach of securitizing the underlying Bonds, the financial institution (in this case RBTTMB) may continue to hold the legal title to the Bonds. However, it sells the beneficial interest in defined portions of the cash flows due to be received under the underlying Bonds, including the beneficial interest in the security provided by the issuer, to the investors. To evidence each investor's ownership of the beneficial interest in its defined portion of the payments that is due under the Bonds, as well as any security that may have been granted to back these payments, the financial institution (in this case RBTTMB) issues instruments which may be variously referred to as Certificates of Interest or Certificates of Participation to each investor. By securitizing the underlying Bonds and re-packaging the cash flows in this way, the financial institution (here RBTTMB) can offer investors a wider choice of potential investments, such as investments which have a shorter term or attract a different interest rate than that which is applicable to the underlying Bonds.

12. These revenue streams, by their very nature, produced revenue of varying amounts and at irregular intervals. In order to manage this and to provide a secure and efficient mechanism for payment, Dominica, by the terms of the Trust Deed, agreed to create the Security Accounts and directed that these revenues be paid into those accounts.

14. Unlike corporate debt, there is no register for Sovereign debt which would allow a lender to independently search and determine what debt has been incurred by a sovereign nation and the security, if any, that has been provided

for such debt. Accordingly there was no mechanism by which RBTTMB could have independently confirmed whether Dominica had any other outstanding debt and to ascertain the terms of such debt and RBTTMB would have had to rely on the representations of Dominica. By letter dated 30 June 1999 RBTTMB's Trinidad Attorney raised with RBTTMB's Dominican Attorney the potential existence of any negative pledges. This letter was forwarded to Permanent Secretary of the Ministry of Finance as evidenced by a letter to that office from RBTTMB's Dominican Attorney dated 1 July 1999. True copies of these letters are now produced and shown to me in a bundle marked "**DW14"** and are exhibited hereto. Although Dominica did not respond to this letter it made a number of representations as to its ability to enter into the Trust Deed and to provide the security that it had agreed to provide for the Bonds which were inconsistent with the existence of a negative pledge as follows:

(i) By clause 7.2.3. of the Trust Deed, Dominica represented that its entry into and performance of the Trust Deed and the transactions contemplated thereby (which included the provisions of security) did not and would not conflict with, inter alia, any agreement or documents to which Dominica or any Public Entity was a party or which is binding upon any of them or any of their respective assets, nor result in the creation or imposition of any Security Interest on any of their respective assets pursuant to the provision of any such agreement or document.

(ii) By clause 4.1.2. of the Government Undertaking, Dominica represented and warranted that the entry into and performance of that Undertaking did not and would not violate in any respect, inter alia, any agreement to which Dominica was a party.

(iii) By clause 6.1(e) of the Charge of Accounts and clause 5.1(g) of the Charge of Securities and Dividends, Dominica represented and warranted that the giving of the various charges did not conflict with or result in a breach or constitute default under any agreement instrument or obligation to which Dominica was a party or by which it was bound.

(iv) By clause 3.1.2. of the Subscription Agreement Dominica represented that the authorisation, offering and issue of the Bonds and the execution and delivery of the various security instruments did not, inter alia, constitute a default under any trust deed, agreement or other instrument or obligation to which Dominica was a party or by which it was bound.

(v) By clause 7.2.1 Dominica represented that it had the power to enter into and perform the Trust Deed and the transactions contemplated thereby (including the provision of the Dominica Security) and had taken all necessary action to authorise the entry into and performance of the Trust Deed and said transactions.

(vi) By clause 7.2.5 Dominica represented that all authorisations, approval, consents, exemptions or other matters required or advisable in connection with the entry into, performance, validity and enforceability of the trust Deed and the transactions contemplated (including the

provision of the Dominica Security) thereby had been obtained or effected and were in full force and effect.

22. A default in the Participation Certificates would only arise if Dominica defaulted in its obligations under the Bonds as in fact happened in this case. In such a case, RBTTMB would have the power to enforce the security that was granted by Dominica. This power is held on trust for the investors in the Participation Certificates upon whose instructions RBTTMB would be required to act.

25. However, as member companies of AIG, both ALICO and ALGICO would (as represented on ALGICO's website) have had access to AIG's vast worldwide resources particularly in the area of financial services and investments. As such, either or both of them would have had the opportunity to draw on these resources to assist their investment decisions.

26. Indeed, whether on their own steam or as members of AIG, both ALGICO and ALICO would have had the resources (i) to weigh the risks and merits of an investment opportunity such as an investment in the Participation Certificates (and thereby the Bonds), and (ii) to carry out their own analysis and evaluation of such an investment before deciding to purchase the Participation Certificates (and thereby an interest in the Bonds) and as such were what we in the industry commonly refer to as "sophisticated investors".

15. This is the evidence of Mr Guiseppi that the claimants want to strike out:

8. As institutional investors, and in view of the resources and experience that both ALICO and ALGICO claim to have in the financial services industry, they are both sophisticated investors, i.e. investors who have the ability to properly understand, consider and evaluate a transaction so as to weigh the risks and merits of in investment opportunity.

17. Dominica is a sovereign country and unlike normal corporate debt, there is no register for Sovereign debt which would allow a lender to independently search and determine what debt has been incurred by a sovereign nation and the security, it any, that has been provided for such debt. Indeed, it was often the case that Sovereign debt was unsecured.

21. Each of these representations was inconsistent with Dominica having previously given a negative pledge.

22. In inviting investors to participate in a Bond issue such as the Dominica Bond issue, there are two possible options that are open to RBTTMB in that it may either.

(i) (No objection taken to paragraph 22 (i))

(ii) Securitize or strip by re-packaging the income streams that are to be derived under the transaction and selling an interest in these receivables to 3rd party investors. In this scenario RBTTMB continues to hold the Bond and sells

> an interest in the bonds to the Investors. When the Bond is securitized or stripped RBTTMB issues Certificates of Interest to each certificate holder. These Certificates evidence each investor's interest in a specific portion of the payments that are due under the bonds. The investors in these securitized bonds are provided with an original Certificate of Interest which they will retain and hold as evidence of their interest. The issuing and securitization of stripping of securities is not a concept that was developed by RBTTMB. Rather securitization or stripping is an international practice used throughout the international financial world. RBTTMB, like many other local financial institutions has merely copied and adopted structures and models used in standard international financing and applied them to the local market.

16. These are the grounds of objection stated in the claimants' notice of application dated 20 September 2011:

> 1. The paragraphs are in the nature of expert evidence and/or are based on and contain inadmissible opinion evidence;
>
> 2. The Defendant did not make an application pursuant to Part 33.5 (1) of the CPR to call on either Darryl White or Lyndon Guiseppi as an expert or to adduce expert evidence;
>
> 3. The Defendant has not provided to this Honourable Court nor the Claimants the names and addresses of these witnesses as is required by Part 33.7 (3) of the CPR when a party is instructing an expert;
>
> 4. The Defendant has not provided to this Honourable Court nor the Claimants the nature of the instructions given to these witnesses as is required by Part 33.7 (3) of the CPR when a party is instructing an expert;
>
> 5. The witness statements are not in compliance with Part 33.10 of the CPR since both statements contain evidence in the nature of expert evidence and neither witness has indicated:
>
> (a) that he understands his duty to the court as set out in Part 33.1 and 33.2 of the CPR;
> (b) that he has complied with that duty;
> (c) that his report includes all matters within his knowledge and area of expertise relevant to the issue on which his expert evidence is given; and
> (d) that he has given details in his report of any matters which to his knowledge might affect the validity of his report.

17. This case involves an objection to the evidence of a special type of witness. These men are involved, not in medicine or physics, but in a field of knowledge that is becoming

more widely disseminated. While it is true that individuals are not likely to be investing directly in sovereign bonds the capital markets industry (and investment advisors in almost every bank) have circulated knowledge of these transactions and even made it possible for such investments to be made by laymen without any special training.[1] The words "financial literacy" are used often as the goal of many institutional and governmental public education programmes. This is not to say that the impugned evidence is not specialised. It must still conform to the law in order to be admissible.

Issues to be determined

18. In order to determine whether or not the grounds of the objections are sustainable the following questions must be posed:

    (1) Are these witnesses experts; if not, are they lay persons giving evidence in the nature of expert evidence?

    (2) Is their evidence in any event admissible?

19. Some background checks are needed in order to understand the law that governs these very important and practical questions. I begin at the beginning.

The Evidence Act

20. The Evidence Act, Chap. 7:02 of the Laws of Trinidad and Tobago ('the Evidence Act') was enacted in 1848. The introductory note on commencement dates advises that the Act is a consolidation of several independent enactments relating to evidence, namely those enacted in 1848, 1855, 1898 and 1905. The 1940 edition of the Laws of Trinidad and Tobago consolidated the legislation of 1855, 1898 and 1905, and the commencement dates of these ordinances are still shown on the first page of the Evidence Act. Several amendments were made to the Act since its consolidation in 1940 but none that concern the inadmissibility of opinion evidence. The Evidence Act is totally silent on opinion evidence; it is not a source of law as to its admissibility into evidence in civil or criminal proceedings. Why this important piece of legislation is so, I cannot say. It may perhaps have something to do with the uncomplicated nature of disputes and the evidence needed

[1] Internet sites like www.etrade.com have made it possible for individuals to buy and sell shares and securities, and public discussion of financial matters proliferate in all media.

to resolve them in earlier times. In the modern world, as this case demonstrates, we live in an era of specialization that has led to expertise in fields of knowledge that did not exist before, and that are still rapidly expanding.

21. Section 2 of the Act preserves the law in force in England. This is what it says (insofar as it is material):

> 2. Whenever any question arises in any action, suit, information, or other proceedings in or before any Court of Justice....touching the admissibility or the sufficiency of any evidence, or the competency or obligation of any witness to give evidence...or the admissibility or sufficiency of any document, writing, matter, or thing tendered in evidence, every such question shall be decided according to the law in force in England on 30th August 1962.

22. The Common law position in England in 1962 was not as accommodating to witnesses expressing opinions as it is today. The general rule, as stated in Halsbury's Third Edition (1956), is that the opinion of an individual is usually inadmissible in proof of relevant facts. "The ground of exclusion of such evidence is that opinions, insofar as they may be founded on no evidence, or evidence not recognised by law are worthless; and insofar as they may be founded on legal evidence, they tend to usurp the functions of the court and jury, whose province alone it is to draw conclusions of law and fact." (See *Davie v. Edinburgh Magistrates, 1953 S.C. 34, 40 per* Lord President Cooper: "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert".)

Expert opinion evidence

23. Prior to 1962[2], the opinions of experts were generally admissible whenever an issue comprised a subject of which knowledge could only be acquired by special training or experience. "Under this head are included matters of science, art and trade, the genuineness of handwriting, and foreign law. Thus, the opinions of medical men have been received on the questions whether the existence of certain facts, proved by other

[2] Most of the statements in this part of the judgment are taken from Halsbury's Third Edition

witnesses, was symptomatic of insanity, or was the cause of disease or death".[3] The authors of Halsbury's Third Edition list a number of other examples, all mostly indicative of specialized knowledge from an earlier less technological and specialized era.

24. Since the 16th century the opinions of properly qualified experts have been admissible as an exception to the general rule against opinion evidence[4]. This exception is also recognized in the section 3, Civil Evidence Act, 1972 (UK):

> "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.

25. The 1972 English statute provided for experts to adduce opinion evidence on the real or substantive issue before the court; for example in a medical negligence case, whether a case of negligence has been made out. Section 3 (3) abolished the "Ultimate Issue Rule" by providing that a 'relevant matter' includes an issue in the proceedings.[5] This subsection removed the prohibition on experts from expressing an opinion on the ultimate or real issue before the court for decision.

26. In the absence of a statutory provision as found in section 3 (3) of the Civil Evidence Act, 1972 (UK), it might be said that the Ultimate Issue Rule is still in effect in Trinidad and Tobago. The authors of *Phipson on Evidence*, Fifteenth Edition, however posit that section 3 (3) did no more than reproduce the common law, which had been developing in England with some flexibility, prior to 1972. They write[6]:

> "The weight of authority appears to support the following propositions: (a) where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case, (b) where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide. If, however, his opinion is based merely upon facts

[3] Halsbury's Third Edition para 587 p 321
[4] see: *Buckley v. Thomas (1554) Plowd 118*
[5] Section 3(3) Evidence Act, 1972 UK
[6] at paragraph 37-12, pages 924 – 925

> proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion on it; the correct course is to put such facts to him hypothetically but not *en bloc*, asking him to assume one or more of them to be true, and to state his opinion thereon...There are indeed authorities for the contrary proposition (i.e. that experts' opinions may not be directed to the ultimate issue,) but these either rest or a confusion between admissibility and weight or were concerned with a slightly different question. There is considerable difficulty in identifying what is and what is not an "ultimate issue", but in many cases an expert's opinion is valueless, even unintelligible, if he is prohibited from expressing his view merely because the trier of fact will be called upon to decide the same question."

It seems to me that the common law in Trinidad and Tobago allows an expert to express an opinion that goes to the real or ultimate issue in the case.

Non-expert opinion evidence

27. The opinion of an expert is to be contrasted with the opinion of a non-expert. As a general rule opinion evidence is inadmissible. A witness may only attest to that which is within his personal knowledge. The drawing of inferences from those facts is the function of the court, not the witness. In England, the Civil Evidence Act 1972 (UK) recognizes that a non-expert may express an opinion on matters of general knowledge:

> S. 3 (2): It is hereby declared that where a person is called as a witness in any civil proceedings, a statement or 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."

This is an exception to the general rule that is not incorporated in the Evidence Act. However, it cannot be doubted that the common law in Trinidad and Tobago provided latitude in and since 1962 for the admission of non-expert opinion evidence, at least in the civil courts.[7]

[7] The exact parameters may not be as clearly defined as they are in the 1972 English statute.

The Common Law position in Trinidad and Tobago: non-expert opinion evidence

28. Halsbury's Third Edition[8] sets out various exceptions under the rubric "opinions of ordinary witnesses": (a) Identity of persons, (b) handwriting in general, if within the knowledge of the witness, (c) handwriting in an ancient document when compared with undisputed contemporaneous documents (d) miscellaneous cases, like matters involving the age of a person, or the affection between two people, where the witness "is allowed to state his opinion where it is scarcely possible to do more than draw inferences of fact from appearances or surrounding circumstances"[9]. In ancient times, it seems, a much invoked exception was that of handwriting, and the ability of a layperson to express an opinion on the technology of its craftsmanship or execution. But the list of situations or technologies that fall into the common law exceptions to the rule must have or be expanded. An often cited example of this exception at work in modern times are cases where a driver renders an opinion on the speed of an oncoming vehicle. Must there not be cases of admissible non-expert evidence where, for example, a person says that he received an email on his computer but not on his mobile phone, or that a message was received as a text message and not as an email on his computer? Could he not also say what is the difference between a text message on his phone and an email on his computer? It would stymie the law if section 2 of the Evidence Act were to be so restrictively interpreted as to mean that questions on the admissibility of evidence in Trinidad and Tobago involving opinion evidence "shall be decided according to the law in force in England on 30th August 1962", so that only the technology of handwriting would be within the common understanding of the ordinary witness. It seems to me that the knowledge or understanding of the so-called ordinary witness or non-expert has been growing as rapidly as that of the expert, and the words "in force in England on 30th August 1962" must refer to the common law (an organic, non-static entity) and not the everyday expertise or common understanding of laypersons in 1962.

[8] page 325 ff
[9] para 596, p 327

Hearsay Generally and the Civil Proceedings Rules, 1998

29. Part 33 CPR governs the procedure by which expert evidence may be adduced. It does not provide a definition of expert evidence. Such definitions have been found in a number of authorities, among them, notably, *The Torenia [1983] 2 Lloyds Rep. 210*. In that case Hobhouse J analysed evidence generally, in language that has since been widely approved:

> "First, evidence is adduced which can be described as direct factual evidence which bears directly on the facts of the case. Second, there is opinion evidence which is given with regard to those facts as they have been proved; and thirdly, there is evidence which might be described as factual, which is used to support or contradict the opinion evidence. This is evidence which is commonly given by experts because in giving their expert evidence they rely upon their expertise and experience, and they do refer to that experience in their evidence. So an expert may say what he has observed in other cases and what they have taught him for the evaluation of the facts of a particular case. So also experts give evidence about experiments which they have carried out in the past or which they have carried out for the purposes of their evidence in the particular case in question."

30. Hobhouse J made a distinction between direct factual evidence and opinion evidence that is given with regard to those facts as they have been proved. He then included a third category, namely evidence that might be said to be factual that is used to support or contradict the second category of evidence, namely opinion evidence. The court in *The Torenia* held that this third category should also be treated as expert evidence. In this regard see the decision of Lewison J in O^2 Holdings Ltd. and Anor v Hutchison 3G (UK) Ltd EWHC 601 (Ch):

> "The two submissions which Hobhouse J had to consider were, on the one hand, that any factual evidence given by somebody who happens to be an expert is to treated as evidence of fact; and, on the other hand, that if factual evidence is relevant only to the expert opinion of the

> experts, then it must be treated as expert evidence and expert evidence alone. Hobhouse J preferred the latter of these two submissions.
>
> Hobhouse J cannot properly be said to have ruled that everything outside of the knowledge of a layperson amounts to expert evidence. Indeed, the distinction in *The Torenia* is between (a) direct factual evidence which bears on the facts of a case which does not amount to expert evidence; and (b) factual evidence which is relevant only to the expert opinion of the experts, and which must itself be treated as expert evidence.

31. I have been referred to *Top Hat Ltd v The Attorney General and Others (unreported) CV 2006-3677* as authority for the proposition that evidence outside of the knowledge of the layperson amounts to expert evidence. It is not a safe practice, in my view, to lay down any general rule as to what knowledge, special or otherwise, a layman may have, or to assume what knowledge is outside his understanding. Each case must be separately evaluated. Some of the evidence of a layman will be relevant, while, at the same time, it may be outside the knowledge of other laymen, and not be based on the opinion of any external expert but on facts actually perceived by the layman. It seems to me that in today's age of instant communication and easy access to knowledge it would be unwise to impose such a narrow test.

Experts and the admission of their evidence under the CPR

32. The English Parliament has become progressively more tolerant of expert and non-expert opinion evidence since 1972. In 1995 the rule against hearsay evidence was altogether abolished in civil trials in the UK. Every degree of hearsay evidence is now potentially admissible. The onus has shifted away from costly and time-consuming admissibility arguments before and during a trial towards issues of weight at the close of the trial. The statutory position in Trinidad and Tobago is remarkably different. The lack of a statutory underpinning (with precise guidelines) and the apparent confusion (or lack of uniformity) as to what is the common law position on admissible expert and non-expert opinion evidence in Trinidad and Tobago has led to a torrent of applications under Part 33 CPR to contest the admission of so-called expert testimony.

33. Prior to the adoption of the CPR these objections severely disrupted the time management and conduct of many civil trials. Since the CPR, with its promotion of witness statements as evidence-in-chief, pre-trial applications to strike out opinion and other hearsay evidence have been steady and abundant, and they include applications not unlike the present applications now before this court. The scope of admissible evidence was widening in England by virtue of their progressive civil evidence legislation, but the same was not happening in Trinidad and Tobago. With a statutory relaxation of the rules of admissibility in England, and a new statutory emphasis on weight as opposed to admissibility, it may be that there was a different focus in the drafting of Part 35 CPR UK, that might not have been present within the legislative and rule-making context of Trinidad and Tobago in 1998.

34. Part 33 CPR is said to adopt a position of strictness in the procedure to admit expert evidence. Whether this strictness applies evenly across all the rules of Part 33 is open to debate. The emphasis seems to me to be on certifying that the expert, in rendering his or her opinion, is completely insulated from the exigencies of litigation[10] and that the costs of litigation are kept to a minimum. The most prohibitory of the injunctions against the utilisation of expert evidence is found at Part 33.5 (1): "No party may call an expert witness or put in an expert's report without the court's permission". However, sub-rule (2) goes on to provide "The general rule is that the court's permission should be given at a case management conference" . Further, the court may give permission on or without an application (Part 33.5 (3)). A number of other prohibitory injunctions are said to exist. If a party instructs an expert he must provide details of the referral to the other parties (33.7 (3)). The expert, if he supplies a report, must include in it a statement that he understands his duty to the court as set out in Part 33.1 and 33.2 CPR, that he understands and has complied with that duty, that his report includes all matters within his knowledge and that he has given details of any matters which to his knowledge might affect the validity of his report (33.10).

[10] See: *Vanessa Garcia v North Central Regional Health Authority* (unreported) CV 2010- 00463, dated 15 July 2011 at para 13.

Conclusion and disposition

35. I have examined the impugned evidence and I have come to the conclusion that some of the evidence of both Mr White and Mr Guiseppi is expert evidence. Most of it, however, is not.

36. The defendant's attorneys have agreed voluntarily to strike out the following from paragraph 22 of Mr. White's witness statement, and I therefore have no reason to rule on it:

> 22. ~~A default in the Participation Certificates would only arise if~~ Dominica defaulted in its obligations under the Bonds ~~as in fact happened in this case~~. In such a case, RBTTMB would have the power to enforce the security that was granted by Dominica. This power is held on trust for the investors in the Participation Certificates upon whose instructions RBTTMB would be required to act.

37. I have found the following evidence in the witness statement of Mr White to be that of an expert:

(a) Paragraph 25: This paragraph is an opinion based on facts not before the court and falls into the third category of Hobhouse J. It is offered as an opinion based on what is posted on the ALGICO website and moves from there to make conclusions of fact that are really suppositions.

(b) Paragraph 26: The following 'struck-through' evidence is experts evidence:

> Indeed, whether on their own steam or as members of AIG, both ALGICO and ALICO ~~would have had the resources (i) to weigh the risks and merits of an investment opportunity such as an investment in the Participation Certificates (and thereby the Bonds), and (ii) to carry out their own analysis and evaluation of such an investment before deciding to purchase the Participation Certificates (and thereby an interest in the Bonds) and as such~~ were what we in the industry commonly refer to as "sophisticated investors".

My reason is the same as above. This evidence is not based on direct proven facts and the evidence is based on a supposition of the claimants' resources and the expression of an opinion based on those unproven resources. However, the question of whether or not the claimants are sophisticated investors is a question of fact, not opinion, based on the

witness's knowledge of the industry, and I will explain this more fully below.

38. I have found the following evidence in the witness statement of Lyndon Guiseppi to be that of an expert:

> 8. As institutional investors, ~~and in view of the resources and experience that both~~ ALICO and ALGICO ~~claim to have in the financial services industry, they~~ are both sophisticated investors, i.e. investors who have the ability to properly understand, consider and evaluate a transaction so as to weigh the risks and merits of in investment opportunity.

Again, for the reasons stated above, this witness is expressing an opinion based on unproven facts that can only be expressed in the form of an opinion.

39. Save for the above parts highlighted in the paragraphs listed above, I am of the view that all the other evidence of these two gentlemen falls into the category of non-expert direct evidence, or more specifically, evidence within the first category of Hobhouse J. Insofar as any part of their evidence goes to the ultimate issues before the court, and "tends to usurp" the function of the tribunal, I would exercise my discretion to allow those parts to be adduced. I say so on the basis that this evidence is relevant, that the court's function, in the circumstances of this case, is not being usurped, and that those parts of their evidence that go toward a definition of the financial products and the practices of the industry must still be weighed at the conclusion of the trial.

40. Further, the job experience and familiarity with the subject matter of the dispute and, in many instances, the actual details of the specific transaction lead me to the conclusion that these witnesses are conveyors of fact, not opinion. For example, the sentence opening Para 5 of Mr White's witness statement, "Generally, a Bond is a promise to repay a principal sum on or by a specified date" is either a true statement or a false statement. It cannot be an opinion when uttered by a person with Mr White's credentials or job experience. I need not add that many persons, myself included, know about bonds and their derivatives, either as investors in the financial markets or having rendered legal advice to such investors. The knowledge of the tribunal should not be underestimated. Mr White is the defendant's "Head - Investment Banking" and has considerable undisputed experience in the financial and capital markets sector. The claimants are free

to challenge the veracity or accuracy of his evidence at the trial. Much of Mr White's evidence is in the vein of direct factual evidence, falling with the first category of Hobhouse J. For example, it is either that there is no register for Sovereign debt or there is a register (Para 14). Certainly, the claimants have not suggested that there is such a register.

41. With respect to the witness statement of Mr Guiseppi the objections have even less weight. Mr Guiseppi is a former employee of the defendant and was directly involved in the transaction which is the subject matter of the dispute. He is certainly speaking to direct facts when he describes the securitisation of the Bonds, or that it is not a concept that was developed by the defendant. He is making allegations of fact based on his direct experience of the subject transaction or like transactions within his experience, and he is either telling the truth or not telling the truth when he speaks about the particular transaction or the practice of the industry.

42. It seems to me that there is, hovering beneath many applications to strike out hearsay evidence (including expert evidence), a seeming lack of confidence in judicial officers to sift through the evidence and to weigh and measure it. It is as if there is a belief that once a thing is presented in black and white in a witness statement it will be taken as the truth, the whole truth, and nothing but the truth. This is a fallacy. The trial process provides the tools to weigh all evidence, including evidence that might otherwise be described as unchallenged or even uncontradicted.

43. Most importantly, it must be noted that the critical dispute between the parties is contractual, and it involves the construction of the language used in the contract documents and in the subsequent communications passing between the parties. The difference between the character of the two types of security is not in dispute. What is in dispute is whether, on the evidence, the claimants invested in one type or the other. The answer to that question will be found in an evaluation of the correspondence and representations passing between the parties.

44. I have held that certain parts of the evidence of these two witnesses is expert in nature but I have not struck it out. It seems to me that Part 33 ought not to be regarded as a strategic forensic barrier to evidence that one party finds useful to its case or another party finds hazardous to its own. How can the overriding objective be achieved if, after the exchange of witness statements, an iron curtain is allowed to intractably descend whereby (a) certain vital evidence is excluded and (b) the opportunity to cure its defects or to adduce it in a correct form is mechanically denied? Recently, the Court of Appeal suggested that even after liability had been determined in a running down case, and while damages were being assessed, a Master, at that late stage, could have treated a witness as an expert by granting permission to adduce such evidence, rather than striking it out.[11]

45. Part 33.5 (2) merely states the general rule, namely, that the court's permission to call an expert witness should be sought at a case management conference. This language is not restrictive of permission being granted outside of a case management conference, nor does it specify (like the Part 20 CPR amendment of the statement of case) at what case management conference the permission should be sought.

46. While this court, and many informed laymen, have a working knowledge of investment products, including bonds, it would still nonetheless be useful, and in the interests of justice, to expand or more fully explain the dynamics of the underlying transaction. I am therefore permitting the two witnesses to give the opinion evidence that is expert in nature and which I have identified above. I do so in exercise of my powers under Part 33.5 (2) and (3), and I take note that this matter is still in a process of case management. It seems to me that if any inconvenience or prejudice is caused to the claimants it can be addressed either by their application to call an expert of their own or by a joint application to appoint a truly independent, disconnected financial expert to whom certain agreed questions can be put. I prefer the latter of the two options. The Caribbean is full of financial services providers especially on those islands that offer off-shore investment services. An application to appoint a joint expert to whom agreed questions can be put may be made at the next case management conference. With a view to facilitating the

[11] *Rhonda Taylor v Andy Sookhoo and Ors Civ App 216 of 2011* (Transcript, 16 November 2011) per Kangaloo JA

inclusion of that part of their evidence that is expert in nature, I also give permission to the defendants to file supplemental witness statements that attest to the matters set out in Part 33.10.

47. Save for the voluntary concessions made by each party all the evidence is preserved. The two notices of application are accordingly dismissed. I will hear the parties attorneys on the question of costs.

James Christopher Aboud

Judge