ST. GEORGE WEST COUNTY

PORT OF SPAIN PETTY CIVIL COURT

RULING ON A SUBMISSION OF NO CASE TO ANSWER

CITATION: Lucy James v. Christopher Joseph

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 157 of 2012

DELIVERED ON: 20th May 2013

CORAM: Her Worship Magistrate Nalini Singh

St. George West County

Port of Spain Petty Civil Court Judge

REPRESENTATION:

Mr. Joseph Sookoo for Lucy James

Mr. Ancil Moses for Christopher Joseph

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1. INTRODUCTION

1.1 By ordinary summons dated and filed on the 13th April 2012, the claimant, Lucy James, claimed TT $4,000.00 as money owed to her by the defendant bailiff Christopher Joseph as reimbursement for nonperformance of an eviction agreement that was previously entered into between the parties.

1.2 At the conclusion of the case for the claimant, Mr. Ancil Moses invited the Court to entertain and uphold a submission that his client had no case to answer without being put to his election to call evidence. The hearing on this issue proceeded on the basis of oral submissions.

1.3 The hearing on the issue was premised on the fact that the Court could determine whether the claimant had made out a case for the defendant to answer without the need for the defendant to be put to his election to call evidence.

1.4 Since the application made before this Court is to uphold a submission of no case to answer, the appropriate place to start, on an examination of the pertinent facts, is with the particulars of claim filed.

2. THE PARTICULARS OF CLAIM

2.1 On the 22nd November 2010 the claimant hired a bailiff (the defendant) to evict her niece from premises belonging to her situated at Acono Road, Maracas St. Joseph. It was agreed that the cost payable for the said eviction was TT $5,000.00. This sum was paid to the defendant in two installments with the first installment of TT $1,000.00 being paid to the defendant on the

22nd November 2010 and the second installment of TT $4,000.00 being paid to the defendant on the 30th November 2010.

2.2 The claimant further set out in her particulars of claim that in December 2010 she had a conversation with the defendant and he indicated to her that he had a lot of work to complete and would be unable to evict her niece before Christmas 2010 but he expected that same would be done in January 2011.

2.3 In the third week of February 2011, the defendant had not yet evicted her niece and he indicated to the claimant that he would not do the job. At this point the claimant asked the defendant for a refund of her TT $5,000.00. The defendant in turn returned to the claimant the sum of TT $1,000.00 in mid March 2011 with an oral assurance that the outstanding money would be paid to her within one week of that date. The defendant never advanced to the claimant any further sums and notwithstanding numerous attempts by the claimant to recover same, a balance of TT $4,000.00 still remains due and owing to the claimant.

2.4 Against this backdrop the claimant instituted proceedings against the defendant on the 13th April 2012 and the trial into this matter commenced on the 11th December 2012. The claimant called two witnesses to prove her case and I turn now to an examination of this evidence as it is material to the determination of the application at hand.

3. THE EVIDENCE AT TRIAL

The Evidence of Lucy James

3.1 The evidence of Lucy James in relevant part is this.

3.2 The claimant stated that she needed a bailiff to do an eviction and her cousin gave her the defendant's phone number. The claimant then called the defendant and told him she wanted him to do an eviction. They set up a date to meet on Frederick Street Port of Spain. When both parties eventually met, the claimant told him that she had someone i.e. her niece Genevieve Ramcharran, living in her mother's house and she wanted to get them out as the people "used drugs". The defendant told the claimant that it would cost her TT $5,000.00 to do the eviction and he wanted TT $1,000.00 upfront and TT $4,000.00 just before he did the eviction when he was ready. The claimant paid the defendant the TT $1,000.00 that same day and the defendant gave her a receipt for this payment.

3.3 A few days later the claimant said the defendant called her and told her he was ready to proceed and he had a document for her to sign. They met at the Maraval Gas Station and the claimant signed the document. The defendant then told the claimant that he could not do anything until he got the rest of the money so the next day, the claimant caused the sum of TT $4,000.00 to be advanced to the defendant. The claimant received a receipt evincing the payment of TT$4,000.00. At this point the defendant told the claimant he would get the job done before Christmas 2010.

3.4 A week or two before Christmas 2010, the claimant called the defendant and he told her that the police officers who were supposed to go with him were busy as it was Christmas time and he would arrange to do the eviction after Christmas.

3.5 After Christmas when the claimant saw that nothing was happening, she called the defendant who assured he that he was putting things in place. Nothing happened after that conversation and the claimant again called the defendant this time around the ending of January 2011. This was when he told her that he would not be doing the job again and that he would refund to her the moneys she had originally advanced to him. The claimant said it was okay and she would get someone else to do the job.

3.6 Sometime later when no money was returned to the claimant she called him and then two weeks after that she called the defendant once more. By this time in was in February 2011. After numerous calls the claimant stated that she eventually noted that the defendant had paid into the claimant's account the sum of TT $1,000.00.

3.7 At one point according to the claimant she called the defendant and told him that she wanted her "frigging money". The defendant told the claimant that he would pay her TT $100.00 a week and if she didn't like it she was free to take him to "fucking court". After that the claimant never heard from the defendant.

3.8 The claimant said the property was located at Acono Road Maracas, St. Joseph and it was dilapidated. She had visited the property one year before the incident. It was deteriorated

and could not hold much items. At any rate the claimant told the Court that there was a living room set, two old beds, a space saver, an old TV, a microwave, an old stove, some garbage bags tied up with clothes, four car rims, and two gas tanks on the premises.

3.9 In cross examination the claimant said this:

3.10 The claimant agreed that she met the defendant in November 2010. She stated further that she hired the defendant because she wanted her niece evicted as quickly as possible from the property located at Acono Road Maracas, St. Joseph. She reiterated that pursuant to this agreement she paid the defendant a total of TT $5,000.00 and by this time there was an arrangement that the eviction would be done in December 2010 i.e. before Christmas.

3.11 The claimant confirmed that her brother lived to the back of the premises in Acono Road Maracas, St. Joseph. She described the property as comprising one house separated in two. Her niece was in occupation of the front part of the house whilst her brother occupied the back portion of the said house. The first time any mention was made of this fact was when it was alluded to in the claimant's reply.

3.12 The claimant stated that she paid all the money the defendant requested to do the job by November 2010 and after she "sat waiting" on the defendant to do the job until February 2011 which was when the defendant informed her that he would not be doing the job. The claimant agreed that during this time she neither made a report to the police nor did she go to a lawyer and

have a letter sent to the defendant as the defendant had assured her that he would return her money to her so she was waiting on that to happen.

3.13 The claimant went on to say that she is always at the premised located at Acono Road Maracas, St. Joseph. There is nothing much on the premises as the house is very dilapidated. She confirmed that it is easy to enter the dilapidated house. When the witness was shown a picture of the entry way of the dilapidated house i.e. "VL1" she was able to point to the location of a door to the front of the house which led into that house.

3.14 The claimant agreed that on the date that the defendant is alleging he did the eviction i.e. the 4th December 2010 she did not go on the premises at Acono Road Maracas, St. Joseph because he did not do any eviction on that date. She stated that although nothing stopped her from going on the premises that day, she did not know that he was supposed to do the eviction on the 4th December 2010.

3.15 The claimant said that the defendant never told her he did not do an eviction. She then said later in cross examination that she knew the defendant did not do the eviction because he told her so. She stated that another reason she knew that the defendant did not do the eviction was because if he had done an eviction "the whole village would have say he do an eviction they put her out".

3.16 In the end the claimant conceded that she was not sure the defendant did not do an eviction because she was not there. She stated however that she had a witness who would tell

the Court that the defendant did not do an eviction on the date he is alleging and further, when the brother did not see the bailiff coming to do the eviction he called the claimant to ask her what was happening to the bailiff. None of these facts were mentioned by the claimant in her reply or evidence in chief notwithstanding the fact that in her view, it was important evidence that went toward disproving the defence in the matter. Her explanation for this omission was that she missed it and it could happen.

The Evidence of Virginia Mendez

3.17 This is the daughter of the claimant. This witness testified that on the 30th November 2010 she had a conversation with her mother. She got the funds from her account, contacted the defendant and informed him that she had money for him. They arranged a meeting in Independence Square Port of Spain and the witness handed over TT $4,000.00 to the defendant. The defendant counted the money and handed a receipt to the witness which evinced this payment.

3.18 In cross examination the witness admitted that she was not present when the arrangement between the claimant and the defendant was negotiated.

3.19 The witness admitted that she was familiar with the house in Acono Road Maracas, St. Joseph. The last time she went to that house was Easter of 2010. After that she went to the house in July 2012. The witness stated that she knows that the house is now broken down but prior to it being broken down it was an old dilapidated house.

3.20 The witness stated further that she knew the person living there to be her cousin and that attempts were made to made to get her cousin to leave but those attempts were unsuccessful.

The Evidence of David Mendez

3.21 This witness stated that Lucy James is his mother. He stated that on the night of the 3rd December 2010, into the evening of the 4th December 2010 he was liming at a junction in Maracas, St Joseph. This junction was "a couple houses away" that is about four or five houses away from the house at Acono Road Maracas, St. Joseph. He limed at the junction for the entire night and did not leave the junction until after three in the afternoon of the 4th December 2010. During this time the witness testified that he never saw any one attempt to get into the property at Acono Road Maracas. He saw nothing strange. "Everything was just normal". He saw no one who was unfamiliar to him attempt to enter that property and he emphasized that he was there from the night before and left after 3 or 4 in the afternoon of the next day.

3.22 In cross examination the witness stated that the 3rd was a Friday and the 4th was a Saturday. During that entire period the witness said he was liming -engaged in talking with friends and having a drink. He was not paying attention to how many cars were passing or anything in particular but he was certain that nothing like moving took place.

3.23 Finally, he was clear on the fact that he was not lying to the Court.

3.24 At the conclusion of this evidence, counsel for the defendant made a no case submission.

4. THE SUBMISSIONS

Submission of the defendant

4.1 Mr. Moses states that the claimant has not proved that the defendant failed to carry out the eviction as alleged. The point was developed in this way.

4.2 Counsel for the defendant argues that the claimant is asking the Court to believe that the eviction was not carried out by his client because:

1. The defendant told her that the job was not done and,
2. "Eyes and ears" in the community would have told her about it if such an eviction was done.

Counsel's point is that the claimant cannot seek to establish that a job was not done by saying no one told her that it was done. He says further that if the claimant wanted to establish that no job was done, she should have gone into the witness box and lead evidence in a pointed fashion that she knew no job was done because of "X,Y and Z". In failing to do this, the claimant according to counsel, is now seeking to establish the absence of a positive action by negative inferences.

4.3 Counsel further submits that the evidence of David Mendez is equally unhelpful. This witness according to counsel, says that he knew that no eviction was done because he was opposite the premises and he saw nothing. Counsel submits that this observation cannot be accepted because he never said he had the premises under his observation or was looking for anything in particular. All he was able to say was that he was liming and drinking from the evening before until 3 to 4 the next afternoon and saw nothing. This therefore is another negative assertion which is that he saw nothing therefore the eviction never occurred.

4.4 Mr. Moses states that for these reasons, there is not even "a fragile limb" for the court to rule that there is a case to answer. He supplied no cases in support of his impassioned submission.

Submission of the claimant

4.5 Mr. Sookoo submits in response that he disagrees with counsel for the defendant when he says that the negative proposition advanced by the claimant ought to be proved. Counsel relies on the learning which is contained in **The Halsbury's Laws of England (Volume 11 2009) at paragraph 1096** to support his position. In relevant part it is that:

> "Presumptions of facts are inferences logically drawn from one fact as to the existence of other facts. There is no obligation upon a tribunal to draw such inferences and presumptions of fact are rebuttable by evidence to the contrary".

This according to counsel says that when an inference of fact is to be proved, the tribunal of fact must look at the surrounding circumstances to see if it has been proved.

4.6 Counsel then relied on the case of **Over v. Harwood [1900] 1 QB 803** to take his argument further by saying that the issue which confronted the court in that case was whether certain vaccinations were administered or not and it was sufficient for the claimant in that matter to simply say that it wasn't and the burden then shifted to the defendant to prove that it was in fact administered. In this regard the learning at paragraph two was highlighted by counsel. It is that:

> "How is the proposition, which is a negative one, to be proved? If it were a civil proceeding, the burden of proof would undoubtedly be on the defendant...".

In Mr. Sookoo's view, this supports the position that the burden of proof is actually on the defendant to prove that he did the job once the claimant has adduced a scintilla of evidence from which the court can infer that the job was not actually done. Mr. Sookoo submits further that the Court already has a scintilla of evidence that the job was not done. This comes from:

1. The evidence of David Mendez who says that he was opposite the house on the day in question and saw nothing.
2. The claimant never called by the defendant and notified that he was going to do the eviction.
3. The claimant's "eyes and ears" in the neighborhood would have informed her had the eviction been done.
4. In February 2011 the claimant called the defendant and he told her that he would not be doing the job.
5. The defendant refunded to the claimant the sum of TT $1,000.00 to date.

According to Mr. Sookoo, in light of this evidence it is now for the defendant to show that the job was done. Mr. Sookoo submits further that to do otherwise would mean that the Court would be making the claimant disprove the defendant's case before even advancing her own -which he states may be how it operates in a criminal court but certainly not in the civil arena.

In response Mr. Moses says that there is no evidence at all before the Court that the job was not done and so his client should not be called to answer the case.

The following issues therefore arise for determination:

5. THE ISSUES

5.1 The issues are;

(a) Whether the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence.

(b) Whether there is a threshold test that is to be applied by a court exercising a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence.

(c) Whether the claimant has proved that the defendant has not done the job he was hired to do.

6. THE LAW

(a) Whether the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence:

6.1 The general rule is that a court ought not to rule on a submission of no case to answer unless the party making it elects to call no evidence. The cases which illustrate this point are **Alexander v. Rayson [1936] 1 KB 169, Laurie v. Raglan Building Co. Ltd. [1941] 3 All ER 332** and **Graham v. Chorley BC [2006] EWCA Civ 92.** Notwithstanding this established principle, there is an exception to the general application of this rule because in some instances, a court has the discretion to rule on a submission of no case to answer notwithstanding the fact that the party making the submission has not been put to his election.

6.2 This line of thinking first became apparent with the case of **Mullan v. Birmingham City Council The Times 29 July 1999.** In this case, David Foskett QC, sitting as a Deputy High

Court Judge, found that in the light of new case management powers given to the courts under the new regime and the overriding objective, judges now have a greater discretion to entertain and rule on a defendant's submission of no case to answer without requiring it not to call evidence. As he put it:

> "Given the requirements of the 'overriding objective' to deal with the case expeditiously and fairly, allotting to it an appropriate share of the court's resources and taking account of the need to allot resources to other cases and acting in a way designed to save expense, it did seem to me that I would be entitled to adopt a rather more flexible approach to the kind of submission made than might have been the case prior to the implementation of the Civil Procedure Rules.
>
> The court has considerable power under the Civil Procedure Rules to dictate how a case is to be managed both pre-trial and at the trial. Rule 3.1(2)(m) gives the court power:
>
> > 'to take any . . . step or make any . . . order for the purpose of managing the case and furthering the overriding objective'
>
> over and above the specific orders and directions specified earlier in that rule. In my judgment, therefore, the court does have the power to hear a submission of this nature without putting the defendant to its election".

6.3 Two other cases reflect this line of thinking. The first is **Boyce v. Wyatt Engineering [2001] EWCA Civ 692.** Mance LJ started off by first noting that where a judge decides not to

put defendants to their election before dealing with a submission of no case to answer, there is a need for considerable caution for two reasons. One is that the judge would have to put his mind to the facts of only one side of the case, and if he overrules the submission of no case to answer, he will then be expected to hear further evidence and to retain and apply an open mind in relation to all the facts at the end of the trial which could prove an inherently difficult exercise. The second reason is that if no election is extracted before deciding on a submission of no case to answer, there is always the risk that if the claim is dismissed, and a successful appeal follows, a re-trial would inevitably be ordered at a greater cost than that which would have arisen if the other side had been heard during the first trial. This said, his Lordship went on to state at paragraph 5 that:

> "There may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's evidence or case, but this is not one of them, and care would be required in identifying them".

6.4 These sentiments were echoed in the case of **Bentley v. Jones Harris & Co. [2001] EWCA Civ 1724** where it was said that if a judge concluded that a claimant had no real prospect of success, or was bound to fail, on the judge's assessment of the evidence, the judge would be entitled to give judgment for the defendant in the same way as if there had been an application for summary judgment and so it was held that in that matter, the judge had not been wrong to dismiss the claimant's case, based upon his findings arising out of the facts of the claimant's own evidence. This is what Lord Justice Latham said at paragraph 75:

> "… it will only be in a rare case that the judge should be asked to determine the issues before him before all the evidence has been completed. However, it seems

to me that, if a judge concludes at the end of the claimant's evidence, whether on the application of the defendant or of his own motion, that the claimant has no real prospect of success or, in other words, is bound to fail, on his assessment of the evidence before him at that stage, he is in my view entitled to give judgment for the defendant, in the same way as if there had been an application at an earlier stage in the proceedings for summary judgment under CPR Part 24.2. In that way he will be giving effect, in the circumstances of a trial, to the overriding objective and in particular to the need to contain within limits the expenditure of time and costs on the particular case before him". *(emphasis mine)*

6.5 It also seems to be the case that if there is some flaw of fact which emerges for the first time during the trial which makes it entirely obvious that the claimant's case must fail and it may save significant costs if a determination is made at that stage then in these types of exceptional circumstances, a judge may rule on a submission of no case to answer without requiring an election. This was illustrated in the case of **Miller (t/a Waterloo Plant) v. Cawley [2002] EWCA Civ 1100.** In this case, the claimant claimed sums due for work done in 1998 on a property in which the defendant proposed to live. A preliminary issue arose as to whether or not there was a contract between the claimant and the defendant. At the conclusion of the claimant's evidence counsel for the claimant asked the judge to indicate whether if a submission were to be made to him, he would invite the defendant to elect. The judge said that he would as there was authority which said that a judge should put a person submitting no case to answer on his election except in exceptional circumstances. The defendant elected that she and her witnesses would not give evidence. On the submission of no case the judge asked himself whether there

was any or any real prospect of the claimant succeeding, or any case fit to go before a jury, or before himself wearing his jury hat. Having decided that there was such a prospect he simply stated, without any further consideration of the matter, that the claimant had proved the preliminary issue and that there was a contract with the defendant. The defendant appealed. It was held that where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on the balance of probabilities. In the instant case, the judge having ruled correctly that the defendant should be put to her election, had applied a test which was too favourable to the claimant. It followed that the judgment entered against the defendant could not stand. The matter would be remitted for the judge to hear further submissions applying the correct test and to determine the outcome of the case. The appeal was accordingly allowed. Instructive is the learning set out at paragraph 12 by Lord Justice Mance:

> "But it is clear that in some circumstances a submission of no case to answer at the close of a claimants' case can be appropriate and may, in the exercise of the judge's discretion, be entertained without the defendant being put to his or her election - cf both Bentley itself and Boyce v. Wyatt Engineering [2001] EWCA Civ 692, per Potter LJ at para. 36 (last 31 words). Some flaw of fact or law may, for example, have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". *(emphasis mine)*

6.6 Two points therefore surface from a consideration of the foregoing. One is that in the light of new case management powers given to courts under the new regime and the overriding objective, judges now have a greater discretion to entertain and rule on a defendant's submission of no case to answer without requiring them not to call evidence. Secondly, if there is some flaw of fact which emerges for the first time during the trial which makes it entirely obvious that the claimant's case must fail and it may save significant costs if a determination is made at that stage, then, in these types of exceptional circumstances, a judge may rule on a submission of no case to answer without requiring an election.

6.7 Against this backdrop I conclude that the Court has a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence. Accordingly I turn now to the test which is to be used by a court who has so ruled.

(b) Whether there is a threshold test that is to be applied by a court exercising a discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence

6.8 The law is that the test which is to be applied in circumstances where a court exercises its discretion to rule on a submission of no case to answer without requiring the defendant to elect to call evidence is the prima facie or scintilla of evidence test. The case of **Benham Limited v. Kythira Investments Ltd and Another [2003] EWCA Civ 1794** is instructive on this issue. According to the facts of this case, the claimant was a well-known firm of estate agents. The defendants were property companies. The claimants claimed that they had acted as agents for the defendants in connection with certain property transactions and that they

accordingly became entitled to commission in respect of them. The trial judge dismissed the claim at the close of the claimant's evidence. In doing so he acceded to the defendants' submission of no case to answer without first putting the defendants to their election. The judge accepted that although generally the defendant would be put to his election, the judge had a discretion not to do so in an exceptional case. He thought that such an exceptional case could arise when two conditions were satisfied: first that nothing in the defendant's evidence could affect the view taken of the claimant's evidence, and secondly that it was obvious that the claimant's case must fail.

6.9 The claimants appealed. The appeal was allowed. It was felt that the case crossed the evidential threshold required to defeat a no case submission. If the judge had asked himself the correct question with regard to the evidence adduced, he would have been bound to reject the defendants' no case submission. The point was made that rarely, if ever, should a judge trying a civil action without a jury, entertain a submission of no case to answer. The test to be applied by the judge if he entertained a no case submission was not whether or not on the evidence adduced by the claimant had a real prospect of success. The question to be asked in a case, such as the present, where the defendants' witnesses had material evidence to give on the critical issue in the action could be reformulated variously as follows: have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended, sufficient evidence to call for an explanation from the defendants. That it might be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendants' evidence, or by adverse inferences to be drawn from the defendants not calling any evidence, would not allow it to be dismissed on a no case submission. The claim in the instant case could not be

characterized as having only a fanciful, rather than a realistic, prospect of success. In the circumstances the case was remitted for retrial before a different judge. Lord Justice Brown had this to say at paragraphs 31-32:

> "[31] The linking of the two strains of authority in this way to my mind lends added weight to the need for caution at the half way stage of a trial. The disadvantages of entertaining a submission of no case to answer are plain and obvious and have been spelled out already in the cases. Essentially they are twofold. First, as Mance LJ explained both in Boyce and in Miller, the submission interrupts the trial process and requires the judge to make up his mind as to the facts on the basis of one side's evidence only and applying the lower test of a prima facie case with the result that, if he rejects the submission, he must then make up his mind afresh in the light of whatever further evidence has been called and on the application of a different test. This, to say the least, is not a very satisfactory procedure. The second disadvantage, as again Mance LJ made plain in Boyce and Miller, is that if the judge both entertains and accedes to a submission of no case, his judgment may be reversed on appeal with all the expense and inconvenience resulting from the need to resume the hearing or, more probably, retry the action.
>
> [32] Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was this court's conclusion in Alexander v Rayson and I see no reason to take a different view today, the CPR notwithstanding.

> Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. Just conceivably, as Mance LJ suggested at the end of para 12 of his judgment in Miller (see para 21), "some flaw of fact or law may . . . have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". Plainly, however, that was not the case here and hardly ever will it be so. Any temptation to entertain a submission should almost invariably be resisted".

6.10 It follows that if a Judge concludes at the end of the plaintiff's evidence that he has a discretion to entertain a submission of no case to answer without putting the defendant to his election, the threshold test at that stage is: "have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended, sufficient evidence to call for an explanation from the defendant?". Once an assessment of the evidence reveals that there is a prima facie case or a scintilla of evidence to support each ingredient of the cause of action then the submission must be overruled. With this in mind I come now to deal frontally with the matter raised by counsel for the defendant in developing his submission of no case to answer.

(c) Whether the claimant has proved that the defendant has not done the job he was hired to do

6.11 I have found that the best way to answer this issue lies in approaching the matter in three stages. The first matter to ascertain is precisely upon whom does the burden of proof lie in

respect of proving this negative fact; in other words, who bears the evidential burden of proving this fact? The second matter to determine is what would suffice as sufficient evidence on this matter at this stage of the trial? The final matter is, does the burden shift at this stage of the matter, from one litigant to the other in respect of proof of this negative fact?

The legal burden or the burden of proof rests squarely on the shoulders of the person who is alleging a fact. Authority for this position can be found in **Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd [1942] AC 154** where Lord Maugham made the point at page 174 that "he who asserts must prove, not he who denies". According to the **Blackstone's Civil Practice 2013 at paragraph 47.35** the evidential burden on the other hand is the obligation to adduce sufficient evidence of a fact to allow the issue in question to go before the tribunal of fact.

Who has the evidential burden to prove a negative fact?

6.12 In the opinion of the Court, an appropriate starting point -as previously stated, is to determine which party has the evidential burden in respect of the issue of whether the eviction was conducted or not. Case law suggest that even if an allegation is affirmative or negative, once it forms an essential part of a party's case then that party must bring proof of that allegation. This point was made in the case of **Abrath v. The North Eastern Railway Company (1882-83) L.R. 11 Q.B.D. 440** where at page 457, Lord Justice Bowen made the point that:

> "If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative" and "affirmative" are after all relative and not absolute. In dealing with a question of

> negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively" (emphasis mine).

Further, the principle is actually illustrated in the case of **Tolean v. Portbury (1870) L.R. 5 Q.B. 288.** On the facts of this case, the plaintiff demised a dwelling house to C who in turn covenanted not to permit a sale by public auction on the premises without the consent in writing of the plaintiff. C then let the premises to the defendant, and assigned his goods on the premises to three persons under a bill of sale. They sold the goods on the premises by public auction on the premises, with notices of that auction being posted at various points on the premises. In an action for forfeiture, it was held that there was no evidence that the sale had taken place without the consent of the plaintiff, and the plaintiff was bound in law to give some evidence of this even though it was a negative. This is what Cleasby B., had to say at page 296:

> "I think there is little doubt about the proposition being true, that though it is a mere negative allegation which has to be proved, some evidence must be given. Now, what is the covenant here? It is, that the lessee will not permit a sale without a licence in writing. It involves two things, - a positive thing, permitting the sale; a negative thing, no consent in writing. Therefore, the plaintiff must give not only positive evidence of the sale, but also negative evidence of there being no consent in writing".

It follows from this that the claimant has the burden of proving that the eviction was not conducted by the defendant even if this is a negative fact. The reason for this is that the failure of the defendant to carry out the eviction is an essential part of the claimant's case.

The quality of evidence required to prove a negative fact

6.13 That said, the second matter to be addressed is the quality of evidence which is required to discharge proof of a negative fact. Clearly the amount of evidence and the strength of that evidence which is adduced to discharge the evidential burden regarding a negative fact might very well be considerably less if the opponent is in a better position to know and prove that fact. This point was plainly stated in the cases of **Dunlop Holding Ltd's Application [1979] RPC 537 at page 544, Moller v. Bruce-Sanders Ex parte Bruce-Sanders [1962] QWN 12** and **Bellia v. Colonial Sugar Refining Co Ltd [1961] SR (NSW) 401.** This notwithstanding, the fact remains that the party alleging a fact must be the person to prove that fact. Indeed the point was made by the learned authors **D Bryne & JD Heyton in Cross on Evidence (Australian edition, 1986) at paragraph 4.33** that because a fact may be within the particular knowledge of one party does not relieve that other party of the burden of adducing evidence on the issue.

6.14 Additionally, even slight evidence on the issue will suffice or as Baron Alderson made the point at page 665 of **Elkin v. Janson (1845) 13 M&W 655** "slender evidence" is all that could be expected. On the facts of that matter the plaintiff bore the initial burden of proving that a material communication -which was that the ship was missing, was not made to the insurance company at the time the insurance policy was sought. The fact of the acceptance by the underwriter of the application for the insurance of the ship, was regarded by the court to be

sufficient evidence that the defendant had not communicated to the insurance company the fact that the ship was at that material time a missing ship. This is how the matter was stated at pages 665 to 666:

> "No one could have any doubt whether such a fact as that had been communicated to the defendant or not; and proof of the fact itself would be reasonable evidence to shew that it had not been communicated, because the absurdity of such an insurance is so great, that you would naturally conclude that the insurer could not be aware of the fact of the ship's destruction by fire when he executed the policy. So here, it is almost impossible to believe that the defendant would have insured this ship, had he known that she had sailed from Seville so long before, that she must be considered as a missing ship at the time the policy was effected. It was proved affirmatively that the time of her sailing was communicated to the plaintiff, and that is sufficient to require some affirmative evidence from him, to shew that it was also communicated to the defendant".

6.15 Another case which illustrates the operation of this principle is the Canadian case of **Littley v. Brooks [1930] S.C.R 416** where it was held that the fact that a witness did not hear a train whistle was sufficient to infer that the train never signaled its whistle at the material time. This is what Rinfret J had to say on the matter:

> "9 That he did not hear the sound of the whistle is, as a general rule, the most any witness can say as to whether the particular signal was or was not given. No doubt, his evidence will not be relevant or material, if, at the time, the witness was not in a position to hear or was shown not to have been paying any attention

whatever. But, in a later part of his testimony ... [witness] said that `what first attracted (his) attention to the train' was `the sound of it going along the line'. He could `hear the rumble of this train for a distance of 300 yards.' If he could hear the train, it would not be unreasonable to assume that had the whistle been sounded, he could also have heard it. And if, under the circumstances he described, ... [witness] did not hear it, a fair and even logical inference may be that the whistle was not sounded either at eighty rods from the crossing or at the whistle post.

10 That evidence, if believed by the jury, would establish the fact of non-performance by the motorman of a specific positive duty laid on him by the statute or imposed as a precautionary measure by the company itself; and if, in the opinion of the jury, the omission caused or contributed to the accident, it would entail the responsibility of both the motorman and the company.

11 That would bring this case within the rule laid down by Lord Cairns in Metropolitan Railway Company v. Jackson:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should

> be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the Jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.
>
> 12 In the passage quoted from Worgan's testimony, we think there was "evidence — more than a mere scintilla — from which negligence may be reasonably inferred"; and it was for "the jurors to say whether, from those facts, when submitted to them, negligence ought to be inferred." Accordingly the case should not have been withdrawn from the jury, and there must be a new trial as against both respondents".

6.16 I am of the view that the case of **Over v. Harwood [1900] 1 Q.B. 803** albeit a case from the criminal arena, which was the case upon which counsel for the claimant Mr Sookoo relied, is another robust illustration of the principle of law that slender evidence is all that is actually required to satisfy the evidential burden in respect of proof of a negative fact. On the facts of that matter, the prosecution had to prove that a child had not been vaccinated since the defendant was charged with non-compliance with an order of the court that he should have his child

vaccinated. Even if the public vaccinator had been called to say the child had not been vaccinated by them, it was entirely possible that the defendant could have taken the child to any other medical practitioner to have the vaccine administered but this notwithstanding, the court was prepared to act on what they termed "the proper presumption" in the circumstances of that case -being that the proper person had not administered the vaccine and this could only be accounted for on the basis that the father had not taken the child to be vaccinated. This according to Channell J at page 807 was "prima facie evidence sufficient to satisfy the burden of proving the negative proposition that the child has not been vaccinated".

6.17 This leeway in terms of proof of a negative fact is similarly recognized in the case of **Weatherill Estate v. Weatherill 2003 A.B.Q.B 69, 11 Alta. L.R. (4th) 183** where it was stated at paragraph 16 by Slatter J that:

> " In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference.

> When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question (emphasis mine)".

These cases therefore suggest that the extent of proof which is required by the claimant proving a negative fact could be "slender evidence".

Does the evidential burden shift?

6.18 Taking the matter just one step further, the final matter which arises for consideration is whether the evidential burden will shift at any stage to the defendant. Mr. Sookoo submits that once sufficient evidence is before the court which proves or as he says "raises" the fact that the eviction was not done, it will then be for the defendant to prove that the job was in fact done. I am inclined to agree with Mr. Sookoo. The general position regarding what is involved in a shifting evidential onus is in my view, neatly summarized in the case of **Rockcote Enterprises Pty Ltd v. FS Architects Pty Ltd [2008] NSWCA 39 at paragraphs 74 and 84** where Campbell JA had this to say:

> "If a plaintiff has the onus of proving a negative proposition, the fact that the defendant has greater means to produce evidence which contradicts that negative proposition, does not mean that the plaintiff ceases to have the onus of proof of that negative proposition. However, once the plaintiff establishes sufficient evidence from which, if that evidence is accepted, the negative proposition may be inferred, an evidential onus shifts to the defendant to adduce evidence that

tends to show that the negative proposition is incorrect. If a defendant adduces such evidence, the plaintiff must then, as part of its overall burden of proof, deal with that evidence either by submission or argument. See generally *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation (1985) 1 NSWLR 561; Hampton Court Ltd v Crooks [1957] HCA 28; (1957) 97 CLR 367 at [1]-[2], 371-2; Baiada v Waste Recycling & Processing Service of NSW [1999] NSWCA 139; (1999) 130 LGERA 52 at [55], 64-65.* As Hunt J put it in Apollo at 565:

> '… provided that the plaintiffs have established sufficient evidence from which the negative proposition may be inferred, the defendant carries what has been called an evidential burden to advance in evidence any particular matters with which (if relevant) the plaintiffs would have to deal in the discharge of their overall burden of proof …. [T]he plaintiffs' burden of proof of the negative proposition for which they contend is not as difficult in this case as it might otherwise have been because of the defendant's greater means to produce evidence which contradicts that proposition.'

…

Before an evidential onus shifts from a plaintiff, the plaintiff must have adduced enough evidence for the court to infer, if the evidence that the plaintiff adduced was accepted by the court and was the only evidence on that topic in the case, that the proposition concerning which the plaintiff had the onus of proof was more

likely than not true. In that situation, one says that an onus of adducing evidence shifts to the defendant because the defendant is then in a situation in which, if the defendant does not adduce evidence concerning that proposition, the plaintiff might succeed in establishing that proposition. Counsel for a defendant has to decide whether to adduce evidence on a topic at a time in the course of the trial when counsel necessarily cannot be absolutely sure of two matters that are of critical importance to whether the onus of adducing evidence has actually shifted - will the judge accept the plaintiff's evidence on the topic, and if so will the judge regard that evidence, if no other evidence is adduced, as enough to make it more likely that the plaintiff's contention concerning that topic is correct. The type of 'onus' that the defendant is then under is one of practical necessity - either adduce evidence, or risk losing on that issue. But before a defendant is in that situation, the evidence that the plaintiff has put forward on the topic must be such that, if accepted and the only evidence on the topic, it would justify the court in deciding it is more likely than not that the proposition for which the plaintiff bears the onus of proof is true. If the evidence that a plaintiff adduces is equally consistent with that proposition being true, or that proposition not being true, so that the plaintiff would fail to discharge its onus of proof if that were the only evidence on the topic, the defendant does not come under the sort of practical compulsion that I have been describing".

6.19 The question which concerns the Court at this stage however, is whether the claimant has in fact led a scintilla of evidence to even call upon the defendant to answer the claim. If I so find, then the defendant will face an onus of practical necessity -to repeat the words of Campbell

JA in *Rockcote Enterprises Pty Ltd v. FS Architects Pty Ltd (supra)* in respect of whether he did do the eviction he was contracted to perform for the claimant but that onus would only arise if the defendant is called upon to answer the case against him.

6.20 Applying this learning to the matter at hand, the cases in summary, suggest that

1. The claimant must prove that the defendant did not carry out the eviction
2. Evidence of this negative fact can be "slender evidence"
3. If a case is made out only then would the onus be placed on the defendant to prove positively that he did carry out the eviction -if he chooses so to do.

6.21 With this in mind I find that the claimant bears the evidential burden of proving the fact that the eviction was never conducted by the defendant. Looking at the evidence before me, I find further that the claimant has led a scintilla of evidence that the defendant failed to carry out the eviction he was contracted to perform. I am able to make this finding from:

1. The evidence of David Mendez who says that he was opposite the house on the day in question and saw nothing. The inference being that had the eviction occurred on that day, he would have seen it unfold.
2. The claimant was never called by the defendant and notified that he was going to do the eviction. The inference being that if he was going to do the eviction he would have told her of same beforehand.
3. The claimant's "eyes and ears" in the neighborhood would have informed her had the eviction been done. The inference in this case being that if the eviction had occurred the neighbors would have said something to the claimant.

4. In February 2011 the claimant called the defendant and he told her that he would not be doing the job.

5. The defendant refunded to the claimant the sum of TT $1,000.00 to date.

In making these findings I disagree with counsel for the defendant Mr. Moses that there is no evidence at all before the Court that the job was not done.

7. ORDER

7.1 I am of the view that on an assessment of the evidence led the ultimate question of whether the claimant has advanced a prima facie case or a scintilla of evidence of her claim is a question correctly answered in the affirmative.

7.2 In these circumstances the Court orders that:

1. The claimant has established a prima facie case or a scintilla of evidence of her claim against the defendant.

2. The submission of no case to answer fails.

3. The cost of this application will be cost in the cause.

8. POSTSCRIPT

8.1 The Court takes the opportunity to thank Mr. Joseph Sookoo and Mr. Ancil Moses for the benefit of their industry. In this matter, the Court had the very helpful oral submissions of both advocates which were plainly the result of thorough research. Such assistance offered by them is greatly appreciated.

……

Her Worship Magistrate Nalini Singh

Petty Civil Court Judge