

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2006-3677

BETWEEN

TOP HAT YACHTS LIMITED

CLAIMANT

AND

EVELYN PETERSEN

(sued in her capacity as MARSHALL OF TRINIDAD AND TOBAGO)

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

AND

PROPERTY PROTECTORS LIMITED

AND

CINDY JAGROOP

DEFENDANTS

Before the Honourable Madame Justice C. Pemberton

Appearances:

For the Claimant: Mr. M. Morgan instructed by Ms. D Charles

**For the First and Second Defendants: Mr. Hosein, S.C. leading Ms N D Alfonzo
instructed by Mr Sean Julien**

**For the Third and Fourth Defendants: Mr K Garcia instructed by Ms P
Chankardyal**

DECISION

[1] On the second day of trial, February 1, 2011, Top Hat's second witness, Mr. Anthony McVeigh, was present to give his testimony. Prior to that, Attorney-at-law for the Third and Fourth Defendants, Mr. Garcia, made an application to the Court to have certain paragraphs of his witness statement struck out. Mr. Garcia's objection to paragraphs 15 and 16 on was that there was no pleading to support the evidence contained in those paragraphs. Additionally, Mr. Garcia's objection to paragraphs to 9, 10, 11, 12, 14, 20, 21, 22 and 23 was that those paragraphs contained expert evidence. Mr. Hosein, Attorney-at-Law for the First and Second Defendants joined Mr. Garcia in this application. Attorney-at-law for Top Hat, Mr. Morgan, opposed these applications. I listened to the merits of the arguments from all parties and reasoned as follows.

[2] PLEADINGS

A party's pleadings may be regarded as "ground zero" for the examination and analysis of his evidence. The amended Statement of Claim, simply states at paragraph 11,

As a result, the said vessel sustained severe damage and/or destruction and the Plaintiff suffered loss and damage.

PARTICULARS OF DAMAGE

- (i) *Complete destruction of the entire galley and dinette area together with appliances and furnishings contained therein;*
- (ii) *Severe fire damage to the interior steering/navigation station and to its contents;*
- (iii) *Visible smoke and soot stains in the sleeping quarters and the bow area;*

(iv) Complete destruction of the entire sail and ropes.¹

This is the damage to the res.

PARTICULARS OF SPECIAL DAMAGE

(i)	Value of the said vessel	U.S. \$340,000.00
(ii)	Value of the contents of the said vessel at the date of the fire	U.S. \$ 20,000.00
(iii)	Less Salvage value	U.S. \$ 25,000.00
	TOTAL	U.S. \$335,000.00

(iv) **Marshal's Disbursement for Expenses paid by the Plaintiff on the following dates:**

<u>Dates:</u>	<u>Amount in TT\$</u>
14 th October, 1996	\$ 5,000.00
16 th April, 1997	\$ 20,000.00
27 th June, 1997	\$ 43,759.80
22 nd September, 1997	\$ 8,983.80
21 st January, 1998	\$ 26,371.80
26 th February, 1998	\$ 51,760.54
12 th May, 1998	\$ 8,983.80
18 th September, 1998	\$ 69,808.69
TOTAL	\$234,668.43²

The pleaded particulars of special damages speak to the value of the vessel being \$340,000.00, while the value of the contents on board the said vessel at the date of the fire was \$20,000.00 less salvage value. It is

¹ Amended Statement of Claim. Para. 11. Filed Apr. 17, 2007.

² Id.

clear that no references were made in the pleadings as to what these items comprised.

[3] **PARAGRAPHS 15 AND 16**

Evidence of Type of Loss Not Pleaded

It has not been changed by the **CPR 1998**, but fortified, that a party must plead his case fully. This has not been achieved in this case. There is no pleading as to administrative costs regarding annual maintenance in the pleading. I cannot stretch this to include it as a part of the value of the res. This cost ought to have been specifically pleaded and the actual evidence of charges incurred and paid brought to the Court. As this has not been done, I cannot now allow evidence of such loss to be led. Therefore, paragraph 15 and the exhibit are disallowed.

- [4] Paragraph 16 speaks to a variety of expenses, which I daresay are recoverable as costs if Top Hat were to succeed in this case. These expenses include:

Numerous international telephone calls, meetings and research conducted from 2004	U.S. \$ 7,000.00
Cost to attend these hearings in respect Only of the return flight –UK/Trinidad, holstelry and maintenance	U.S. \$ 6,000.00
Total Direct Cost	U.S. \$13,000.00³

In any event, they have not been specifically pleaded and proved by way of exhibit. Therefore this paragraph is also disallowed.

[5] **PARAGRAPHS 9, 10, 11, 12, 14, 20, 21, 22 AND 23**

Mr. McVeigh's witness statement is being challenged by the Defendants on the grounds that,

³ Witness Statement of Anthony McVeigh. Para. 16. Filed on Jan. 25, 2011.

1. the witness statement is disguised as expert evidence which did not adhere to the rules laid down by the **CIVIL PROCEEDINGS RULES, 1998 (CPR 1998)**⁴, Part 33;
2. certain parts of the evidence are hearsay or violate the rules of admissibility of evidence; and

⁴ **CIVIL PROCEEDINGS RULES, 1998 PART 33** states:

Expert's overriding duty to the court

33.1(1) *It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.*

(2) *This duty overrides any obligations to the person from whom he has received instructions.*

Experts - way in which duty to court is to be carried out

33.2(1) *Expert Evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.*

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

(3) *An expert witness must state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded view.*

(4) *An expert witness must make it clear if a particular matter or issue falls outside his expertise.*

(5) *If an expert's opinion is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one.*

(6) *If the expert cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.*

(7) *If after exchange of reports an expert changes his view on a material matter such change of view must be communicated to the other party.*

Expert's right to apply to court for directions

33.3...

General duty of the court and of the parties

33.4...

Court's power to restrict expert evidence

33.5...

Court's power to appoint a single expert

33.6...

Joint instructions to experts

33.7...

Power of Court to direct party to obtain and share expert evidence

33.8...

Expert's reports to be addressed to the court

33.9...

Contents of report

33.10...

Meeting of experts

33.11...

Consequence of failure to disclose expert's report

33.12...

Appointment of assessors

33.13...

Fees for experts or assessors

33.14...

Cross-examination of court expert

33.15...

3. there is evidence of certain types of loss which have not been pleaded.

[6] **ANAYLSIS**

Nature and Character of Mr. McVeigh's Evidence

Paragraph 1 of the witness statement spoke to who Mr. Anthony McVeigh is. He is a Director of the Claimant Company. Paragraph 2 speaks to his qualifications and his academic and professional career. The offending paragraphs are paragraphs 9, 10, 11, 12, 14, 20, 21, 22, and 23, and these are objected to on the ground that they contain expert evidence. Counsel for Top Hat and the Defendants provided me with several authorities on the issues.

THE HARMONIDES⁵, THE PERENE⁶ and THE SAN ONOFRE⁷ provided that in assessing damages for loss or damage in the absence of evidence of the market value of the res, the best evidence available of its value would be that of a competent person who was best acquainted with it and this is usually the owner. This is a subjective test and may be expressed as “the Best Evidence Rule”.

R V. GRAAT⁸ which followed the reasoning of “the Best Evidence Rule”, states that a layman or non-expert could testify as to his opinion on the value any res. It dispels the idea that a non-expert's perception is inconsequential.

GRAHAM V. BIGELOW⁹ discussed the determination of what the market value is by using the nearest available market to get a value for the res.

⁵ **THE HARMONIDES [1902] PROB. DIV.**

⁶ **THE PERENE [1924] EX. C.R. 229.**

⁷ **THE SAN ONOFRE [1916] A. 472.**

⁸ **R. V. GRAAT (1982) CARSWELL ONT. 101.**

⁹ **GRAHAM V. BIGELOW 1911 CARSWELLNS 15.**

HARRISON V. MANITOBA¹⁰ demonstrated that the market value of similar commodities, and current purchase price could be used to approximate the value of the commodity.

R V. GILES¹¹ identified when expert evidence may be necessary in a trial and spoke to the fact that information outside the experience or knowledge of the trier of fact qualifies as expert evidence.

QUEEN V. PAULMAN¹² supported **R V. GILES** in stating that for testimony to be classified as expert evidence it must survive the “*test of admissibility*” which is that any testimony which is beyond the ordinary knowledge of the trier of fact is considered expert evidence.

O2 HOLDINGS LIMITED V. HUTCHISON 3G LIMITED (NO. 2)¹³ discussed the difference between “direct factual evidence”, “opinion evidence” and “factual or expert evidence”¹⁴. What an expert may admit in support of the evidence is also discussed.

[7] When the evidence is viewed as a whole, it seems to me to have the combined flavour of the “aggrieved owner” and the “expert”. But one has to analyze the statement carefully because Mr. McVeigh cannot wear the two hats. Paragraph 2 sets up a professional who is going to speak to the evidence. Paragraph 9 speaks to how this evidence is going to be called, the methodology for determining the value of the res. That with respect is not the approach taken by a layman. Mr. Morgan made the submission

¹⁰ **HARRISON V. MANITOBA 2000 CARSWELLMAN 791.**

¹¹ **R. V. GILES 2008 CARSWELLBC 3223.**

¹² **R. V. PAULMAN 1994 CARSWELLONT 873.**

¹³ **O2 HOLDINGS LIMITED V. HUTCHISON 3G LIMITED (NO. 2) AT 766.**

¹⁴ **O2 HOLDINGS LIMITED** referred to **HOBHOUSE J.** in **THE TORENIA [1983] 2 LLOYDS REP. 210, 233.**

This states:

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 proven; and then thirdly, there is evidence which is commonly given by experts because in giving their expert evidence, they rely upon their expertise and their experience, and they do refer to that experience in their evidence.

based on **R v. GRAAT**¹⁵ that non experts are allowed to give views on value. The Court in **GRAAT** opined, “*I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.*”¹⁶ This is based on the perception of facts and the rationale and that cannot be applied to this case.

- [8] In addition, when one reads paragraphs 9 and 11, in the context of paragraph 2, it would seem to me that Mr. McVeigh is providing the evidence as an expert. Even though Mr. McVeigh states that he is unaware of any assistance for valuation professionals which can be used to bring to bear an objective open market valuation over time, Mr. McVeigh seeks to do just that. I am not of the view that this exercise can be executed by a layman. Here I would refer to Hobhouse J. in **THE TORENIA**¹⁷ in which he opined,

*[T]here 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 their experience, and they do refer to that experience in their evidence.*¹⁸

- [9] Using this reasoning, I find that the evidence contained in paragraphs 21, 22 and 23 is that of an expert. I am fortified by the decision in **R v. GILES**¹⁹ which referred to **R V. MOHAN** when the Court expressed these

¹⁵ **GRAAT AT 101.**

¹⁶ Id. at para 51.

¹⁷ **THE TORENIA** This matter was referred to in the decision by Lewison J. in **O2 HOLDINGS LIMITED V. HUTCHISON 3G LIMITED (NO. 2) AT 768.**

¹⁸ **O2 HOLDINGS LIMITED AT 768.**

¹⁹ **R. V. GILES 2008 CARSWELLBC 3223.**

sentiments, “[e]xpert evidence is necessary if it provides the trier of fact with information that is likely outside its experience or knowledge.”²⁰

[10] Having found that the evidence is expert evidence, it is obvious that Part 33 of the **CPR 1998** has not been complied with. The paragraphs do not take into account the expert’s overriding duty to the Courts and the presentation of the evidence does not take cognisance of the requirement of Part 33.2.

[11] Part 33.5²¹ of the **CPR 1998** outlines the procedure for calling an expert witness before the Court and gives the Court a discretion as to whether to give permission to the evidence being called or not. No permission was sought by Top Hat in the event that I ruled that Mr. McVeigh’s evidence was indeed expert evidence. It is now too late in the day to make such an application.

[12] I am of the view that to allow these paragraphs to stand would prejudice the Defendants and would put this Court at a severe disadvantage in assessing the evidence. It is true, as Mr. Morgan pointed out on the first day of trial, that the Court can seek expert guidance at any juncture during a trial. But to seek to do this at this stage would be prejudicial to the

²⁰ **R. V. MOHAN [1994] 2 S.C.R. 9, 23.**

²¹ **CPR 1998, Part 33.5** states,

Court's power to restrict expert evidence

33.5(1) *No party may call an expert witness or put in an expert's report without the court's permission.*

(2) *The general rule is that the court's permission should be given at a case management conference.*

(3) *The court may give permission on or without an application.*

(4) *No oral or written expert's evidence may be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert intends to give.*

(5) *The court must direct by what date such report must be served.*

(6) *The court may direct that that evidence be given by one or more experts -*

(a) *chosen by agreement between the parties; or*

(b) *appointed by the court; or*

(c) *appointed in such way as the court may direct.*

(7) *The court may direct that part only of an expert's report be disclosed.*

Defendants and would not further the overriding objective, which is to deal with this case justly.

[13] **CONCLUSION**

Having found that the testimony is that of an expert since the procedure contained at **CPR 1998** Part 33 was not followed, the offending paragraphs cannot stand. Additionally, the paragraphs which attempt to lead evidence in the absence of any factual basis in the statement of case are disallowed, and these offend Part 8.6²² of the **CPR 1998**.

[14] Top Hat has therefore failed to convince me that any of the testimony contained in the witness statement of Mr. Anthony McVeigh and objected to by the Defendants should stand.

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Defendants' Application to strike out paragraphs 15 and 16 on the ground that the evidence being led was not pleaded in Mr. Anthony McVeigh's witness statement is hereby granted.
2. The Defendants' Application to strike out paragraphs 9, 10, 11, 12, 14, 20, 21, 22 and 23 on the ground that the contents of those paragraphs amount to expert evidence is hereby granted.
3. Paragraphs 9, 10, 11, 12, 14, 15, 16, 20, 21, 22 and 23 of the witness statement of Mr. Anthony McVeigh are hereby struck out.

Dated this 1st day of February, 2011.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE

²² Part 8.6 of the CPR 1998 states,
Claimant's duty to set out his case

8.6(1) *The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.*

(2) *The claim form or the statement of case must identify or annex a copy of any document which the claimant considers is necessary to his case.*