REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-01989

BETWEEN

ZANESHIR POLIAH
JOHN POLIAH Claimants

AND

ZIYAAD AMIN
ALSO KNOWN AS
ZAIYAD AMIN Defendant

Before The Honourable Madam Justice Margaret Y. Mohammed

Dated the 2nd July, 2018

APPEARANCES:
Mr. Stephen Boodram Attorney at law for the Claimants.
Mr. Haresh Ramnath Attorney at law for the Defendant.

RULING – EVIDENTIAL OBJECTIONS

1. On the 14th March 2018, the Claimants filed objections to certain parts of the evidence which the Defendant is seeking to adduce in support of his case The objections were in relation to the witness statements of the Defendant, Dwight Thorne, Hafiza Amin, Amin Bodoo and Andy Mohammed. The objections were on the basis of hearsay, opinion, relevance and matters which were not pleaded. I permitted the Defendant to file responses to the objections.

2. The evidential objections must be considered in light of the parties pleaded case and the issue to be determined by the Court at the trial. The issue in the instant matter is the width of a right of way or a road reserve which is situated to the north of the Claimants land and which runs along south of the Defendant's land. Both the Claimants land and the Defendant's land are situated in Cunjal Road, Barrackpore.

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

4. Rule 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**[1] 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.

5. 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)[2]) that the Court must decide admissibility with the overriding objective in mind since in

[1] HCA No. 2472 of 2003

[2] 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."

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. 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.

6. 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**[3] 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."

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

[3] [1900] 2 Ch 753

> "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 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."

8. 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.

Relevance

9. 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."[4] Relevance depends on the circumstances of each case. Lord Hoffman in his article **Similar Facts After Boardman**[5] 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, 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."

10. 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

11. 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[6]. 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** [7] referred to the principle on the application of the rule on hearsay evidence as set out in **Subramaniam v Public Prosecutor**[8] 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

[4] Stephen, Digest of the Law of Evidence, 12th ed, art. 1
[5] [1975] 91 L.Q.R 193
[6] Gibson J in **Savings and Investment Bank Ltd v Gasco Investment (Netherlands)** BV (No.1) [1984] 1 WLR 27.
[7] 17th ed at paragraphs 28-30
[8] [1956] 1 WLR 965

and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement."

12. 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.

13. If a party wishes to rely upon hearsay evidence it must comply with section 37 of the **Evidence Act**[9] and Part 29.5(1)(f)[10] and 29.5(2). CPR. While there is a discretion which the Court can exercise in admitting evidence in the absence of such a hearsay notice the Court is slow to adopt such approach. In this case neither party filed any hearsay notice.

Opinion

14. **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.

[9] Chap 7:02

[10] 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;"

> 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)

15. In **Hibbert Civil Evidence for Practitioners** [11] 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's evidence, having regard to the background facts, rather than one of inadmissibility."[12]

16. In this jurisdiction the Court has adopted the approached set out aforesaid.

17. Aboud J in **American Life Insurance Company and RBTT Merchant Bank Limited**[13] 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

[11] 4th ed
[12] Supra at page 327
[13] CV 2008-00215

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."

18. In **B (By his kin and next of friend Karen Mohammed) v The Children's Authority of Trinidad and Tobago**[14], 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." 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.

19. The determination of the issue of the width of the right of way will turn on the documentary evidence, the viva voce evidence and the evidence from the expert.

[14] CV2016-04370

APPENDIX A

Witness statement of Hafiza Amin

No. of Paragraph	Objection	Ruling and Reason
2	The entire paragraph	***Struck out.*** The words "10.6 meters", "10 meters in width" and "10.06 meters" on the basis there is no foundation for the witness' knowledge of how she arrived at the precise measurement; and it is opinion evidence.
3	The words " the person who owns the lands…to access their lands"	***Overruled.*** It is not hearsay but based on the witness' observations.
4	The words "my parents themselves…and reap cane."	***Struck out***. The words "which measured 10.06 feet" on the basis that: this is the issue to be determined by the Court; there is no foundation for the witness' knowledge of how she arrived at the precise measurement; and it is opinion evidence.
5	The entire paragraph	***Struck out.*** There is no foundation for the witness' knowledge of how she arrived at the precise measurement; and it is opinion evidence.
6	The words " I am familiar with …the Defendant's business"	***Struck out.*** The words "Because of this…occupied by the Defendant's business". The witness is giving her opinion and conclusion on the issue in dispute which is for the Court to determine.
7	The entire paragraph	***Struck out by agreement.*** The words "Everyone in the area". ***Struck out*** the words "in accordance with the width of 10.6 metres" on the basis that there is no foundation for the witness' knowledge of how she arrived at the precise measurement; and it is opinion evidence.

Witness statement of Anand Boodoo

No. of Paragraph	Objection	Ruling and Reason
2	The entire paragraph	***Struck out.*** The words "10 metres in width" on the basis there is no foundation for the witness' knowledge of how he arrived at the precise measurement; and it is opinion evidence.

Witness statement of Andy Mohammed

No. of Paragraph	Objection	Ruling and Reason
5	The entire paragraph	***Struck out.*** On the basis of opinion and speculation.

Witness statement of Dwight Thorne

No. of Paragraph	Objection	Ruling and Reason
2	The entire paragraph	***Struck out.*** The words "10 metres in width" and "10.06 metres" on the basis there is no foundation for the witness' knowledge of how he arrived at the precise measurement ; and it is opinion evidence.
3	The entire paragraph	***Overruled.*** This is the witness' observations.
4	The entire paragraph	***Struck out.*** The words "16 feet or 18 feet" and "smaller than 16 metres" are struck out since it is opinion evidence and there is there is no foundation for the witness' knowledge of how he arrived at the precise measurement.
5	The words "I say that from living…. Occupied by the Defendant's business"	***Struck out.*** The words "partially comprised of the road reserve" on the basis that the witness is giving his opinion on the issue in dispute which is for the Court to determine.

6	The entire paragraph	***Struck out by agreement*** The words "Everyone who lives in my village". ***Struck out*** the words "a width of 10.6 metres" on the basis that there is no foundation for the witness' knowledge of how she arrived at the precise measurement; and it is expert opinion evidence.

Witness statement of Ziyaad Amin

No. of Paragraph	Objection	Ruling and Reason
7	The entire paragraph	***Struck out***. On the basis that the witness is not the person who did the survey in 1980 and therefore he cannot give evidence of the precise measurement. He is not an expert and he is attempting to give such evidence.
8	The words "In each of the Deed's Schedule…reserve in issue"	***Struck out.*** The words "which is the said road reserve in issue" on the basis that it is opinion evidence and it is not within his expertise.
9	The entire paragraph	***Struck out.*** The words "never mentioned …which should be rectified." On the basis that this is the witness' opinion and conclusion.
10	The entire paragraph	***Struck out by Agreement.***
11	The words "In August 2013… when the survey was done"	***Overruled.*** This is a statement of fact within the witness's knowledge.
12	The entire paragraph	***Struck out.*** On the basis that this is the witness's opinion and conclusion on a matter which is not within his knowledge and expertise.
13	The entire paragraph	***Struck out.*** The words "existing at 10.06 metres…as part of their lands". On the basis that this is opinion evidence.
14	The words " The road reserve has…the width of 10.06 metres"	***Struck out.*** On the basis that this is the witness's opinion and conclusion on a matter which is not within his knowledge and expertise.

15	The entire paragraph	***Struck out.*** The words "I say that the 10.06 metre road reserve…neighbouring me." On the basis that the measurements are the witness opinion and he is attempting to give evidence which is expert opinion evidence.
17	The words " I say that this road … this reserve road's with since 1980"	***Struck out.*** The first sentence is struck out on the basis that it is opinion evidence. The second sentence is struck out on the basis that the witness has not established any basis to demonstrate that he knew what was within the First Claimant's knowledge.
18	The entire paragraph	***Struck out.*** On the basis of opinion evidence.
22	The entire paragraph	***Struck out.*** On the basis of opinion evidence.
24	The words "The quantity of the backfill … incurred without their consent."	***Struck out.*** On the basis that there is not foundation by the witness for this evidence and it is his opinion.

Margaret Y Mohammed
Judge