REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2014-02818**

BETWEEN

ISHRAK DANIEL
T/A DANIEL'S GROCERY **Claimant**

AND

ISLAND PROPERTY OWNERS' ASSOCIATION **Defendant**

Before the Honourable Madame Justice Margaret Y Mohammed

Dated this 28th September, 2018

APPEARANCES:
Mr. Colin Kangaloo instructed by Mrs. Nicole de Verteuil-Milne and Mr. Adrian Ramoutar Attorneys at law for the Claimant.
Mr. Rishi Dass instructed by Ms. Marina Narinesingh Attorneys at law for the Defendant.

RULING-EVIDENTIAL OBJECTIONS

1. The evidential objections for both parties were filed on the 30th April 2018. The Claimant objected to certain parts of the witness statements of Yohann Govia filed on behalf of the Defendant on the basis that the evidence was not part of the pleaded case, it was irrelevant, inadmissible hearsay and lacked probative value.

2. The Defendant objected to the Two Hearsay Notices filed on behalf of the Claimant on the basis that they are deficient and embarrassing since they failed to set out the specific

grounds relied upon under section 43(2) (b) of the **Evidence Act**[1]**.** The Defendant also filed evidential objections for the witness statements of the Claimant, Omar Daniel, Hasrat Ameer Daniel, Shira Daniel-Khan, Christopher Mootoo, and Junior Joseph Jattan on the basis that there was a lack of pleadings, opinion evidence, inadmissible hearsay, prejudicial and of no probative value.

Background

3. The Claimant had instituted the instant action on the 31st July 2014 seeking declarations: that he is the owner of the building known as "Daniel's Grocery" ("the building") located on the premises leased by the Defendant from the Chaguaramas Development Authority (CDA) by Deed No. 2733 of 1990 ("the premises"); that he is entitled to remain in occupation of the building; he is entitled to operate the grocery business known as "Daniel's Grocery" ("the grocery") out of the building on the premises pursuant to a licence granted by the Defendant to the Claimant's predecessor in title, and assigned to the Claimant, coupled with the Claimant's interest in the building.

4. The Claimant also sought an injunction restraining the Defendant and its servants and/or agents from demolishing, disposing of or otherwise dealing with the building and from interfering with the Claimant's operation of the grocery; from harassing and/or molesting and/or interfering with the Claimant, the Claimant's employees, agents and/or servants and/or customers of Daniel's Grocery and/or visitors to premises of the grocery. He sought damages for breach of the Concession between the Claimant and the Defendant by the Defendant refusing to allow the Claimant to repair the building's roof; interest, costs and further or other relief. On the 31st July 2014 he obtained the injunctive relief which was subsequently varied pending the trial of the substantive issues.

5. The Claimant asserts ownership of the building. His case is that his father had a licence to occupy and operate the grocery. He also claims that he had an interest in the building and that it was passed unto him. By letter dated 25th July 1994 the Defendant was informed by the Claimant's father of his assignment to the Claimant. The Claimant's father constructed

[1] Chapter 7:02

the building which houses the grocery in 1977 and it was completed in 1978 at a cost of $14,200.00. He entered into an agreement with the Defendant in 1978 ("the 1978 agreement"), the terms of which were as follows:

i) The cost of the building and facilities was agreed at $14,200.00;
ii) Rent in the sum of $142.00 per month was to be deducted from the said loan at the end of each calendar month for the sum of $14,200.00 from the 1st January, 1978 until the total amount was repaid;
iii) The grocery was required to provide certain types of items at a reasonable cost;
iv) The opening hours of the grocery should be suitable to IPOA members' requirements;
v) The Defendant was entitled to cancel the "concession" by giving six (6) calendar months' notice and paying the balance due on the said loan of $14,200.00; and
vi) The said agreement was subject to the Defendant's tenure with the CDA.

6. In 1980 with the approval of the Defendant, the Claimant's father extended the building at his own costs. A second extension was done in 1985. The Claimant's father was never repaid by the Defendant for the said extensions. By letter dated 18th June 2009 the Defendant informed the Claimant that based on the 1978 agreement, all monies expended by the Claimant's father in the construction of the building had been repaid by way of set off since April 1986. In a letter dated June 2009, the Claimant's attorney at law wrote to the Defendant disputing the said assertion.

7. The Claimant's father had on-going issues with the Defendant since 1978 such as increasing the rent for the concession of the grocery on two occasions and requesting that the Claimant close the grocery at 6pm daily instead of 8pm. However, the Claimant refused to pay the increased rent since the Defendant is a non-profit organisation and there was no basis for the increased rent.

8. The Claimant also alleges that from June 2009 to July 2014 there has been a concerted effort on the part of the Defendant to have him and the grocery removed. In particular, he referred to an incident in February 2011 when the Defendant's agent informed him that the Defendant proposed upgrading and developing the premises and that it wished for the Claimant to vacate

the building with an assurance that he would be offered new premises once the existing facilities were upgraded. In May 2012 the Defendant issued a notice addressed to its members concerning improving security on the premises. The notice also included "Compound Rules" to be adopted in July 2012 which prevented the Claimant from stocking the grocery properly. Rule 18 directly had a negative impact on the Claimant's ability to run the grocery since it set out guidelines for pedestrians entering the premises for the grocery; it restricted parking for vehicles and delivery trucks going to the grocery; and it prevented consumption of alcohol on the premises. In June 2012 the Claimant commenced repairs to the roof of the building with the approval of the Defendant. He was later stopped prematurely and in August to September 2013 the Claimant's suppliers had to park their delivery trucks 50 to 100 feet away from the grocery. The Claimant's customers were informed by the Defendant's security that they were not allowed to stay more than fifteen (15) minutes at the grocery. In July 2014 the Defendant informed the Claimant that it intended to upgrade its facilities which included demolishing the grocery.

9. The Defendant's Defence admitted that the Claimant's father constructed the building where he operated the grocery and that the Claimant presently operates the grocery. However, it stated that it did not know if the Claimant owns the building or that he is the proprietor or owner of the grocery. It admitted that it is a non-profit organization and it had a twelve (12) year lease from the CDA in 1990 with an option to renew but since 2007 it has held over the premises as a monthly tenant while it negotiates with the CDA for another long term lease. One of the CDA's prerequisites for another long term lease is a detailed proposal for redevelopment of the premises. In the draft proposal submitted by the Defendant to the CDA, the relocation of the building from which the Claimant operates the grocery, in addition to other changes, were proposed. It also admitted the terms of the 1978 agreement. In particular it stated that the concession to operate the grocery, the tenancy of the building and the tenancy of the land on which the building stands is terminable upon six (6) months' notice.

10. The Defendant also admitted that the Claimant's father constructed the building which he financed in the sum of $14,200.00 and that they agreed that the arrangement to repay the Claimant's father was to set off the costs against the agreed rent/concession fee. In 1980 the

arrangement changed whereby the Defendant agreed that the Claimant's father was the owner of the building, there would be no repayment of the building costs and that the Claimant's father would pay an increased rent/concession fee for the land on which the building stands and the concession to operate the grocery. It admitted that it knew that the Claimant's father extended the building at his own costs but that it was unaware of the actual costs and it has no record of its consent or approval. It admitted that it has increased the rent/concession fee from time to time but denied that it was arbitrary. Instead it asserted that it has increased the fees from time to time on a commercial basis to cover rental for the land on which the building stands and from which the grocery operates as well as the concession to operate the grocery. It admitted to informing the Claimant that he needed to close the grocery earlier. However, it did so due to security concerns and it does not know if the Claimant lost income. It denied that it accepted the lower rent since it called upon him in March and April 2009 to pay the arrears of rent.

11. The Defendant also denied that there was tension between it and the Claimant's father and that it prevented customers from accessing the grocery or at all. It denied that it was notified that the Claimant's father had assigned the concession and the building to the Claimant. Further, it denied that since 2009 it has made a concerted effort to have the Claimant and the grocery he operates moved. In 2001 it approached the Claimant with its development plans. It admitted it issued a notice in May 2012 but that the Compound Rules were intended to provide greater security. It stated that the purpose of the communication between June 2012 to December 2012 on the issue of the repairs to the building and a new licence to operate on its premises, was not a concerted effort to remove the Claimant but rather, since the Defendant was a tenant of the CDA, any changes to the building had to be approved by it as it impacted on the its plan for the property.

12. It denied that it had any issue with the Claimant repairing the roof but its concern was the Claimant's attempt to change significantly the elevation of the roof. This is so since the Defendant's proposed redevelopment of the premises contemplated the relocation of the Claimant to a different part of the premises, the payment of compensation for any structure that it would have to demolish and the improvement to the existing building would affect the compensation the Defendant would have to pay.

13. It also denied the Claimant's allegation that in August to September 2013, it caused the delivery trucks from the Claimant's suppliers to park 50-100 feet away from the grocery to make their deliveries. It asserted that part of its overall development plan is the construction of a perimeter wall to assist in addressing an escalating security concern. It closed the premises to drive-in access to non-members due to security concerns. It also averred that the Claimant was informed on the 6th July 2014 of the proposed construction of the perimeter wall and that it was not its intention in the said letter to convey to the Claimant that the demolition of the building housing the grocery was imminent. It acknowledged that it would first have to terminate the concession to operate the grocery and the tenancy of the land on which the building stands in accordance with its agreement and that the issue of compensation to the owner of the building would have to be considered before the issue of its demolition could arise. The Defendant acknowledged that it would also have to address the question of the grant of a new concession to operate a grocery on the premises and that while there were preliminary discussions held with the Claimant in the past relating to the proposal of a new grocery concession, those discussions were never concluded. Notably, while the Defendant acknowledged that the Claimant operated the grocery it did not concede that he was the owner of the building.

14. In any event, the Defendant's position was that the Claimant did not make out any case that the Defendant is estopped from denying that he is the owner of the building from which the grocery operates.

15. The substantive issues which arise from the pleadings are: (a) whether the Claimant is the owner of the building; (b) whether he is entitled to remain in occupation of it; (c) whether he is entitled to operate the grocery out of the building pursuant to a licence granted by the Defendant to the Claimant's predecessor in title and assigned to the Claimant along with the Claimant's interest in the building; and (d) whether the Claimant is entitled to damages for breach of concession between the Claimant and the Defendant by the Defendant's refusing to allow the Claimant to repair the roof of the building.

Law and Analysis

16. Before I set out my ruling on the evidential objections in Appendix A, I will set out the relevant law which I considered.

17. Part 29.5 CPR empowers the Court to strike out any inadmissible, scandalous, irrelevant or otherwise oppressive matter from a witness statement. In **Chaitlal v Attorney General of Trinidad and Tobago**[2] Myers J summarized that for evidence to be admissible, adequate foundation evidence must be adduced; the witness must otherwise be an appropriate person to give the evidence; it must not offend against the hearsay rule, (subject to any relevant exceptions to that rule, and perhaps any residual judicial discretion to admit otherwise legally inadmissible evidence) and, it must not constitute opinion evidence, subject to the exception to the rule.

18. Zuckerman in **Civil Procedure-Principles of Practice** discussed the relevance of proportionality under the CPR in the exercise of the Court's discretion to exclude inadmissible evidence, scandalous or irrelevant matters. He is of the view that (in reference to the UK counterpart of Rule 32.1 which is comparable to our CPR 29.1 and 29.5(2)[3]) that the Court must decide admissibility with the overriding objective in mind since in exercising its discretion to exclude inadmissible evidence, scandalous or irrelevant matters the Court is engaged in an exercise of giving effect to the overriding objective. Therefore, in dealing with a case justly, the Court must apply the principles in the overriding objective (CPR Part 1) of equality, economy and proportionality and ensure that the contribution of the proposed evidence to the issue is proportionate. Proportionality in this context means that the evidence makes a sufficient probative contribution to justify its time and expense in its presentation.

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[2] HCA No. 2472 of 2003

[3] 29.1: "The court may control the evidence by giving directions as to –

a) The issues on which it requires evidence;
b) The nature of the evidence it requires; and
c) The way in which any matter is to be proved,

by giving appropriate directions at a case management conference or by other means."

29.5: "(2) If –

a) A party has served a witness statement; and
b) He does not intend to call that witness at the trial, he must give notice to that effect to the other parties not less than 21 days before the trial."

To conduct such an approach the Court is engaged in a more thorough examination of the proposed evidence by asking the question what contribution the evidence is making to the issues that fall for determination.

19. Part 29.5(1) (f) CPR also mandates that witness statements must "(f) not include any matters of information or belief which are not admissible and, where admissible, must state the source of such information or belief of any matters of information or belief." Without stating those sources, the evidence is virtually worthless: In **Young Manufacturing Company Ltd. v J.L. Young Manufacturing Company Ltd**[4] Alverston CJ described the approach the Court should take as:

> "So called evidence on 'information and belief' ought not to be looked at all not only unless the Court can ascertain the source of information and belief but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever and as soon as affidavits are drawn so as to avoid affidavits that are not evidence, the better it will be for the administration of justice."

20. Rigby LJ in the same authority shared the following position:

> "In the present day, in utter defiance of the order (Rules of the Supreme Court, 1883, Order XXXVIII., r. 3) (1), solicitors have got into a practice of filing affidavits in which the deponent speaks not only of what he knows but also of what he believes, without giving the slightest intimation with regard to what his belief is founded on. Or he says, "I am informed," without giving the slightest intimation where he has got his information. Now, every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit. At any rate, speaking for myself, I should be ready to give such a direction in any such case. The point is a very important one indeed. I frequently find affidavits

[4] [1900] 2 Ch 753

stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general - that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief."

21. While the aforesaid learning was with respect to affidavits, in my view, it is still equally applicable to witness statements in order for them to be of assistance to the Court.

Pleadings and Evidence

22. Objections were taken by both parties on the basis that there were no pleaded facts to support the evidence of various witnesses.

23. In this jurisdiction, according to Part 8.6 CPR a party in a CPR matter is required to plead a short statement of all the facts upon which he/she relies. Part 10.5 CPR sets out the duty of the Defendant to set out his case. The Defendant must set out a short statement of all the facts on which he relies to dispute the claim. He must state which allegations in the Statement of Case which he admits, which he denies and which he neither admits nor denies because he does not know whether they are true but which he wishes the Claimant to prove. If he denies any allegation he must set out his reasons for doing so and if he intends to prove another version from the events given by the Claimant he must state his own version. If he does not admit or deny or put forward a different version and he resists any allegation he must state each reasons for resisting the allegation. The Defendant must identify or annex to the Defence documents he relies on.

24. The role of pleadings and the evidence which can be lead in support or rebuttal thereof have been a source of contention with the advent of witness statements as introduced under the CPR both in the UK and in this jurisdiction.

25. Lord Woolf in **McPhillemy v Times Newspapers Ltd**[5] stated the following on the purpose of pleadings:

> "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 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 does not mean that pleadings are not 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. This is true both under the old rules and the new rules. The Practice Direction to r.16, paragraph 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a Defendant relied to be given. No more than a concise statement of those facts is required.
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> 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 Statement, 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

[5] 3 All ER 775

dispute over particulars was just being used as a vehicle for that purpose."[6] (Emphasis mine)

26. The extent a Court can read allegations into pleadings was addressed by the Judicial Committee of the Privy Council in **Lawrence v Poorah**[7] where it held that it is not open to a Court to read allegation of undue influence or unconscionable bargain into an imprecisely drawn Statement of Case. Later in **Lombard North Central Plcv Automoble World (UK) Limited**[8] the English Court of Appeal was of the view that the onus was on a party to amend its Statement of Case if it wished to advance an un-pleaded point.

27. In this jurisdiction in **Joel Cromwell v The Attorney General of Trinidad and Tobago**[9] the Court of Appeal in dealing with an appeal where a trial judge had struck out certain paragraphs from the appellant's witness statement at the pre-trial review reinstated the paragraphs which were struck out on the basis that the evidence was necessary for the determination of an issue at the trial.

Relevance

28. In determining the admissibility of evidence it must first be relevant. Relevance is said to exist when "*any two facts are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other."*[10] Relevance depends on the circumstances of each case. Lord Hoffman in his article **Similar Facts After Boardman**[11] explained it as:

"The degree of relevance needed to qualify for admissibility is not a fixed standard, like a point on some mathematical scale of persuasiveness. It is a variable standard,

[6] pages 792 (letter j) – 793 (letter a-d)
[7] [2008] UKPC 21
[8] [2010] EWCA Civ 20
[9] Transcript Civ App 228 of 2011 dated the 14th November 2011
[10] Stephen, Digest of the Law of Evidence, 12th ed, art. 1
[11] [1975] 91 L.Q.R 193

the probative value of the evidence being balanced against the disadvantages of receiving it such as taking up a lot of time or causing confusion."

29. Therefore, whether evidence is relevant is often a question of degree and determined not by strict logic but by common sense and experience and of course, it must be of assistance to the Court in determining the issues in the matter.

Hearsay

30. Even though evidence may be relevant it may be excluded based on an exclusionary rule such as contravening the rule against opinion or hearsay evidence[12]. The objection against hearsay arises when a witness recounts a statement by another and asserts that the statement is true. Hearsay evidence is defined at Part 30.1 (2) CPR as "a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated". **Phipsons on Evidence** [13] referred to the principle on the application of the rule on hearsay evidence as set out in **Subramaniam v Public Prosecutor**[14] as:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement."

31. A witness can give direct evidence about what he saw or did. Where a statement is tendered for its evidential value as such and there is no issue as to the truth of any fact stated, the statement is admissible. What is inadmissible is the hearsay, but not the evidence (or the fact) of what one person may have said to another.

32. If a party wishes to rely upon hearsay evidence it must comply with section 37 of the **Evidence Act**[15] and Rules 29.5(1)(f)[16] and 29.5(2). CPR. While there is a discretion which

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[12] Gibson J in **Savings and Investment Bank Ltd v Gasco Investment (Netherlands)** BV (No.1) [1984] 1 WLR 27.

[13] 17th ed at paragraphs 28-30
[14] [1956] 1 WLR 965
[15] Chap 7:02
[16] 29.5(1) A witness statement must – "(f) not include any matters of information or belief which are not admissible and, where admissible, must state the source of such information or belief of any matters of information or belief;"

the Court can exercise in admitting evidence in the absence of such a hearsay notice the Court is slow to adopt such approach.

33. There were two hearsay notices filed by the Claimant on the 29th March 2018 ("collectively referred to as the Two Hearsay Notices"). One hearsay notice ("the First Hearsay Notice") is concerned with statements made in the various witness statements filed on behalf of the Claimant. The other hearsay notice ("the Second Hearsay Notice") is concerned with various documents attached to the witness statement of the Claimant.

34. The Defendant has objected to the Two Hearsay Notices on the basis that they are deficient and embarrassing since they fail to state the specific grounds relied upon under section 43(2)(b) of the Evidence Act in relation to each item of hearsay. As such, the Defendant and the Court is left to speculate as to which ground is being relied upon for each item. According to the Defendant this creates unfairness as it affects the evidence which must be led in order to substantiate a particular category and the notice does not give the substance of the statement and so far as possible the actual words used as is required.

35. Counsel for the Claimant disagreed with the position adopted by the Defendant. He argued that objections made by the Defendant with respect to the Two Hearsay Notices are overly technical and run contrary to the overriding objective of the CPR and that the CPR makes no provision for the striking out of a hearsay notice. According to Counsel for the Claimant if the Two Hearsay Notices do not comply with the requirements of Rule 30.3 of the CPR, the Court still retains a discretion on whether or not to admit the hearsay evidence and any failure by the Claimant to identify reasons for not calling persons highlighted in the Two Hearsay Notices as witnesses does not invalidate them. It was also submitted that given the importance of the statements contained in the Two Hearsay Notices, the Court should exercise its discretion to admit all of the statements contained therein. Further, the proper procedure for the Defendant to follow would have been to file and serve a counter-notice pursuant to Rule 30.7 of the CPR. However, the Defendant has failed to do so and, in any event, more than twenty one (21) days have passed since the Two Hearsay Notices were served on the Defendant. Therefore, the time for the Defendant to file a counter-notice has

long passed and the various statements made in the witness statements ought to remain since the Defendant has not applied to strike out same.

36. Section 37 (1) of the **Evidence Act** states that hearsay evidence will be admissible "subject to this section and to rules of court".

37. The relevant rules of Court in civil matters are Rules 30.2, 30.3, 30.4, 30.6 and 30.8 CPR. They provide:

"30.2 (1) Any party who wishes to give hearsay evidence which is admissible only by virtue of section 37 , 39 or 40 of the Act must serve on every other party a hearsay notice.

(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 wishes 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 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 and 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 be 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 reasons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied on.

30.4 (1) This rule applies where the statement is admissible under s.39 of the Act (admissibility of certain records).

(2) The notice must have annexed to it a copy or transcript of the statement or the relevant part of the statement.

(3) The notice must also contain—

(a) particulars of—

(i) the person by whom the record containing the statement was compiled;

(ii) the person who originally supplied the information from which the record was compiled; and

(iii) any other person through whom that information was supplied to the compiler;

(b) a description of the duty under which any person named or particularised under paragraph (a)(i) or (iii) was acting when—

(i) compiling the record; or

(ii) supplying the information from which the record was compiled;

(c) a description of the nature of the record containing the statement; and

(d) particulars of the time when, place at, and circumstances under which that record was compiled.

(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 reasons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied on.

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 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.

30.8 The court may permit a party to adduce hearsay evidence falling within sections 37, 39 and 40 of the Act even though the party seeking to adduce that evidence has-

(a) failed to serve a hearsay notice; or

(b) failed to comply with any requirement of a counter notice served under rule 30.7".

38. The English case **R v Nicholls**[17] was a criminal case involving a statute which permitted hearsay statements of persons who were across the seas or deceased. On appeal, the Court emphasized the importance of foundation evidence to substantiate any of the circumstances prior to the statement being admitted into evidence:

"In the judgment of this Court the judge did fall into the errors which Mr. Wedmore argues were present in the conduct of this trial. It is our view that the documents in

[17] (1976) 63 Cr App Rep 187

the pages of exhibit 6 were wrongly admitted in evidence at the stage they were admitted, and that there had not been created sufficient foundation for the judge to draw the reasonable inference which he is required to draw, or may draw, from the face of the documents in order to satisfy himself that those requirements of section 1 (1) (*b*) are satisfied. There was nothing to indicate in the state of the evidence whether those who might have been called as witnesses in relation to the information compiled on the document were alive or dead, whether in this country or beyond the seas, whether unfit or fit to attend as witnesses or would or would not have a reasonable expectation of being able to recollect the information which they provided and which was contained in the documents. Further, the objection having been raised by counsel for the then defendant the defendant was entitled to have the matter investigated as in a trial within a trial in order to ascertain whether or not the evidence could properly be admitted pursuant to the Act"[18] [emphasis added]

39. For the purpose of deciding whether or **not** a statement is admissible in evidence by virtue of section 37, 39 or 40 of the **Evidence Act**, the Court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document the form and contents of that document[19].

40. The Two Hearsay Notices state that time, place and circumstances in which the statements were made; the person to whom and by whom the statements were made and the substance of the statements. To this extent they are in compliance with Rule 30.3 CPR.

41. However, the Claimant has lumped all the reasons for seeking to have the hearsay statements admitted into evidence by stating the grounds as *"the makers of the statements are deceased and /or cannot be reasonably be expected to attend the trial and/or cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statements"*. By doing so the Claimant has failed to set out the specific reasons for adducing the specific evidence under the hearsay rule. However, it is ultimately

[18] R v Nicholls (1976) 63 Cr App Rep 187 at page 191
[19] Section 41(2) of the Evidence Act.

in the Court's discretion whether to permit the evidence to be admitted as hearsay based on the foundation provided by the Claimant. In the instant case, the Claimant pleaded at paragraph 14 of the Statement of Case that his father Mano Daniel died on the 6th August 2003. This was not disputed by the Defendant. Therefore, it is reasonable for the Court to infer that the statements made by Mano Daniel to various persons which the Claimant is seeking to rely on is due to Mano Daniel being deceased. For this reason, I am minded to permit those statements to be adduced pursuant to the First Hearsay Notice.

42. With respect to statements made by the other persons such as Mrs. Hargreaves, the delivery truck persons, customers and security guards of the Defendant, I have not been provided any specific reasons for the statements from those persons being adduced under the First Hearsay Notice. I have not been told if the said persons are overseas, if they cannot reasonably be expected to recall the events, if they are deceased; if they are not unfit due to bodily or a mental condition or if reasonable efforts were made to locate the person without success. In this regard, in exercising my discretion, I have no basis to permit the said statements.

43. With respect to the objections in the Second Hearsay Notice I have decided that the documents are to be admitted into evidence under the Second Hearsay Notice on the basis that the Claimant has stated that both Mano Daniel and Philip Lazarri cannot attend the trial since they are deceased. Further, the documents listed at items 1, 2, 4, 5 and 7 in the Second Hearsay Notice are also exhibited to the Defendant's witness, Yohann Govia's witness statement as "YG 9", "YG 10", "YG 11", "YG 14" and "YG 19" respectively.

44. I have noted that Counsel for the Claimant argued that the objection made by the Defendant to the Two Hearsay Notices are of an overly technical nature and not consistent with the overriding objective of the CPR. However, Counsel for the Claimant has adopted the same approach by arguing that the Defendant should not be permitted to raise the objection since it failed to file a counter notice under Rule 30.7 CPR. In my opinion, this is being overly technical since Counsel for the Defendant has raised his objection within the time he was required to in making the evidential objections. I do not consider that the Defendant's failure to file a counter notice to be fatal to it raising the objection. Further, in the Defendant's Notice

of Evidential Objection it was specifically stated that the *"specific objections below are made expressly without prejudice to this preliminary objection".* The preliminary objection referred to was on the Two Hearsay Notices. I understood this to mean that the Defendant's objections were both to that referred to in the Two Hearsay Notices and the specific objections to the respective witness statements for the Claimant and I have treated with all the objections in Appendix A.

Opinion

45. **Halsbury's Laws of England, 2015, Volume 28 paragraph 567** under the heading "Opinions of ordinary witnesses" states the following:

> "On matters with respect to which it is practically impossible for a witness to swear positively, the most that can be asked is that a witness should give his honest impression. Hence the opinions of ordinary witnesses are admissible as to a variety of matters including the identity, condition, comparison or resemblance of persons or things. A witness may state his belief that the defendant is the person he saw committing the offence, or that a photograph which is produced is a likeness of a relevant person; and a person's handwriting may be proved by, inter alia, the opinions of witnesses who are acquainted with it.
>
> Where a statement of opinion is proffered as a way of conveying relevant facts perceived by a witness, the opinion is admissible. Thus a witness may give his opinion that a person was drunk, if he gives the facts on which he bases his opinion. Observations as to the conduct of a person with whom he is well acquainted may lead the witness to a conclusion as to his sanity which summarises the results of his observations.
>
> Where the opinion of the witness or his belief is, or becomes, relevant to an issue in the case, as evidencing his state of mind or good faith, he may of course give evidence of it." (Emphasis added)

47. In **Hibbert Civil Evidence for Practitioners**[20] the learned author was of the view that the Court can admit a non-expert witness opinion on facts where:

> "Therefore, one can conclude by saying that an expression of an opinion by a witness based on facts which he or she has observed, and which have been narrated by the witness, is relevant evidence and is admissible as a means of conveying an impression of events which have been observed. The real issue here relates to the weight to be given to this particular witness' evidence, having regard to the background facts, rather than one of inadmissibility."[21]

48. In this jurisdiction the Court has adopted the approached set out aforesaid. Aboud J in **American Life Insurance Company and RBTT Merchant Bank Limited**[22] stated that:

> "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."

49. In **B (By his kin and next of friend Karen Mohammed) v The Children's Authority of Trinidad and Tobago**[23], Kokaram J stated at paragraph 14 that "the general rule is that opinion evidence is inadmissible. Halsbury's Laws of England, 2015, Volume 28 sets out the exceptions to the general rule under the heading "Opinions of ordinary witnesses."

[20] 4th ed
[21] Supra at page 327
[22] CV 2008-00215
[23] CV2016-04370

Opinion evidence will however be admissible in some instances such as evidence as to condition and observations as to the conduct of a person with whom he is well acquainted which lead the witness to a conclusion which summarizes the results of his observations.

50. The determination of the issues in this matter turn on the viva voce evidence and the contemporaneous documents.

Appendix A

Witness Statement of Ishrak Daniel

No. of Paragraph	Objection	Ruling and Reason
6	The entire paragraph	***Overruled***. Statements made by Mano Daniel to the Claimant. Admitted pursuant to the First Hearsay Notice.
7	The entire paragraph	***Overruled***. Statements made by Mano Daniel to the Claimant. Admitted pursuant to the First Hearsay Notice.
12	The first sentence. "From the very inception my father had ongoing issues with IPOA to the extent that in or around 1979, 1980 I told my father that I could not continue to work there on a daily basis as I hated the tension between IPOA and my father."	***Overruled***. Statements made by Mano Daniel to the Claimant. Admitted pursuant to the First Hearsay Notice and information told to the Claimant's father by the Claimant.
13	The words "However, in or about... which he received from IPOA"	***Overruled.*** Statements made by Mano Daniel to the Claimant. Admitted pursuant to the First Hearsay Notice.
14	The words "with the full knowledge, consent and approval of IPOA" The third sentence – the words " I know this….that was being done"	***Overruled.*** The words are admitted since the source of the information and the persons who gave approval are set out in paragraph 13 of the witness statement.

	The words "At the material time… I would talk to them about the work."	
16	The words "My mother, Sagra Muniram Daniel …. Control of same during his lifetime."	***Overruled.*** Statements made by Mano Daniel to the Claimant. Admitted pursuant to the First Hearsay Notice.
23	The words "Since then there has been …once the existing facilities were upgraded"	***Struck out.*** The words "In or about February 2011…facilities were upgraded". The failure to name the IPOA representative who made the statements is prejudicial to the Defendant.
28	The words "At the said meeting, the IPOA representative… its negotiations (at the time) for a new lease."	***Overruled.*** In paragraph 39 of the witness statement of the Defendant's witness Yohann Govia reference is made to the exchange of correspondence which concerned the changing of the roof.
29	The entire paragraph	***Struck out.*** It is inadmissible hearsay. There is no evidence before the Court that Mr. Hargreaves who purportedly made the statements to the witness is deceased or unable to recollect the information.
36	The entire paragraph	***Struck out***. It inadmissible hearsay since the persons who made the statements have not been identified and there is no evidence that they cannot attend at the trial.
40	The entire paragraph	***Struck out.*** The words "At the said meeting Mrs. Hargreaves…the status of the said grocery." It is inadmissible hearsay. There is no evidence before the Court that Mr. Hargreaves who purportedly made the statements to the witness is deceased or unable to recollect the information.
46 and 47	The entire paragraphs	***Overruled.*** The matter is not limited to the events which occurred in 2014 but also concern the relationship of the parties after the notice to quit which was issued in August 2016 and one of the relief sought by the Claimant is for a permanent injunction.

51	The entire paragraph	***Overruled.*** The facts in paragraph 51, the oral assurances by Philip Lazarri and the reason the loan was forgiven were pleaded at paragraph 6 of the Claimant's Defence to the Amended Defence and Counterclaim.

Witness Statement of Omar Daniel

No. of Paragraph	Objection	Ruling and Reason
3	The entire paragraph	***Overruled.*** Statements made by Mano Daniel to the witness. Admitted pursuant to the First Hearsay Notice.
4	Lines 1 and 2 The words "In or around the early … informed me of same."	***Overruled.*** The witness worked in the grocery with Mano Daniel and it is based on statements made by Mano Daniel to the witness. Admitted pursuant to the First Hearsay Notice.
5	The entire paragraph	***Overruled.*** Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel to the witness.
6	The entire paragraph	***Overruled.*** Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel to the witness.
7	The entire paragraph	***Overruled.*** The words "I distinctly recall a night in or about 1994… building to Ishrack." Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel to the witness. ***Struck out***. The words "all of us siblings knew about and agreed with this decision because we discussed same amongst ourselves as a family and everybody knew that Ishrack owned and operated the business". It is speculative since the witness cannot testify to the knowledge of the other siblings.

Witness Statement of Hasrat Ameer Daniel

No. of Paragraph	Objection	Ruling and Reason
3	The words "At that time IPOA also had its base of operations at Staubles Bay. In or around early 1970s Mr. de Verteuil handed over the business to our father, who took it over completely."	***Overruled.*** Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel to the witness.
4	Line 1 the words "From in or about the late 1980s…in the said grocery."	***Overruled.*** Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel and his wife to the witness.
4	The words "in 1994 my father gave the said grocery to Ishrack."	***Struck out.*** It is the witness' opinion with a conclusion without a basis to state how in 1994 he became aware of this information.
4	The words "my siblings and I were aware of this decision and were in agreement with same."	***Struck out***. It is speculative since the witness cannot testify to the knowledge of the other siblings and it is inadmissible hearsay since he has not stated how he became aware of the said decision in 1994.

Witness Statement of Shira Daniel- Khan

No. of Paragraph	Objection	Ruling and Reason
3	The words "in 1994 my father gave the said grocery to Ishrack."	***Struck out.*** It is the witness' opinion with a conclusion without a basis to state how in 1994 he became aware of this information.
3	The words "It was always my mother's…to the words "home and the said grocery".	***Overruled.*** Admitted pursuant to the First Hearsay Notice. Based on statements made by Mano Daniel and his wife to the witness.

3	The last sentence.	***Struck out***. The words "who were well aware…such arrangements." It is speculative since it speaks about the mind of other family members.

Witness Statement of Junior Joseph Jattan

No. of Paragraph	Objection	Ruling and Reason
4 and 5	The entire paragraphs	***Struck out.*** In paragraph 4 the words "I was then informed …left." Inadmissible hearsay. The First Notice does not satisfy the Court that the security guard cannot attend the trial. ***Overruled.*** The matter is not limited to the events which occurred in 2014 but also concern the relationship of the parties after the notice to quit which was issued in August 2016 and one of the relief sought by the Claimant is for a permanent injunction. The hearsay statements are admitted pursuant to the First Hearsay Notice.

Witness Statement of Christopher Mootoo

No. of Paragraph	Objection	Ruling and Reason
3	The entire paragraph	***Overruled.*** The matter is not limited to the events which occurred in 2014 but also concern the relationship of the parties after the notice to quit which was issued in August 2016 and one of the reliefs sought by the Claimant is for a permanent injunction.
4	The entire paragraph	***Struck out.*** The words "I was informed by the said security guard…at which point" and the

		words "The security guard then…and walk in". Inadmissible hearsay. The First Notice does not satisfy the Court that the security guard cannot attend the trial.
5	The entire paragraph	***Overruled.*** The matter is not limited to the events which occurred in 2014 but also concern the relationship of the parties after the notice to quit which was issued in August 2016 and one of the relief sought by the Claimant is for a permanent injunction.

Witness Statement of Yohann Govia

No. of Paragraph	Objection	Ruling and Reason
16.	The words "A draft lease has been prepared by the CDA but no formal lease has been executed to date. A true copy of the draft lease is attached hereto and marked "Y.G.4"	***Overruled***. The draft lease is admitted into evidence the fact of there being negotiations between the CDA and the Defendant. The Defendant cannot rely on the truth of the contents of the draft lease since it is not the maker of the document.
30	Lines 2-4. The words "As far as I am aware, the increase in concession fees was done on a commercial basis to cover the rental of the said Premises from the CDA and to operate the concession."	***Overruled.*** The witness is Director and Corporate Secretary of the Board of the Defendant therefore it is information within his knowledge.
32	Lines 5-6. The words, "To date, the sum of $162,650.00 in concession fees remain outstanding."	***Overruled.*** The issue of outstanding concession fees is relevant to both parties.
33	The words and the exhibit. "A true copy of the summary report of payments received from Ishrack Daniel from 2006 to 2016 for Daniel's Grocery is	***Overruled.*** The witness has stated the source of the information. It is relevant to the issue of the Claimant's payments made for the period 2006-2016. It was disclosed in the Defendant's

	attached hereto and marked "Y.G16". I obtained this summary from our accounting database on the 31st January 2017."	supplemental list of documents filed 30th April 2018.
39	The words "…9th June 2012" and the letter dated 9th June 2012 which is annexed as "Y.G. 17"	***Overruled.*** The witness is Director and Corporate Secretary of the Board of the Defendant therefore it is information within his knowledge from the records of the Defendant.
44	The entire paragraph	***Overruled.*** The witness is Director and Corporate Secretary of the Board of the Defendant therefore it is information within his knowledge from the records of the Defendant.
47	The words "As far as I am aware, the internet service at the offices of the IPOA was non-functional over the period 28th July 2014 to the 31st July 2014. As a result, the IPOA Manager Ian Cross was unable to access his email during that time."	***Overruled***. It is not opinion evidence. The witness has stated the basis for this evidence.
47	The following words and the exhibit "Y.G.28". "However he did provide a sworn affidavit in these proceedings which was sworn to and filed on the 18th August 2014. At paragraph 25 (c) of his affidavit he explains the circumstances which arose. A true copy of the affidavit of Ian Cross on the 18th August 2014 is attached hereto and marked "Y.G. 28."	***Struck out***. The words "At paragraph 25 (c) of his affidavit he explains the circumstances which arose." The words are the witness opinion of paragraph 25 (c) of the affidavit of Ian Cross. The rest of the words and the exhibit remain for the fact that such documents was filed in the proceedings and not the truth of the contents.

Margaret Y Mohammed
Judge