REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2017-03067

Between

NICKEL'S SPORTS CLUB

OTIS THOMAS

Claimants

And

NIGEL SCOTT

Defendant

Before The Honorable Justice David C. Harris

Appearances:

Ms. Alisa Khan instructs Mr. Ravi Rajcoomar **for the** Claimants

Mr. Varude Badrie-Maharaj instructed by Mr. Ronald Sammy **for the** Defendant

DECISION

1. This is an action (claim, defence and counterclaim) for: Breach of Contract/Promissory note; damages for Unlawful Imprisonment which involved the pleaded allegations of Duress.

2. This is the Court's decision on the filed evidential objections.

3. The objections largely revolve around (i) the pleadings (ii) relevance and (iii) hearsay issues.

4. In relation to hearsay issues, the objections are for the most part based on the old common law regime which is more pertinent to the criminal trial process. However, the court is cognizant of the ambit and import and the effect of the Evidence Act Chap: 7.02 (the Act) generally and more specifically sections 37(1) and 37(3), 41 and 42 as a guiding principle where applicable in civil actions. The court is also guided by Part 30.8 and Part 35 of the CPR1998. Unless the disposition below expressly indicates to the contrary, the hearsay statements are in whole or in part supported and/or allowed by the sections and rules referred to above. Testimony in chief has been permitted in accordance with the Act where direct oral evidence of the impugned statement would be admissible if given by the original speaker of the impugned words. Further, the court is of the view that where there is lack of clarity of a context within which to determine the hearsay character of the impugned statement (e.g. whether the witness was a percipient witness or, the purpose of the statement), then as a general rule, this issue is best dealt with in cross examination at trial. Where the alleged hearsay statements are based on the objection that the source of the information is not given, that information is at best, only required if the statement is a statement made by another person not testifying. Where the context does not presume that the witness is not a percipient witness, then there is no requirement to state a source. Again, in cross examination further clarity may be brought about.

5. In relation to the issues arising out of the pleadings, particularly the question as to whether the pleadings foreshadow the evidence in chief (or whether the evidence in the witness statement should have been pleaded as a fact relied upon), the court applies CPR1998 Part 8 (8.6(1)), along with the learning in Mc Philemy v Times Newspaper Ltd and others [1999] 3 ALL ER 775 and more particularly in the Judgment of Lord Wolf M.R. The gist of the learning is set out in the following excerpt:

"*The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together [at 793] with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the* ***GENERAL NATURE of the case*** *of the pleader [emphasis mine]. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction--Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.*

As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest. Although in this case it would be wrong to interfere with the decision of Eady J, the case is overburdened with particulars and simpler and shorter statements of case would have been sufficient. Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged. In this case the distinct impression was given by the parties that both sides were engaged in a battle of tactics. Each side was seeking to fight the action on, what from that party's perspective appeared to be, the most favourable ground. The dispute over

particulars was just being used as a vehicle for that purpose. If disputes of the nature which have occurred in this case are necessary, they should certainly not be dealt with in isolation. They should be dealt with at hearings where all the outstanding issues are resolved. I regret that it seems all too likely that in this case the decision on this appeal will be followed rapidly by a further bitterly fought interlocutory skirmish over the question of whether the case should be heard by a judge alone or a judge sitting with a jury. The defendants' delay in seeking leave may have contributed to the need for the additional hearing. However, proper case management by the parties required the consolidation of the three hearings. ***At a case management hearing, instead of a sterile argument as to whether a particular fact should or should not be pleaded as a particular of justification, if necessary and desirable, the issues to be decided at the trial*** *could, failing agreement, have been identified by the court and a decision taken as to what evidence would be appropriate for this purpose"*. ([emphasis provided)

6. The litmus test as it were, to start the conversation about the adequacy of the pleadings, is simply this: If the claimant were to prove the facts alleged in the statement of case, would it make out a case for a breach of contract/promissory note, executed as alleged in the pleadings? Similarly, if the defendant's pleaded facts were to be believed over that of the claimant would it displace the claim and further, make out a claim/defence on its Defence and counterclaim? The short answer to these questions is, yes. That parties must plead their case fully is not in dispute (See Top Yachts Limited v Evelyn Peterson CV2006-03677 paras 2-3; Chaitlal v Attorney General of TT HCA No. 2472 of 2003); See also paras 4-5 of the claimant's Notice of Application filed 09/07/18. However, what constitutes a fully pleaded case is guided by the learning in the ***McPhilemy case*** (and the line of authorities generated from it); all the circumstances of the case; by the CPR logic and application of the overriding objectives, such that it cannot be that the pleading is to be overloaded with an accumulation of all the evidence to be found in the witness

statements. The pre-trial process of separating out what should or should not be pleaded, can be an artificial and sterile one (and not necessarily a productive one) especially if the *litmus test* above is satisfied. There is a gray area if you will; a thin line between what is fact to be pleaded and what is evidence in support of the pleaded case. Along the continuum between fact and evidence, if this blur occurs at all, it is often only clarified after all the evidence is in. But in any event, upon the witness statements being exchanged, if such clarity is required, the parties are expected to pursue part 35 and not wait for the 11th hour to spring an ambush as it were.

7. For cogent objections based on the alleged inadequacy of the pleadings to foreshadow the evidence, if, and only if, CPR1998 part 29.10 is properly applicable, then the respective party may apply for *amplification*. The court notes further, that just as in the obvious admissibility of relevant evidence given in direct response (and an unanticipated response even) to a question in cross examination notwithstanding that it will not be contained in the pleadings (or in the witness statement), so is it with evidence in chief that is contained in the witness statement that is not a verbatim reproduction of the pleadings (or the other way around). In the context of a trial, 'unanticipated evidence' and 'ambush' although overlap, are not necessarily identical concepts.

8. Further still, the exhibits (or documents identified) to the pleadings, are part of the pleaded case for the claimant and defendant and the content of those exhibits or documents identified, foreshadow the evidence contained in the witness statements whether in support of the claim or in opposition to the claim as the case may be. It is the case that the exhibits and documents identified in the pleadings form part of the claim and placed in the context of the pleadings, also act to foreshadow the evidence. The Rules expressly require the documents to be exhibited or otherwise identified in the pleadings if the party intends to rely upon the exhibit or document there identified. That is why it is there. If the import of any exhibit were unclear to the defendant (or to the claimant) so as to prejudice the party, the respective party can deal with it in the cross examination at trial. Otherwise, it was incumbent on the claimant or defendant to earlier raise this by the

myriad means available under the CPR, not least of which may be CPR1998 Part 35 – *Requests For Information.*

9. Wheresoever this court refers to an objection going to 'weight', the veracity of the statement will be weighed in the balance in relation to the other evidence in the trial from all parties together with the usual considerations in such an exercise, including the existence of relevant and cogent documentary corroboration, inherent consistency with the narrative, demeanour of the witnesses, plausibility of the occurrence/action/intention and the like.

10. What is the case for the claimant that the defendant has to answer? Or that of the counterclaimant that the claimant has to answer? It is in the context of the elements of each cause of action that the pleadings are settled and subsequently the testimony is given.

11. If the claimant proves its civil claim as pleaded, it would have made out its case. Similarly, if the defence version of the events were to prevail then its case as pleaded, on a balance of probabilities would likewise prevail. The burden of proof rests with the claimant and counterclaimant. Each side knows what the other has to prove. The issues are joined. The witness statement will flesh out their respective cases. Cross-examination still has a great role to play in litigation under the CPR1998.

EVIDENTIAL OBJECTIONS[1]

<u>Witness Statement of Otis Thomas</u>

12. Paragraph 31 – **Objection Dismissed**. This is evidence. Evidence is not pleaded. That there were cameras, is not denied. Indeed the videos taken from the cameras are disclosed. Further, neither the Defence nor Counterclaim dispute the authenticity (as opposed to

[1] See further, the Claimant's response to the evidential objections filed Oct 12 2018.

weight of contents) of the video or the function of the camera. The Statement of Case, Defence and Counterclaim and Reply and Defence to Counterclaim are replete with reference to the related particulars that one cannot imagine what could possibly not have foreshadowed the evidence that followed. Further still, Part 35 was never invoked by the defendants.

13. Paragraph 35 – **Objection Dismissed**. This deficiency, if that is what it is, was self-evident from the beginning and ought to have been the basis for a Part 35 application. Part 35.3 specifically provides for a request to be made after the filing of the witness statements. The purpose of this is that witness statements are intended to "flesh out" the pleadings and it is at this stage, if the information is not contained therein, and in the view of counsel, relates to any matter which is in dispute in the proceeding, the application can and ought to be made. In the circumstances of this case, now is not the time.

14. Paragraph 39, 44, 45 – **Objection Dismissed**. There is nothing in the said paragraph that suggest this witness was not a percipient witness and did not hear and see the occurrences for himself. Counsel can explore this further, in cross-examination if he/she so desires at all.

15. Paragraph 49 – **Objection Sustained** (in part). Part of the last sentence is struck-out i.e. from "There was no need…since…". The last part from "…he had…" remains in evidence.

16. Paragraph 54 – **Objection Sustained:** Unlike certain circumstances subject to earlier objections, this evidence is entirely barren of detail sufficient to attribute any weight to, even if it were to be allowed into evidence pursuant to the Evidence Act or CPR.

Witness Statement of Nectu Nandlal

17. Paragraph 2, 3, 5 – **Objection Dismissed**. The evidence is just that; evidence and not facts to be pleaded. Further, the pleadings foreshadow this evidence. Para 6 of the Reply is even more detailed in relation to foreshadowing this evidence. There are no surprises in these

paragraphs. Defence counsel to deal with the material in cross-examination if he/she so desires.

18. Paragraph 6, 7 – **Objection Dismissed**. The witness is not attempting to tender computer generated documents. He is merely stating his conclusions and identification of the discrepancies. He includes in his narrative the means by which he accessed the information he used. The objection goes to weight not admissibility.

19. Further, section, 40 of the Evidence Act upon which it appears this objection is based, is directed to the admissibly of computer generated documents where their maker is not, or any relevant person along the chain of production is not giving evidence. See further the objection to witness statement of Patrick Lee.

Witness Statement of Patrick Lee

20. Paragraph 3: **Objection undetermined**. Section 35 of the Evidence Act defines document to include a recording of the type used and referred to here. Who is the maker of this document/recording? It appears to be the percipient witness, Mr. Lee. He is coming to give evidence of the fact of what was said and recorded. **This objection to be raised at trial**. Otherwise, the weight attached to this evidence will be determined at the end of the trial.

21. As in earlier objection, once this evidence came to light on the filing of the witness statement and consistent with the overriding objectives, it was incumbent on the Defendant to have sought further information (Part 35) from the Claimant, if this evidence was going to be in dispute. Failure to do so is one indication that there is no dispute and then objection is an ambush objection.

22. Further still, Section 43.3(a) of the Evidence Act and Part 30.8 of the CPR allow the court to permit hearsay evidence to be allowed into evidence, notwithstanding the failure of the Claimant to file a hearsay notice or failure to comply with any of the requirements for the tender of a hearsay statement contained in a document or otherwise. In considering this the

Court would take into consideration several factors including the prejudice(as opposed to its permissible incriminating character) in allowing the evidence in; the provision that allow for the Defendant to put in evidence that goes to the credibility of the statement and of its maker and so on. I note that the Defence never availed himself of these opportunities once he was served with the witness statement.

Witness Statement of Indarjit Seuraj

23. Para 7. **Objection Dismissed**. This evidence is part of the narrative. How else can the alleged subsequent actions of the claimant and defendant (at para 8,9,10 and beyond) make any sense if his motivation is not explained. The fact that it was said is important. The content of the second sentence is not proved by this statement.

24. For the reasons provided above **IT IS HEREBY ORDERED** that the findings noted above on each objection stand as the order of the court.

DAVID C HARRIS
HIGH COURT JUDGE
NOVEMBER 2, 2018