

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-02899

BETWEEN

KKRV CONSOLIDATED MARINE
SERVICES LIMITED

CLAIMANT

AND

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

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

For the Defendant: Mr. R. Martineau, S.C., instructed by Mr. G. Ramdeen
and Ms. S. Sharma

Date of Delivery: 4th October, 2012

DECISION

BACKGROUND

[1] Before me are two Applications for decision. The first is a Hearsay Notice by the Claimant; the second by the Defendants seeking to have the Claimant's Hearsay Notice and certain paragraphs of the Witness Statement of James Fifi struck out.

- CLAIMANT'S APPLICATION

[2] The Claimant filed a Hearsay Notice on the 1st February, 2010 to give evidence relating to the following documents:

- i. A letter, dated the 27th February, 2009, from General Finance Corporation Limited to Fitzwilliam, Stone, Furness-Smith & Morgan. This letter, signed by the Chief Executive Officer of General Finance Corporation Limited, advises of the sum loaned to the Claimant during the period June, 2001 - July, 2002 and the rate of interest thereon;
- ii. The interim Report of Michael Reece, Lloyd's Surveyor dated the 9th March, 2005. This Report details the results of investigations by Michael Reece into the works on TTS Cascadura and the delays relating thereto which was commenced by the Ministry of National Security;
- iii. The final report of Michael Reece, Lloyd's Surveyor dated the 6th May, 2005; and,
- iv. The statement made by Alan Otway to James Fifi that the Coast Guard sentry at the gate of the Premises on the 19th January, 2005

refused to allow him and the crane truck driver, from Wahid Ali Transport, to enter the Premises or to deliver the cradles to him. This statement was made by Alan Otway to James Fifi on the 19th January, 2005 during a telephone conversation.

- DEFENDANT'S APPLICATION

[3] The Defendant filed its Amended Notice of Application on the 16th February, 2011 seeking the following orders:

- i. The Claimant's Hearsay Notice of 1st February, 2010 be struck out for failure to comply with **PART 30** of the **CIVIL PROCEEDINGS RULES 1998** ("CPR");
- ii. Paragraphs 5, 6, 7, 8, 9, 12, 13, 15, 16, 17, 18, 20, 21, 25, 27, 28, 31, 32, 37, 39, 40, 44, 48, 49 and 50 of the Witness Statement of James Fifi be struck out; and/or
- iii. The Claimant to produce the following persons as witnesses in the trial of this matter, pursuant to **PART 30.7(1)** of the **CPR**:
 - a. Vishnu Tewari;
 - b. Michael Reece; and
 - c. Alan Otway.

[4] The grounds of the Application to have the Hearsay Notice struck are as follows:

- i. These items of hearsay evidence are only admissible under the provisions of **SECTION 37** of the **EVIDENCE ACT, CHAP. 7:02**;

- ii. The procedure set out in **PART 30** of the **CPR** was not complied with by the Claimant; and,
- iii. A hearsay notice must be served no later than the time by which witness statements are to be served unless the Court gives permission in accordance with **PART 30.2(2)** of the **CPR**;

Accordingly, the Defendant is asking the Court to deem the Claimant's Hearsay Notice struck out as invalid.

[5] In relation to the Witness Statement of James Fifi, the Defendant made the following objections:

- i. Paragraph 5, 5th – 13th line. No foundation was laid by the witness to give this evidence. The evidence of the occupation of the premises with the consent of the CDA is an inadmissible conclusion. No hearsay notice was issued to admit this document;
- ii. Paragraph 6, 3rd – 5th line. Witness cannot give evidence as to coloured area on map as he is not the maker of the document and the map is not admissible through this witness. No hearsay notice was filed in respect of this document;
- iii. Paragraph 7 is admissible for the same reasons as Paragraph 6 above;
- iv. Paragraph 8, the words "which were capable of outhauling vessels of up to 300 tonnes". Witness has no foundation for giving this evidence;

- v. Paragraph 9, the witness is not an expert qualified to give this evidence;
- vi. Paragraph 12, from "I spoke" in the second sentence to "CG6" at the end of the third sentence on the ground that it was not pleaded;
- vii. Paragraph 15, the words "which I consider to be a reasonable rate" is expert opinion evidence which the witness is not qualified to give;
- viii. Paragraphs 16 and 17, evidence was not pleaded
- ix. Paragraph 18, the entire paragraph except the last sentence. The evidence is inadmissible hearsay and was not pleaded. The witness has gave no evidence as to the length of the respective vessels in order to arrive at the conclusions given;
- x. Paragraph 20, lines 1-8 and 11-23. No foundation laid to give this evidence. No hearsay notice was filed in respect of this document;
- xi. Paragraph 21, lines 3-7. This evidence is hearsay and self serving;
- xii. Paragraph 25, the words "It was however considerably less than the rate that I knew Caridoc charged with respect to the Floating Dock" amount to hearsay;
- xiii. Paragraph 27, the words "The delay in providing funding for the repairs of CG6 meant that in 2000 the tender process had to be repeated" amounts to speculation/hearsay;
- xiv. Paragraph 28, the first sentence was not pleaded by the Claimant;
- xv. Paragraph 31, lines 6-11, was not pleaded by the Claimant;
- xvi. Paragraph 32, the entire paragraph except the words "The Coast Guard remained in occupation of the annex from the time that

- they entered it up until October 7, 2002” was not pleaded and no foundation was given by the witness to give this evidence;
- xvii. Paragraph 37, lines 2-18, on the grounds that the evidence was not pleaded and that it is hearsay;
 - xviii. Paragraph 40, the words “thereby depriving La Soufriere of access to the same”. This evidence is not admissible through this witness and it is a conclusion without any primary facts;
 - xix. Paragraph 48, the words “On January 19, 2005 Alan Otway telephoned me”, is hearsay;
 - xx. Paragraph 49, lines 3-12. This evidence was not pleaded and is speculation on the part of the witness; and,
 - xxi. Paragraph 50 is speculation and the hearsay notice filed by the Claimant does not comply with the **EVIDENCE ACT** or **PART 30** of the **CPR**.

ANALYSIS

I. HEARSAY APPLICATION

[6] I will firstly deal with the issues regarding the Claimant’s Hearsay Notice. The admissibility of hearsay evidence is governed by **PART 30** of the **CPR**. The following provisions are relevant to the instant application:

“30.2 (2) *A hearsay notice must be served no later than the time by which witness statements are to be served or, if there are no such statements, not less than 42 days before the hearing at*

which the party which such evidence to be given unless the court gives permission...

30.3

(1) This rule applies where the statement is admissible under s. 37 of the [Evidence] Act (admissibility of out of court statements).

(2) Where the statement was not made in a document, the notice must contain particulars of –

(a) the time, place and circumstances at or in which the statement was made;

(b) the persons by whom and to whom the statement was made; and,

(c) the substance of the statement so far as practicable the words used.

(3) Where the statement was made in a document –

(a) a copy or a transcript of the document or of the relevant part of the document must annexed to the notice; and

(b) such of the particulars required under paragraph (2)(a) and (b) as are not apparent on the face of the document must be given.

(4) If the party giving the notice –

(a) does not intend to call any person of whom details are contained in the notice; and

(b) claims that any of the persons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied upon...

30.6 *The reasons referred to in rules 30.3(4)(b), 30.4(4)(b) and 30.5(4)(b) are that –*

(a) the person –

(i) is dead;

(ii) is overseas;

(iii) is unfit by reason of bodily or mental condition to attend as a witness; or

(iv) cannot be reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement; or

(b) that despite using reasonable diligence it has not been possible to –

(i) identify that person; or

(ii) find him.”

[7] The Defendant raised three objections to the inclusion of the Claimant’s Hearsay Notice, namely:

- i. Failure to comply with **PART 30.3** of the **CPR**;
- ii. The Hearsay Notice was filed out of time in breach of **PART 30.2(2)** of the **CPR**; and,
- iii. Failure to give reason(s) for the persons highlighted in the Hearsay Notice not being able to attend Court and give evidence as required by **PART 30.6** of the **CPR**.

[8] In response to the Defendant’s objections, the Claimant contended that this is a tactical move so as to deny them the opportunity to advance their case

with all the relevant evidence. This, Counsel argued, is not acceptable in furthering the overriding objective. Counsel contended that the constitutional right of access to the Court means a right to be heard on every point. Therefore, a court in exercising its discretion to preclude evidence must do so sparingly so as not to offend the interest of justice.

[9] Counsel for the Claimant pointed out to the Court that the objections raised by the Defendant are overly technical and run contrary to the overriding objective. The delay in bringing this Application has caused no prejudice to the Defendant and it is in the interest of justice for the Court to have all relevant information before it so as to make a proper decision.

[10] It was further argued by Counsel that the **CPR** makes no provision for striking out a hearsay application. If a notice is not compliant with the provisions of **PART 30** of the **CPR**, the issue becomes whether the Court should exercise its discretion under **PART 30.8** of the **CPR**. Counsel also noted to the Court that the proper course to have been adopted by the Defendant was to file a Counter Notice under **PART 30.7** of the **CPR** to require that the named persons attend court instead of the instant Application to strike out.

[11] An examination of the Claimant's Hearsay Notice reveals that there is compliance with **PART 30.3** of the **CPR**. With regard to the Letter of 27th February, 2009, the interim Report of Michael Reece and the final Report of Michael Reece – statements made in documents – do state the time, place and circumstances in which the statements were made; it states the person to whom and by whom it was made and the substance of the statements.

- [12] The Letter of 27th February, 2009 (time) states that this letter was from Vishnu Tewari, Chief Executive Officer of General Finance Corporation Limited, to the law offices of Fitzwilliam, Stone, Furness-Smith and Morgan (to whom and by whom). It advised on the sum loaned to the Claimant during a person and the interest on same – which in my view amounts to the substance of the statement made.
- [13] The interim and final Reports of Michael Reece at the request of the Ministry of National Security (by whom and to whom), dated the 9th March, 2005 and the 6th May, 2005 respectively, (time); detail the investigations and results carried on into the works done on the TTS Cascadura (substance of the statement).
- [14] Finally, the statement made by Alan Otway to James Fifi (by whom and to whom) *via* telephone on the 19th January, 2005 (time and place) reporting on his failed attempts to enter and/or recover items (substance of statement) to my mind does also comply with **PART 30.3** of the **CPR**.
- [15] The transcripts of the letter and two reports are all attached to the Hearsay Notice. I do agree with the Claimant's contention that the Defendant's objections are indeed technical when it comes to compliance with **PART 30.3** of the **CPR**.
- [16] I do note that the Claimant has proffered no reason(s) as to why any of these witnesses cannot attend Court to give evidence. I do not think it necessary for Vishnu Tewari to attend Court to give evidence on the letter sent to the Claimant's Attorney-at-Law. However, I do view the evidence

of Michael Reece and Alan Otway important to the Claimant's case and think it necessary that they attend Court to give evidence.

[17] Accordingly, I grant permission for the Letter of 27th February, 2009 to be admitted. However, Michael Reece is to attend Court to give evidence on the Reports he made and Alan Otway is also to attend Court to give evidence on what transpired on the 19th January, 2005 and his subsequent telephone conversation with James Fifi in accordance with **PART 34**¹ of the CPR.

I. APPLICATION TO STRIKE OUT PARAGRAPHS OF WITNESS STATEMENT

[18] I now turn to the second part of the Defendant's Application to have certain paragraphs of the Witness Statement of James Fifi struck out. I have already highlighted the paragraphs above and the reasons given by the Defendant as to why they should be struck out.

[19] On this Application, I am guided by the learning in Phipson on Evidence, where the learned authors state:

*"A limited company can only know of things through its agents or servants, and in the absence of delegation probably only the knowledge of the board of directors will be imputed to it. If, however, the duty of investigating and ascertaining facts has been delegated to a subordinate official, in civil cases the company will be bound by his knowledge."*²

¹ Court Attendance by Witnesses

² 13th Edition, para. 11-03

Further, in Phipson on Evidence, it is stated that:

*“Actual knowledge ... may also be inferred circumstantially, from the fact that a party has reasonable means of knowledge, e.g. possession of, or access to, documents containing the information especially if he has answered or otherwise acted upon ... ”*³

[20] Accordingly, I made the following conclusions on the contentious paragraphs:

- i. Paragraph 5 is allowed. The evidence in this paragraph was pleaded in Paragraph 4 of the Amended Statement of Claim and stated in Paragraph 4 of the Defence;
- ii. Paragraph 6 and 7 are allowed. The witness need not be an expert to read a plan/map or highlight portions thereof;
- iii. Paragraph 8, the words “which were capable of outhauling vessels of up to 300 tons” are excluded from the paragraph;
- iv. Paragraph 9 is admitted and the weight to be attributed to same will be decided at trial;
- v. Paragraph 12 is admitted and the weight to be attributed to same will be decided at trial. I do note however that reference is made to “Lieutenant Commander Kent Moore” in the Statement of Case⁴ but in the Witness Statement reference is made to “Commander A.S. Franklin;

³ *Op. cit.*, para. 11-02

⁴ Paras. 7-8

- vi. Paragraph 15, the words “which I considered to be a reasonable rate” and “Further in order to provide the Ministry with a comparison I sought a quotation from Crews Inn BoatYard for the storage of a 132 foot steel cutter (which was the length of CG5 and CG6) and was quote a vat exclusive monthly storage fee of US\$15,000.00. This was more than KKRv was charging for the storage;
- vii. Paragraphs 16 admitted. The evidence having being pleaded in Paragraph 8 of the Amended Statement of Claim;
- viii. Paragraph 17 is excluded as not being pleaded;
- ix. Paragraph 18 is admitted, having being pleaded in Paragraph 10 of the Statement of Claim;
- x. Paragraph 20, the words “Several months after the receipt of a vessel condition report on CG5 by Mr. Iain Maxwell of Westmoorings Marin Services/Det Norske Veritas which I had passed on to the Coast Guard” are struck out. The remainder of the Paragraph is pleaded at Paragraph 11 of the Amended Statement of Claim and supported by Invoice No. KK 70:02⁵ from the Claimant;
- xi. Paragraph 21 is admitted and the weight to be attributed to same will be decided at trial;
- xii. Paragraph 25, the words “It was however considerably less than the rate that I knew Caridoc charged with respect to the Floating Dock” are struck out as being irrelevant;
- xiii. Paragraphs 27 and 28 are admitted, having being pleaded in Paragraph 7B of the Statement of Claim;

⁵ Document 36 attached to the Witness Statement of James Fifi

- xiv. Paragraph 31 is admitted, having being pleaded in Paragraph 16 of the Statement of Claim;
- xv. Paragraph 32 is struck out as not being pleaded except for the words "The Coast Guard remained in occupation of the Annexe from the time they entered it up until October 7, 2002";
- xvi. Paragraph 37 is admitted, as being pleaded in Paragraph 24 of the Statement of Claim;
- xvii. Paragraph 40, the words "thereby depriving La Soufriere of access to the same" as hearsay;
- xviii. Paragraph 48, the words "On January 19, 2005 Alan Otway telephoned me and told me that the Coast Guard sentry at the gate had refused to allow him and the crane truck to enter the Premises or to deliver the cradles to them. When I was told this by Mr. Otway" are excluded. Alan Otway is to attend Court to give evidence on same;
- xix. Paragraph 49 is admitted, having being pleaded in Paragraph 14 of the Reply and Defence to Counterclaim; and
- xx. Paragraph 50, the words "On January 27, 2010 my Attorneys were provided with copies of Mr. Reece's interim report dated March 9, 2005 and his final report date May 6, 2005. I attach copies of these reports marked respectively "J.F.5" and "J.F.6"" are struck out. Michael Reece is to attend Court to give evidence in this regard.

CONCLUSION

[21] In the circumstances, I make the following orders:

- i. Paragraph 1 of the Hearsay Notice is granted;
- ii. The Claimant is to produce Michael Reece and Alan Otway as witnesses in the trial of this matter;
- iii. The Witness Statement of James Fifi is modified as stipulated in Paragraph 20 of this Decision; and
- iv. Each party to bear its own costs.

JOAN CHARLES

JUDGE