IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2010-01352**

BETWEEN

CLICO INVESTMENT BANK LIMITED

Claimant

AND

LOUIS ANDRE MONTEIL

First Defendant

RICHARD TROTMAN

Second Defendant

STONE STREET CAPITAL LIMITED

Third Defendant

FIRST CAPITAL LIMITED

Fourth Defendant

BEFORE: THE HONOURABLE MADAM JUSTICE QUINLAN-WILLIAMS

APPEARANCES:

For the Claimant:
Senior Advocate Michael Green, Q.C., Advocate Attorney Nadine Ratiram, Instructing Attorney Keilah Granger.

For the First and Third Defendants:
Senior Advocate Martin Daly S.C., Junior Advocate Jason K. Mootoo, Instructing Attorney Sarah Sinanan.

For the Second Defendant:
Advocate Attorney Jonathan Walker, Instructing Attorney Adrian Byrne.

Dated: 13th April 2018

DECISION

Introduction

1. Clico Investment Bank Limited filed a claim against the Defendants on the 9th September, 2010. Thereafter, on the 8th December, 2010 the Claim Form and Statement of Case were amended and on the 24th March, 2011 re-amended.

2. The Claimant claims against the Defendants, inter alia:
   a. Damages;
   b. Equitable compensation;
   c. Declaratory reliefs;
   d. Orders for delivery up of the assets;
   e. All necessary accounts and inquiries, including to enable the Claimant to trace and recover the assets;
   f. Restitution;
   g. Rescission of the 20.12.07 agreements and/or the 25.07.08 agreements if voidable (and not void); and
   h. TT $78 million dollars along with interest against the third defendant.

3. By order dated 7th March, 2017 the parties were to file and exchange witness statements. The order was complied with. On the 14th March, 2017 the Claimant filed witness statements along with hearsay notices pursuant to **Rule 30. 2 Civil Proceedings Rules 1998 (CPR) (as amended**).

4. Thereafter, on the 4th April, 2017 the First, Second and Third Defendants filed counter-notices pursuant to **Rule 30. 7 CPR**. Approximately five months after those counter-notices were filed the Claimant filed amended hearsay notices. This was followed by the Claimant's application for directions on the admissibility of the hearsay notices. This application was supported by affidavit evidence sworn by Keilah Granger, instructing Attorney-at-Law for the Claimant.

5. On the 23rd November, 2017 this court ordered that written submissions be filed and served respecting the application before the court. The parties filed and served the requisite written

submissions.

The Notices

6. The Claimant's hearsay notices were filed on the 14th March, 2017 (the original hearsay notice). The First, Second and Third Defendants filed the counter-notices on the 4th April, 2017. The amended hearsay notices were filed on the 18th September, 2017 (the amended hearsay notice). Table 1, shows a comparative outlining the particulars of the original hearsay notice, the counter-notice and the amended hearsay notices.

Table 1. Comparison of Hearsay Notices Counter-Notices and Amended Hearsay Notices

	WITNESS	**EVIDENCE**	**REASON**	**COUNTER-NOTICE**	**AMENDMENT**
1.	Email from **Diane Mora Reyes** (Senior Manager Operation, Clico Investment Bank Limited) to Caroline Lewis (28th July, 2008).	The email relates to Stone Street $78M statement for a loan facility. It also refers to the facility not being on the system because of insufficient documentation to book the loan.	The witness is unfit (bodily or mentally) to attend trial.		
2.	Email from **Caroline Lewis** (Vice President-Operations of Clico Investment Bank Limited) to Richard Trotman (14th July, 2008).	Email relates to Stone Street audit confirmation request.	No reason provided.	1st and 3rd Defendant- require this witness to be called. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.
3.	Email from **Alisha Jamie Hosein** to Caroline Lewis	Email relates to information required to book the $78 M loan.	No reason provided.	1st and 3rd Defendant- require this	The witness cannot reasonably be expected to recall

	(12th August, 2008).			witness to be called. 2nd Defendant- require this witness to be called.	the matters relevant to the accuracy or otherwise of the statement.
4.	Email from **Alisha Jamie Hosein** to Caroline Lewis (12th August, 2008).	Email relates to the date of the loan agreement and the loan amount.	No reason provided.	1st and 3rd Defendant- require this witness to be called. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.
5.	Email from **Diane Mora-Reyes** (Senior Manager Operation, Clico Investment Bank Limited) to Melissa Martin (17th September, 2008).	The email referred to the two loan facilities and the lack of documentation to confirm the disbursements.	The witness is unfit (bodily or mentally) to attend trial.		
6.	Email from **Diane Mora-Reyes** (Senior Manager Operation, Clico Investment Bank Limited) to Asha Frederick (19th September 2008).	The email refers to CLICO fixed deposit and whether it was assigned and being held against the loan facility.	The witness is unfit (bodily or mentally) to attend trial.		
7.	Email from **Diane Mora**	The email confirmed that	The witness is		

	Reyes (Senior Manager Operation, Clico Investment Bank Limited) to Caroline Lewis (5th September, 2008).	the 78M facility was for Stone Street and it was transferred to the First Capital Account.	unfit (bodily or mentally). to attend trial.		
8.	Email from **Melissa Martin** to Diane Mora-Reyes (17th September, 2008).	The email refers to the documentation that could not be found as it relates to Stone Street Capital…..	No reason provided	1st and 3rd Defendant- require this witness to be called. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.
9.	Email from **Diane Mora-Reyes** (Senior Manager Operation, Clico Investment Bank Limited) to Melissa Martin (17th September, 2008).	The email refers to the file not having any documentation authorizing the disbursements.	The witness is unfit (bodily or mentally) to attend trial.		
10.	**Diane Mora-Reyes** (Senior Manager Operation, Clico Investment Bank Limited) - CIB Loan Statement (26th September, 2008).	The loan statement of $78M to Stone Street Capital (interest rate and interest accumulated).	The witness is unfit (bodily or mentally) to attend trial.	1st and 3rd Defendant objects to the authenticity of the document.	

11.	Stone Street Security Document Held. **<u>Maker of document not identified</u>**.	Security/ shares held by Stone Street, dates and values.	Despite reasonable diligence the witness cannot be identified.		
12.	Electronic Records of Deposit in the amount of $100 M (15th February, 2007). **<u>Maker of document not identified</u>**.	The document refers to the electronic record of the deposit of a cheque from Clico Investment Bank for the sum of $100M.	Despite reasonable diligence the witness cannot be identified.		
13.	Letter from **<u>Karen-Ann Gardier</u>** (Director Finance and Investments) to Richard Trotman (15th February, 2007).	The letter refers to $100M fixed deposit.	No reason provided	1st and 3rd Defendant- require this witness to be called. 1st and 3rd Defendants object to the authenticity of the letter. 1st and 3rd Defendant object to the Claimant relying on the letter as it was not disclosed. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.
14.	Letter from **<u>Gita Sakal</u>** (Corporate	The letter refers to the resolution of the Board of	No reason provided.	1st and 3rd Defendant- require this	The witness cannot reasonably be

	Secretary) to Michael Fifi (1st May, 2007).	Directors to dispose of assets.		witness to be called. 2nd Defendant- require this witness to be called.	expected to recall the matters relevant to the accuracy or otherwise of the statement.
15.	Stone Street Capital Investment Disposal Justification sent via facsimile from **L.A. Monteil** to Karen Gardier (18th April, 2008).	The Internal Memorandum refers to reasons why the HMB shares were disposed by Clico.	No reason provided.		
16.	Email from **Karen-Ann Gardier** (Director Finance and Investments) to Lawrence Duprey (15th February, 2007).	The document refers to the valuation of HMB and CL communications shares and HMB shares.	No reason provided	1st and 3rd Defendant- require this witness to be called. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.
17.	Internal Memorandum from **Caroline Lewis Richards** (Vice President- Operations of Clico Investment Bank Limited) to Richard Trotman (4th August, 2008).	The document refers to a review of security documents.	No reason provided	1st and 3rd Defendant- require this witness to be called. 2nd Defendant- require this witness to be called.	The witness cannot reasonably be expected to recall the matters relevant to the accuracy or otherwise of the statement.

7. The Table above demonstrates that in total the Claimant, in the original hearsay notice gave notice for seventeen (17) hearsay statements to be admitted into evidence. Of these seventeen

(17) statements the Claimant gave **CPR Rule 30. 6 (a) (iii)** reason for eight (8) statements for which no counter-notice can be filed- **CPR Rule 30.7 (4)**.

8. The Defendants together filed nine (9) counter-notices. Subsequent to these counter-notices being filed the Claimants filed amended hearsay notices relating to eight (8) of the original hearsay notices, all of which the Defendants had already served counter-notices for. The amendments in the main were to include **CPR 30.6 (a) (iv)** reason for the maker of the statement not being able to attend trial. The purported effect of this is no counter-notices can be served for these amended hearsay notices.

The Submissions

Claimant

9. The Claimant submitted that on the 16th October, 2011 the Claimant went into liquidation. Thereafter, the proceedings were continued by a liquidator. The Claimant averred that unlike ordinary proceedings a liquidator does not know personally the affairs of a Company in liquidation. The liquidator is dependent on documents found in the Company's records and should not be required to call the maker of the many documents which the liquidator may want to rely on in support of its case.

10. The Claimant submitted that it would be unfair if the Liquidator is unable to rely on the documents in the hearsay notices. The Claimant further averred that one of its witnesses, Yvette Peters has the authority to tender the documents into evidence. Yvette Peters in her capacity as Project Manager had access to and custody of the documents and records of the Claimant and can tender these documents into evidence.

11. The Claimant further submitted that the Defendants have no right to rely on the counter-notices as the Claimant relied on one of the reasons in **CPR Rule 30.6**. On this basis the court should allow the Claimant's application to admit the documents into evidence. Notwithstanding this, the Claimant further submitted that the court retains discretion to allow a party to adduce hearsay evidence where there has been non-compliance with the rules. This is pursuant to CPR

Rule 30.8. The Claimant submitted that the court in exercising this discretion must do so in accordance with the overriding objective. In this regard the Claimant relied on the authority of **Faaiz Mohammed v Jack Warner**[1].

12. The Claimant made submissions regarding each of the statements and outlined the reasons for not calling the maker of the document. Table 2 below summarizes these submissions:-

Table 2: Claimant's Reasons to Allow Hearsay Evidence and Not Call Witnesses

	DOCUMENT	REASONS
1.	Clico Investment Bank Limited Statement-26th September, 2008 (Diane Mora Reyes).	▪ Requirements of 30.2 (1) complied with-30.6 (a) (iii) reason. ▪ Rule 30.7 (4) no counter-notice may be served. Therefore the First and Third Defendants ought not to serve a counter-notice. ▪ No material prejudice in not cross examining the witness as the document is computer generated and signed off by Diane Mora Reyes. ▪ Not multiple hearsay. The document was prior to the proceedings therefore no ulterior motive or bias. ▪ Unnecessary expense would be incurred by calling this witness. ▪ Diane Mora Reyes cannot be reasonable expected to recall the matters because of the effluxion of time since the making of the document and she is unfit to give evidence.
2.	Letter from Karen-Ann Gardier to Second Defendant-15th February, 2007.	▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ Not unfair or prejudicial as the statement does not contain multiple hearsay and was made contemporaneously with the occurrence of the relevant event. ▪ The evidence has not been contradicted by other evidence. It has been confirmed by paragraphs 33 Second Defendant's Witness Statement dated 19th September, 2016. ▪ The document was prior to the proceedings therefore no ulterior motive or bias.

[1] CV 2013-04726

		▪ The document was addressed to the Second Defendant so it would be unfair if the document is not admitted and unable to cross examine the Second Defendant on a document to which he was a party. ▪ Unnecessary expense would be incurred by calling this witness.
3.	Email from Caroline Lewis to Second Defendant-14th July, 2008.	▪ This document was recovered from server and is highly pertinent to the issues in this case. ▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Caroline Lewis as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document was prior to the proceedings therefore no ulterior motive or bias. ▪ The statement does not involve multiple hearsay. ▪ The evidence was not contradicted by an evidence in the witness statements. ▪ The document was addressed to the Second Defendant so it would be unfair if the document is not admitted and unable to cross examine the Second Defendant on a document to which he was a party. ▪ Unnecessary expense would be incurred by calling this witness.
4.	Memorandum from Caroline Lewis to the Second Defendant-4th August, 2008.	▪ The memorandum was prepared by Caroline Lewis in her capacity as Vice President of Operations. This document was recovered from the claimant's files and is highly pertinent to the issues in the case. ▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Caroline Lewis as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document was prior to the proceedings therefore no ulterior motive or bias. ▪ The document was addressed to the Second Defendant and contains his manuscript comments thereon.

		▪ Unnecessary expense would be incurred by calling this witness.
5.	Email from Alisha Jamie Hosein to Caroline Lewis-12th August, 2008.	▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Alisha Jamie Hosein as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document does not include multiple hearsay. ▪ The evidence was not contradicted by other evidence in witness statements. ▪ The document was prior to the proceedings therefore no ulterior motive or bias. ▪ Unnecessary expense would be incurred by calling this witness.
6.	Email from Alisha Jamie Hosein to Caroline Lewis-12th August, 2008.	▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Alisha Jamie Hosein as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document does not include multiple hearsay. ▪ Unnecessary expense would be incurred by calling this witness.
7.	Email from Melissa Martin to Diane Mora Reyes-17th September, 2008.	▪ This email is highly pertinent to the issues in the case. ▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Melissa Martin as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document does not include multiple hearsay. ▪ Unnecessary expense would be incurred by calling this witness.

8.	Letter from Gita Sakal to Michael Fifi-1st May, 2007.	▪ The document is relevant on the approval and valuation process surrounding the transaction for the sale of the HMB shares by Clico to the Third Defendant and the position of the First Defendant. ▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be with the relied upon. ▪ It is not unfair nor any material prejudice in not being able to cross examine Caroline Lewis as the material was made as part of a routine and normal information gathering process in carrying out her duties. ▪ The document does not include multiple hearsay. ▪ Unnecessary expense would be incurred by calling this witness.
9.	Email from Karen-Ann Gardier to Lawrence Duprey.	▪ This document is important for a proper understanding of the transaction and whether the Claimants acted in accordance with their duties; ▪ The amended hearsay notice referred to ground 30.6 (a) (iv) as the ground. ▪ No counter-notice can be served when Rule 30.6 applies. Therefore, the counter-notices cannot be relied upon. ▪ The Defendant would not suffer material prejudice in not being able to cross examine Karen-Gardier as the statement was made contemporaneously the occurrence of the event. ▪ The document was made well before the proceedings. ▪ Unnecessary expense would be incurred by calling this witness.

The First and Third Defendants

13. The First and Third Defendants submitted that the Claimant is not entitled to rely on the amended hearsay notices as it constitutes an abuse of the process of the court. The First and Third Defendants relied on Rule 30.8 CPR which stipulates when hearsay notices must be served. They averred that the amended hearsay notices were filed more than six (6) months after the date prescribed by the Rule and the order of the court. The amended hearsay notices were also filed more than five (5) months after the Defendants filed counter-notices.

14. The amended hearsay notices also sought to alter the grounds upon which the Claimant relied in the original hearsay notices. The alternation of the grounds is not a procedural irregularity that can be rectified by the court exercising its discretion under **CPR Rule 26.8 and 30. 8**. Furthermore, in these circumstances there is a risk of material prejudice and injustice which flows naturally from allowing the Claimant to rely on the amended notices. In this regard the First and Third Defendants relied on the case of **Anand Rampersad v Willie's Ice Cream Limited**[2].

15. The First and Third Defendants submitted that neither the original nor amended hearsay notices complied with the provisions of the **CPR, Part 30**. The irregularities with the notices are outlined below:

    i. Hearsay Notice CLICO Investment Bank Loan Statement-26th September, 2008. The First and Third Defendant submitted that this document is a computer generated document. This document was required to be admitted pursuant to **section 40 Evidence Act** and **Rule 30.5 CPR** not **Rule 30. 3 CPR**. The notice fails to meet the procedural requirements identified in **Rule 30.5 (3) CPR**. They also submitted that if the court treats the statement as being made by Ms. Mora Reyes, the Claimant has failed to include the basis for relying on **Rule 30.6 (a) (iii) CPR**, as no cogent evidence was provided. The medical certificate (Dr. Lindon Maraj) attached as K.G. 5 to the Directions Application is inconsistent with Ms. Mora Reyes not attending the trial for the purpose of admitting documentary evidence.

    ii. Hearsay Notice letter from Karen-Ann Gardier to Richard Trotman-15th February, 2007. The original notice failed to comply with rule 30.3 (4) (b) CPR as it contains no reason for the Claimant not calling Ms. Gardier as a witness. This document constitutes double hearsay, the admissibility of such a document must be carefully scrutinized. In this regard the First and Third Defendant relied on the case of **Newport Enterprises Limited v Caribbean Commercial Insurance Company Limited and Another**[3].

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[2] Civ App 20 of 2002
[3] H.C.A. S-1193 of 1996

iii. Hearsay Notice email from Caroline Lewis to the Second Defendant-14th July, 2008 and Internal Memorandum from Caroline Lewis to the Second Defendant-4th August, 2008. These documents are only admissible by virtue of section **37 Evidence Act** (apparent error in submissions) and **Rule 30.3 CPR**. The original notice failed to comply with **Rule 30.3 (3) (4) (b) CPR**.

iv. Hearsay Notices emails from Alisha Jamie Hosein to Caroline Lewis-12th August, 2008. These emails are only admissible by virtue of **section 37 Evidence Act** and **Rule 30.3 CPR**. The original notices failed to comply with rule **30.3 (3) (4) (b) CPR**.

v. Hearsay Notice email from Melissa Martin to Diane Mora Reyes-17th September, 2008. These documents are only admissible by virtue of **section 37 Evidence Act** and **Rule 30.3 CPR**. The original notice failed to comply with **Rule 30. 3 (3) (4) (b) CPR**.

vi. Hearsay Notice letter from Gita Sakal to Michael Fifi-1st May, 2007. This document is only admissible by virtue of **section 37 Evidence Act** and **Rule 30.3 CPR**. The original notice failed to comply with **Rule 30. 3 (3) (4) (b) CPR**.

vii. Hearsay Notice email from Karen-Ann Gardier to Lawrence Duprey-15th February, 2007. This document is only admissible by virtue of **section 37 Evidence Act** and **Rule 30.3 CPR**. The original notice failed to comply with **Rule 30. 3 (3) (4) (b) CPR**. This document also constitutes double hearsay.

Second Defendant

16. The Second Defendant does not maintain its objection to the internal memorandum from Caroline Lewis to Richard Trotman dated the 4th August, 2008. As this document has been agreed as to its authenticity.

17. The Second Defendant submitted that the original hearsay notices did not identify any reason for not calling the witnesses. Therefore, the counter-notices were properly taken pursuant to **Rule 30.7 (1) and (2) CPR**. In these circumstances the hearsay evidence that was subject to the counter-notices is not admissible unless the Claimant applies to the court for directions.

18. The Second Defendant submitted that the directions hearing take the form of a mini trial. The court would determine whether to admit the hearsay evidence. In determining this the court must be satisfied that the reasons given or relied upon are established by evidence and that the admission of the evidence is in the interest of justice. In this regard the Second Defendant relied on the authority of **Cuthbert Mc Clatchie v Isola Thomas and the General Assembly of the Church of God**[4].

19. The Second Defendant submitted that in this case the court cannot be satisfied that the reasons relied on in the amended hearsay notices have been established or that it is in the interests of justice for the statements to be admitted as:

    a. There is no evidence from the makers of the statements that they cannot recall the background to the statements in question;

    b. The Claimant has not established the provenance of the documents (**Redstone Mortgages Limited v B legal Limited**[5];

    c. The fact that the original hearsay notices did not set out a **CPR Rule 30.6** reason should alert the court to the bona fides of these reasons subsequently asserted in the amended hearsay notices; and

    d. It cannot be in the interests of justice that the Claimant be permitted to cross-examine the Second Defendant on matters contained in the documents whilst the

[4] CV 2012-01570
[5] [2014] EWHC 3398 Ch

makers of the statements are relieved from cross-examination on the ground that they cannot reasonably be expected to recollect the matters.

20. The following issues would have to be determined by the Court:

I. Whether the Claimant can rely on the amended hearsay notices;

II. If yes, what, if any consideration can the court give to the counter-notices filed before the amended hearsay notice; and

III. If no, whether the court should exercise its discretion and admit the hearsay evidence without the witness attending the trial for cross-examination.

ISSUE I: Can the Claimant rely on the amended hearsay notices?

Law and Analysis

21. **Sections 37, 39 and 40 Evidence Act**[6] provides for the admissibility of hearsay evidence. **Section 37** provides for admissibility of out of court statements as evidence of facts stated whereas, **section 39** provides for admissibility of certain records as evidence of the facts stated. **Section 40** provides for admissibility of statements produced by computers. All these sections are subject to the Rules of Court.

22. The **CPR Part 30** outlines the Rules of Court in relation to hearsay evidence. The material parts (for this purpose) are **Rules 30. 2 (1)** and **(2), 30.7**:

[6] Chapter 7:02

Service of hearsay notice

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 not 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****.*

23. **Rule 30.7** details the service of counter-notices:

Service of counter-notice

30.7 (1) A party on whom a hearsay notice has been served may serve a counter-notice requiring the server of the notice to call any person named in the counter-notice as a witness.

(2) The counter-notice must be served within 21 days of service of the hearsay notice.

(3) If there is a statement in the hearsay notice that the person named in the counter-notice cannot or should not attend for a specified reason, the counter-notice must state why that person should be required to attend.

(4) No counter-notice may be served where there is a statement in the hearsay notice that one of the reasons in rule 30.6 applies.

(5) The party served with the counter-notice may, however, apply to the court for directions as to the admissibility of the statement.

(6) Where a counter-notice is served no statement made by any person named in the counter-notice shall be admissible unless the server of the hearsay notice—

(a) calls the person named; or

(b) applies to the court for directions as to the admissibility of the statement.

(7) Any application to the court under paragraph (5) or (6) must be made at a pre-trial review wherever practicable.

(8) No application may be made at the trial or hearing at which the statement is, or is not, to be admitted unless the applicant can show that the application could not have been made earlier.

24. The Claimant is of the view that the inclusion of provisions in the **CPR** to amend Statements of Case and none with respect to other documents is not an indication that the CPR intended to restrict amending other pleadings. The Claimant further submitted the fact that the court has power to permit hearsay evidence without a hearsay notice along with the court's general power to extend time for compliance with any rule indicate there is a power to file and rely on the amended hearsay notices.

25. While it is clear that **Part 30 CPR** does not make any provision for a hearsay notice to be amended, I am of the opinion that this does mean, for instance, that an application for a court order to amend a hearsay notice cannot be made under **Part 11 CPR**. If an application is make for a court order under **Part 11 CPR**, such an application would have to be supported by evidence in compliance with **Rule 11.8**. In considering such an application the court would, no doubt have regard to the overriding objective **Rule 1.1**. I agree with the First and Third Defendants submission that the CPR is silent on amendments to hearsay notices, however I do not agree that the court does not have jurisdiction and a discretion to permit amendments to hearsay notices because **Part 30** makes no provisions for amendments. A clear distinction can be drawn between pleading which sets out the parameters of a party's case and procedural rules to determine what evidence is admissible and how it is to be adduced. If in the former amends can be made, the latter should be subject to amendments in circumstances that are just too all parties.

26. The court's general powers of management to extend time for compliance with any rule is found at **Rule 26.1 (d) CPR.** The rule provides as follows:

26.1 (1) The court (including where appropriate the court of Appeal) may—

(d) extend or shorten the time for compliance with any rule, practice direction or order or direction of the court;

27. As already noted, there is no issue of the court exercising this discretion in this instance, it does not arise. The original hearsay notices were filed according to the standard set by the Rules of Court. The filing of the amended hearsay notices cannot be regard as an event requiring extending time for compliance with any rule within the meaning of the rule. **Rule 26.1 CPR**, in my view, would apply in a case where there is non-compliance with a rule of court. Having reviewed the original hearsay notices I am of the view that the Claimant generally complied with the rules of court with the exception of Clico Investment Bank Loan Statement. This statement is a computer generated statement and the Claimant sought to admit the statement into evidence under the wrong section of the Evidence Act and the wrong rule in the CPR (this hearsay notice was not one of the notices that formed part of the amended hearsay notices).

28. The power of the court to allow a statement to be given in evidence is found in **CPR Rule 30.8.** This rule provides as follows:

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.

Again, this rule is not applicable. The Claimant did filed and serve the hearsay notices, there is no reason for the court to consider whether it should permit hearsay evidence where the party has failed to serve a hearsay notice.

29. The main thrust of the submissions from the First and Third Defendants is that the original hearsay notice did not comply with the rules of court as **30. (3) (4) (b) CPR.** In **<u>KKRV Consolidated Marine Services Limited and The Attorney General of Trinidad and</u>**

Tobago[7] the Claimant filed a hearsay notice and the Defendant filed to have the hearsay notice struck out as invalid. The Defendant raised three objections to the Claimant's Hearsay Notice:

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.

30. The judge found that there was compliance with **Rule 30. 3 CPR** and that the objections to the hearsay notice was technical. The judge noted the fact that no reasons were given as to why the witness was not able to attend court.

31. In this case currently engaging the court's attention, the main amendment to the hearsay notices was to include **CPR Rule 30. 6 (a) (iv)** as the reason for the maker of the statements not attending court. This reason is one which should have been known prior to the filing of the original hearsay notices. It is implausible that after the filing and serving of the hearsay notices it became known that this was the reason for the maker of those statements not being able to attend court. Additionally, the purported amended hearsay notices were filed more than five months after the Claimant was served with the counter-notices. It would be patently unfair and unjust to allow any amendment to the hearsay notices considering the timelines. Furthermore, allowing this amendment would render the counter-notices filed by the Defendants otiose and contrary to contrary to **CPR Rule 30. 7 (4)**.

32. The amended hearsay notices are hereby struck out.

ISSUE II: What, if any consideration can the court give to the counter-notices filed before the amended hearsay notices were filed.

[7] CV 2008-02899

33. Given the court's ruling on Issue I above, striking out the amended hearsay notices, the counter-notices will be considered along with the original hearsay notices.

ISSUE III: Whether the court should exercise its discretion and admit the hearsay evidence without the witness attending the trial for cross-examination.

Law and Analysis

34. **CPR Rule 30.7** provides for the service of counter-notice and an application for directions as to the admissibility of a statement. This Rule provides:-

> *(5) The party served with the counter-notice may, however, apply to the court for directions as to the admissibility of the statement.*
>
> *(6) Where a counter-notice is served no statement made by any person named in the counter-notice shall be admissible unless the server of the hearsay notice—*
>
> > *(a) calls the person named; or*
> > *(b) applies to the court for directions as to the admissibility of the statement.*
>
> *(7) Any application to the court under paragraph (5) or (6) must be made at a pre-trial review wherever practicable.*
>
> *(8) No application may be made at the trial or hearing at which the statement is, or is not, to be admitted unless the applicant can show that the application could not have been made earlier.*

35. The relevant application is before the court. In determining admissibility of hearsay statements the court is guided by **section 41 (2) Evidence Act**. This section provides:

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 37, 39 or 40 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.

36. I am also mindful of the overriding objective-**CRP Rule 1.1**. The overriding objective is to deal with cases justly. This includes ensuring as far as practicable the parties are on equal footing; saving expense, dealing with cases in ways that are proportionate and expeditiously and allotting an appropriate share of the court's resources.

37. I also considered the learning in Zuckerman[8] at paragraph 22.126; the significance of the hearsay evidence to the case of the party seeking to adduce the hearsay evidence:

Where notice of hearsay has been given, other parties may apply for permission to cross-examine the witness if the hearsay testimony is of significant importance. Although the rule is silent about what would happen if the witness fails to turn up for cross-examination, the court must have the power to exclude their evidence , especially if it considers that entertaining the evidence without cross-examination would significantly prejudice the party seeking cross-examination.

38. I would now consider each of the defendants' counter-notices and make a determination whether the hearsay evidence should be admitted into evidence with or without the witness attending the trial for cross-examination.

Melissa Martin-

- Email from Melissa Martin to Diane Mora-Reyes-17th September, 2008.

[8] Zuckerman, Adrian. 2013. *Zuckerman on Civil Procedure Principles of Practice.* London: Sweet & Maxwell.

39. This email was sent by Melissa Martin to Diane Mora- Reyes who at the material times was the Senior Manager Operations, CIB. The email concerned the lack of documentation for the loan facility on behalf of Stone Street Capital Limited.

40. The First, Second and Third Defendants served a counter-notice to call Melissa Martin as a witness in the trial. The Claimants at paragraph 77 of the re-amended statement of case pleaded that the loan and its disbursements were highly irregular, that there was inadequate documentation or no documentation appropriate to the loan required or prepared by CIB, prior to the disbursement of the same. The Claimant's list of issues filed on the 14th January, 2016 at paragraph 2.6 identified the following as a factual issue to be resolved:

> "Were CIB's proper lending procedures complied with, whether properly or at all".

41. This evidence would go towards this assertion and resolving the issue whether ordinary and prudent lending practices were observed in relation to the TT$78m loan. **Section 41 (2) Evidence Act** empowers the court to draw reasonable inferences from the circumstances in which the statement was made when determining whether a statement is admissible into evidence. The court can reasonable infer that this email was sent by Melissa Martin in her capacity as an employee at the material time, which was well before this trial.

42. Also in determining whether Ms. Martin should attend trial to give evidence regarding this email I am also mindful of the overriding objective in dealing with this case justly which includes saving expense. This is particularly important in this case as the Claimant is in liquidation. This Statement would go towards resolving a factual issue. The Claimant submitted that this email is highly pertinent to the issues in this case. Given the importance of this evidence to the case I am of the view that it is necessary for the witness to attend trial. This evidence purports to address a factual issue which is contested. Cross-examination would be essential to test the truth of this statement and to assist the court in determining what weight or reliance could be placed on this evidence. Accordingly, Melissa Martin is to attend court to

be cross-examined on the email sent to Diane Mora-Reyes-17th September, 2008. The court is satisfied that the hearsay evidence is of significant importance.

Caroline Lewis-

- Memorandum from Caroline Lewis to Richard Trotman-4th August, 2008.
- Email from Caroline Lewis to Richard Trotman-14th July, 2008.

43. The Memorandum from Caroline Lewis to Richard Trotman. Caroline Lewis was the Vice President of Operations, CIB. The memorandum concerned five discrepancies in the Stone Street Capital Limited loan facilities. These discrepancies were:
    i. What company name to book the facility under;
    ii. Letter of offer omitted;
    iii. No evidence of draw down;
    iv. How would the interest be calculated; and
    v. In the event of default payment will CIB be charged 3% on the unpaid interest.

44. The First, Second and Third Defendants served counter-notices regarding this Memorandum. The Defendants required that Caroline Lewis be called as a witness at the trial. In submissions the Second Defendant did not maintain its objection to the internal memorandum as this document forms part of the bundle of documents agreed as to authenticity at number 70.

45. I have examined the bundle of documents agreed as to authenticity filed on the 4th March, 2016. The memorandum forms part of the documents agreed to authenticity at number 70. The Second Defendant did not maintain its objection to this statement for the reasons stated above. This evidence is being admitted for the truth of the contents. This is distinct from evidence that is admissible as authentic. This issue was address by Jones J (as she then was) in **<u>Badewatie Ramnarine v Azziz Mohammed and ors</u>**[9] had this to say:

[9] CV 2009-00202 at page 6

"The question for my determination is whether the documents are admissible as proof of the contents or merely to the fact that the documents were made by the persons signing the document. In other words, are the receipts evidence of the fact that the claimant incurred the expense or merely that a receipt was given by the person purporting to sign it. Truth or authenticity. In my opinion in the absence of a hearsay notice the receipts are only admissible as evidence of the fact that they were made and not to the truth of the contents.

46. The court agrees with the Claimant that this statement is highly pertinent to resolving the issue of whether ordinary and prudent lending practices were observed in relation to the TT78M loan and whether the Defendants acted in breach of their fiduciary duties. The court infers that this memorandum was written by Caroline Lewis as part of her duties in her employ as the Vice President of Operations, CIB. The court did not draw any adverse inferences from the circumstances from which the statement was made. However, the court has to balance this against the importance of the evidence to determining the issues before the court. As well as the important role cross examination in assisting the court in determining what weight or reliance should be placed on the evidence.

47. I am of the view that given the importance of this evidence to this case, Caroline Lewis has to attend court to be cross-examined about the memorandum. The court is satisfied that the hearsay evidence is of significant importance.

48. The email from Caroline Lewis to Richard Trotman dated 14th July, 2008. In this email Caroline Lewis indicated to the Second Defendant that they were unable to retrieve any information from the files to facilitate the preparation of the audit confirmation. The email further requested if the second Defendant had any files or information that could have assisted.

49. The First, Second and Third Defendants served a counter-notice regarding this email. This email is crucial to assisting the court in determining whether the First and Second Defendants breached their fiduciary duties as well as whether ordinary prudent lending practices were observed in relation to the TT$78M. For the reasons discussed above regarding the

memorandum I am also of the view that given the importance of this evidence to the Claimant's case that Caroline Lewis has to attend court to be cross-examined about the email. The court is satisfied that the hearsay evidence is of significant importance.

Karen-Ann Gardier-

- Email from Karen-Ann Gardier to Lawrence Duprey-15th February, 2007.
- Letter from Karen-Ann Gardier to Richard Trotman-15th February, 2007.

50. Karen-Ann Gardier was at the material time the Director Finance and Investment. The email from Karen-Ann Gardier to Lawrence Duprey concerned the valuation of HMB and CL Communications shares and a recommendation of the value that these shares should be sold. The First, Second and Third Defendants required that this witness be called at trial.

51. This email is pertinent to resolving one of the issues in the case. This issue is whether the First and Second Defendants were acting in accordance with their duties. The court can reasonable infer that this email was sent by Karen-Ann Gardier in her capacity as an employee at the material time, which was well before this trial. The court has not inferred anything adverse about the circumstances surrounding this email. This statement is very important to this case and I am of the view that Ms. Gardier has to attend trial to cross-examined about this email. The court is satisfied that the hearsay evidence is of significant importance.

52. The letter concerned the $100M fixed deposit. The letter enclosed a cheque for $100M this sum was to be used to establish a fixed deposit for one year.

53. The First, Second and Third Defendants served a counter-notice regarding this letter. The First, Second and Third Defendants require that Ms. Gardier attend the trial.

54. An examination of the Claimant's list of documents filed on the 28th October, 2011 reveals that this letter was not disclosed. **CPR Rule 28. 13 (1)** is instructive. This rule provides as follows:-

> "*A party who fails to give disclosure by the date specified in the order may not rely on or produce any document not so disclosed at the trial*".

55. Therefore, as this document was not disclosed this document cannot be relied on or produced at the trial. Therefore, in these circumstances this letter is not admitted into evidence.

*Gita Saka*l-

- Letter from Gita Sakal to Michael Fifi-1st May, 2007.

56. This letter was written by Gita Sakal who at the material time was Corporate Secretary, CL Financial Limited. The letter was sent to Michael Fifi, Director CL Financial Limited. The letter concerned the resolution by the Board of Directors to dispose of assets belonging to Clico, CLF and Colfire namely Home Mortgage Bank and CL Communication.

57. The First, Second and Third Defendants requires her to be called as a witness. The court infers that this letter was written by Gita Sakal as part of her duties in her employ as the Corporate Secretary, CL Financial. The court did not draw any adverse inferences from the circumstances from which the statement was made.

58. The Court considers this evidence materially important and the witness has to attend court to be cross-examined. The court is satisfied that the hearsay evidence is of significant importance.

Alisha Jamie- Hosein

- Email sent from Alisha Jamie Hosein to Caroline Lewis-12th August, 2008-12:35 pm
- Email sent from Alisha Jamie Hosein to Caroline Lewis-12th August, 2008-12:09 pm

59. The first email sent by Alisha Hosein was sent at 12:09 pm. This email concerned First Capital. In this email she was enquiring about information that she needed to book the loan. In the email Alisha Hosein specified the information that she required namely Articles of Incorporation/ Date of Registration of First Capital, the Address and Telephone Numbers.

60. The First, Second and Third Defendants require Alisha Jamie Hosein to be called as a witness.

61. The second email sent from Alisha Hosein was sent at 12:35 pm. This email concerned First Capital. In this email Alisha Jamie Hosein specified the date of the loan agreement along with the amount loaned that she was enquiring about.

62. The First, Second and Third Defendants require Alisha Jamie Hosein to be called as a witness.

63. **Section 41 (2) Evidence Act** empowers the court to draw reasonable inferences from the circumstances in which the statement was made for the purpose of deciding admissibility. The court can reasonable infer that this email was sent by Alisha Jamie Hosein in her capacity as an employee at the material time, which was well before this trial. I am of the view that this evidence could be admitted. Therefore, I am granting permission for the two emails sent by Alisha Jamie Hosein on the 12th August, 2008 at 12:09 pm and 12:35 pm to be admitted into evidence. This witness is not required to attend court to be cross-examined. The court is not satisfied that the hearsay evidence is of significant importance.

Clico Investment Bank Limited Loan Statement- 26th September, 2008.

- The First and Third Defendants require the maker of the document to be called as a witness in this trial.

64. This statement is a computer generated statement and for this statement to be admitted into evidence it must satisfy the requirements of section 40 Evidence Act and the Rules of Court.

65. Section 40 Evidence Act has extensive requirements for computer generated statements that are to be admissible as evidence of fact. Section 40 provides as follows:

> *40. (1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to Rules of Court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.*
>
> *(2) The said conditions are—*
>
> > *(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;*
> >
> > *(c) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained in the statement or of the kind from which the information so contained is derived;*
> >
> > *(d) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and*
> >
> > *(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.*

66. The relevant CPR Rules is 30.5. This rule provides:

> *(1) This rule applies where the statement is admissible under s.40 of the Act (admissibility of computer records).*
>
> *(2) The notice must have annexed to it a copy of the document or the relevant part of the document containing the statement.*
>
> *(3) The notice must also contain—*
>
> *(a) particulars of—*
>
> *(i) a person who had responsibility for the management of the relevant activities for which the computer was used during the material period;*
>
> *(ii) a person who during that period had responsibility for the supply to the computer of the information reproduced in the statement of information from which that information was derived; and*
>
> *(iii) a person who had responsibility for the operation of the computer during that period; and*
>
> *(b) a statement whether or not the computer was operating properly throughout the material period and, if not, whether any failure to operate properly might have affected the production of the document containing the statement or the accuracy of its contents.*
>
> *(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.*

67. The court is not satisfied that the requirements of the Evidence Act have been satisfied to allow this hearsay to be admitted into evidence.

Diane Mora Reyes-

68. No counter-notice was filed for the statements for Diane. This witness is not required to attend court to be cross-examined.

69. The court so orders.

70. Defendants Costs in the cause.

Dated this 13th day of April 2018

JUSTICE QUINLAN-WILLIAMS
JUDGE