REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Procedural Appeal No.180 of 2018
CV 2015-02039

BETWEEN

BANKERS INSURANCE COMPANY OF TRINIDAD AND TOBAGO LIMITED

Appellant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Respondent

AND

MARITIMA DE ECOLOGIA S.A. DE CV

Défendant to Counterclaim

Procedural Appeal No.188 of 2018
CV 2015-02039

BETWEEN

PETROLUEM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Appellant

AND

BANKERS INSURANCE COMPANY OF TRINIDAD AND TOBAGO LIMITED

Respondent

AND

MARITIMA DE ECOLOGIA S.A. DE CV

Defendant to Counterclaim

PANEL: A. Mendonça, J.A.
J. Jones, J.A.
P. Rajkumar, J.A.

APPEARANCES:

Mr. I. Benjamin S.C. and Mr. P. Rudder instructed by the Mr. R. Mungroo and Associates for Bankers Insurance Company of Trinidad and Tobago Limited.

Mr. R. Martineau S.C. and Ms. A. Rahaman instructed by Mr. M. Ferdinand for Petroleum Company of Trinidad and Tobago Limited.

DATE OF DELIVERY: 22nd October, 2018

REASONS

1. On 22nd of October we delivered oral reasons in these appeals we now give our written reasons. Both Appellants appeal decisions made by the Judge with respect to the evidence to be admitted at trial. The Appellant, Bankers Insurance, appeals the decision of the Judge in dismissing its hearsay notice dated the 20th November 2017 and striking out portions of the witness statement of Vance Gabriel. The Appellant, Petroleum Company of Trinidad and Tobago, ("Petrotrin") appeals the failure of the Judge to strike out portions of the witness statements of Patrick Zoe, Vince Gabriel and Marlene Samuel all filed by Bankers Insurance.

2. Generally oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the facts or matters stated therein. By its hearsay notice Bankers Insurance seeks to adduce into evidence documents and out of court statements pursuant to sections 39 and 37 of the Evidence Act Chap 7-02. (the Act). The Act permits a party to adduce hearsay evidence where made admissible by the Act, any other statutory provision or by agreement between the parties but not otherwise: **section 36(1).** Both sections 37 and 39 of the Act provide for the admission of oral or written statements as evidence of any fact stated therein of which direct oral evidence would have been admissible. By Section 37(3) of the Act however second hand hearsay is not admissible.

3. Prior to the passing of the Act, in civil proceedings, acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue were admissible as forming part of the res gestae. This was a common law exception to the hearsay rule. The Act, by section 44, permits certain hearsay evidence, formerly admissible under the common law as exceptions to the hearsay rule, to be admissible. Statements forming a part of the res gestae are however not one of the exceptions made admissible by the section. By section 36(1) therefore statements made as part of the res gestae, not being statements made admissible by the Act or by any other statutory instrument, are no longer admissible as an exception to the hearsay rule unless the parties agree otherwise. The Act provides a complete code for the admission of hearsay evidence within its terms.

4. To admit hearsay evidence pursuant to sections 37 and 39, the Act requires the party seeking to adduce the evidence to comply with the provisions of the Act and any applicable rules of court. Part 30 of the Civil Proceedings Rules 1998 as amended ("the CPR") contains the applicable rules. The relevant rules are 30.3 and 30. 4.

5. **30.3** deals with the admissibility of out of court statements admissible under section 37 of the Act and provides that:

> "(2) Where the statement was not made in a document, the notice must contain particulars of –
>
> (a) the time, place and circumstances at or in which the statement was made;
>
> (b) the persons by whom and to whom the statement was made; and
>
> (c) the substance of the statement and so far as practicable the words used.
>
> (3) Where the statement was made in a document –
>
> (a) a copy or a transcript of the document or of the relevant part of the document must be annexed to the notice; and
>
> (b) such of the particulars required under paragraph (2)(a) and (b) as are not apparent on the face of the document must be given.
>
> (4) If the party giving the notice –
>
> (a) does not intend to call any person of whom details are contained in the notice; and
>
> (b) claims that any of the reasons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied on."

6. **30. 4** deals with the admissibility of certain records made admissible under s.39 of the Act (admissibility of certain records) and provides:

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

(3) The notice must also contain –

(a) particulars of –

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

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

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

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

(i) compiling the record; or

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

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

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

(4) If the party giving the notice –

(a) does not intend to call any person of whom details are contained in the notice; and

(b) claims that any of the reasons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied on."

7. Pursuant to sub-rule (4) of each rule therefore where the party giving the notice does not intend to call the person making the statement that party is only required to provide the reasons for not doing so if it claims that any of the reasons set out in rule 30 .6 applies. Where any of the reasons set out at rule 30.6 is contained in the notice no counter notice requiring the attendance of the maker may be served: **30.7(4)**. Where no such reason is given the opposing party may file a counter-notice seeking to challenge the credibility of the hearsay evidence by seeking the production of the maker of the statement.

8. Rule **30.2** requires the hearsay notice to be served "not later than the time by which witness statements are to be served or, if there are no such statements, not less that 42 days before the hearing at which the party wishes the evidence to be given unless the court gives permission."

9. Rule **30.8** permits a judge to allow hearsay evidence falling within sections 37, 39 and 40 of the Act "even though the party seeking to adduce the evidence has

(a) failed to serve a hearsay notice; or

(b) failed to comply with the requirement of a counter-notice served under rule 30.7;

10. It is not in dispute that the hearsay notice was served after the filing of Bankers Insurance's witness statements but outside of the 42 day period referred to in the rule. The Judge found that the service of the notice did not comply with part 30.2 of the CPR and further that part 30.8 did not permit her to allow the documents or the oral statements into evidence. She was of the view that part 30.8 only allowed a discretion to admit in the circumstances identified at sub- paragraphs (a) and (b) of the rule. She therefore dismissed Bankers Insurance's hearsay notice. The Judge however went on to deal with Petrotrin's application to strike out certain of the paragraphs of Bankers Insurance's witness statements.

11. We propose to deal with the issues that arise out of the hearsay notice and then deal with Petrotrin's strike out application. Insofar as there may be an overlap we will treat with the appeals with respect to the contents of the witness statements together.

The hearsay notice

12. Bankers Insurance submits that the Judge was wrong in her determination that the hearsay notice was served out of time. It submits that the rule refers to the witness statements of the persons making the hearsay statements. Since it has no intention of filing witness statements of those persons then the part of the rule that refers to the service of witness statements does not apply. Accordingly having served the notice not less than 42 days before the hearing the service is not out of time and

the notice valid. In any event, it submits, the court has the power pursuant to part 30.8 to allow the documents into evidence.

13. Insofar as the Judge determined that the hearsay notice was served out of time she was correct. On any reading of the rule witness statements can only refer to the witness statements ordered to be served in the proceedings. To attribute the meaning ascribed to the rule by this Appellant makes no sense and does not accord with the plain meaning of the rule. Indeed were the rule to apply in the manner suggested by Bankers Insurance there would be no need to make the hearsay application because the makers would have filed witness statements. The rule therefore requires that hearsay notices be served not later than the time that the evidence in the matter, that is, the witness statements are to be served. It is only where the party seeking to adduce the evidence serves no witness statements that the 42 day period applies.

14. Insofar as the Judge determined that she had no jurisdiction to allow the documents into evidence pursuant to rule 30.8 she was wrong. Rule 30.8 did give the Judge the power to admit the out of court statements. The exercise of the discretion under the rule is not limited to only circumstances' where (a) and (b) of the rule applies as the Judge found. The rule allows a court to exercise its discretion to admit hearsay evidence even in circumstances where no notice has been filed. In this regard it is inclusive rather than exclusive. It follows therefore that it can be exercised in circumstances where the hearsay notice is defective.

15. The Judge having failed to consider whether she should exercise her discretion pursuant to the rule it now falls to us to consider whether this is an appropriate case in which to exercise any discretion pursuant to the rule. The exercise to be embarked upon is not an exercise to grant Bankers Insurance an extension of time to serve the hearsay notice but to examine whether we ought to exercise our discretion pursuant to part 30.8 to allow any of the hearsay evidence sought to be adduced by Bankers Insurance by its hearsay notice into evidence. The effect of any order pursuant to rule 30.8 will be that the evidence is allowed as evidence of the truth of the matters contained therein.

16. It seems to us that the fact that the notice was served late does not of itself prevent us from exercising our discretion. We have not been told of any prejudice to Petrotrin attributable to the delay. It has in accordance with rule 30.7 filed a counter-notice and there is no claim that the trial date has been affected by the late service.

17. The hearsay notice is defective insofar as it seeks to have statements made in documents admitted. The notice does not contain the particulars required under Part 30.4 (3) of the CPR. In particular it does not contain:

    (i) particulars as to the persons by whom the record containing the statement was compiled; the person who originally supplied the information from which the record was compiled and any other person through whom that information was supplied to the compiler;

(ii) a description of the duty under which any person named or particularized under (i) above was acting when compiling the record or supplying the information from which the record was compiled; and

(iii) save perhaps with respect to the date of 4 of the documents particulars of the time when, place at and circumstances under which that record was complied.

18. It seems to us that the particulars absent from the notice are integral to any assessment as to the authenticity and probative value of the documents. These are all relevant considerations in the exercise of the discretion under rule 30.8. Further their absence limits the ability of the opposing side to challenge the bona fides of the information contained in the documents. This is particularly so where the company to whom the documents relate is a foreign entity. An examination of the documents sought to be adduced reveals that this information is not readily available or in some cases not available at all. Nor has Bankers Insurance sought to provide any of this information by any other means. In the absence of this information this is not a proper case for the exercise of the discretion under rule 30.8 of the CPR.

19. This however does not prevent Bankers Insurance from seeking to admit the documents into evidence through the persons to whom the documents were produced pursuant to the rule in **Subramaniam**[1]**,** that is, as evidence of the fact that they were made, in this case given to the witnesses, but not for the truth of the contents.

[1] [1956] 1WLR 956

20. That part of the hearsay notice seeking to adduce oral out of court statements does comply with the requirements of rule 30.3. In this regard therefore unless they contain second hand hearsay made inadmissible by section 37(3) of the Act they are admissible pursuant to rule 30.3.

21. As indicated earlier we will deal with all the applications with respect to the oral out of court statements together. Where it is stated that the statements are admissible pursuant to Part 30 those statements have been admitted for the truth of the facts contained therein. Where statements are admissible pursuant to the rule in Subramanium they are admitted for the fact that they have been said and not for the truth of the facts stated therein.

Witness Statement	**Paragraph number**	**Judge's decision**	**Decision**
Patrick Zoe	27, lines 1-6 "In addition as a result of my interviews with Mr. Salvidar and Mr. Baharas they gave me the clear impression that Maritima was a modest business that did not own nor possess any of the vessels or production equipment necessary to perform the Soldado project. This project was the first overseas endeavour and it proved to be very expensive for them."	The Judge allowed this evidence.	This comprises inadmissible opinion. Any conclusions to be drawn from the meeting is for the Judge. Struck out
	29, lines 1-5 "Based on all of the information provided to me by Maritima in the course of my investigation and given their admissions to me nothing was said nor shared with me to suggest that Maritima ever had the necessary physical or financial resources	The Judge allowed this evidence.	This comprises inadmissible opinion. Any conclusions to be drawn from the information is for the Judge. Struck out

	available at its disposal to execute the contract within the agreed time"		
	30, lines 11-12 "which is a requirement for making a call under the Bond"	The Judge allowed this evidence.	This comprises inadmissible opinion. The witness is not an expert in law. Struck out
Vance Gabriel	7, lines 3-6 "He informed me that his client was awarded a contract by the Petroleum Company of Trinidad and Tobago ("Petrotrin"), the Claimant in these proceedings, and that he would like Bankers to issue the Performance Bond".	The Judge allowed this evidence.	This evidence is not in dispute. Allowed.
	8, lines 1-6 "Mr. Neil Gosine further indicated that his client was a company out of Mexico who are very experienced in Oil & Gas business and that they were able to obtain the contract because of the vast knowledge and experience in relation to the nature of the contract. He further indicated that he will be able to supply all the normal requirements for the Bond and that all will be fine with the job".	The Judge allowed this evidence.	This is sought to be admitted pursuant to the hearsay notice. Words "who are very experienced in Oil & Gas business and that they were able to obtain the contract because of the vast knowledge and experience in relation to the nature of the contract." deleted pursuant to section 37(3) of Act. It is second hand hearsay. The words are however allowed under the rule in Subramaniam. The rest of the paragraph allowed pursuant to Part 30.
	9, lines 1-5,	The Judge allowed	This is sought to be admitted by the hearsay notice. It is

	"advising that a request was made to Bankers for the Performance Bond and indicated that all the relevant documents were already supplied to Bankers and asked me to look at the Website for confirmation of the profile of the Company"	this evidence.	allowed pursuant to Part 30.
	10, lines 1-5 "Mr. Gosine again indicated to me on the telephone that the proposed insured was a well- established contractor carrying out jobs successfully including several overseas projects and spoke in glowing terms about the contractor financial strength and capabilities of completing the job awarded by Petrotrin".	The Judge allowed this evidence.	This is sought to be admitted by the hearsay notice. Not allowed since it comprises second hand hearsay contrary to section 37(3) of the Act. It can however be admitted pursuant to the rule in Subramaniam.
	16, Lines 3-16 "This information implied that Maritima had possession or operation of vessels and equipment as follows: "Our WTSV vessels offer the following services: Receive fluids from oil head; Once received, the process pant separates the crude oil Etc… Toisa Pisces-Operated by Maresca from March 2004 to September 2010, Gulf of Mexica" Burbon Opale-"Operated by Maresca since March 2004, Gulf of Mexico" ECO 111-"Operated by Maresca from February 2010, Gulf of Mexico" Results shown in the table represent the oil recovered during the past 5 years by our FPSO Fleet".	The Judge struck out this evidence.	Words "This information implied that Maritima had possession or operation of vessels and equipment "struck out. This comprises impermissible opinion. This is a matter for the judge. The rest of the paragraph admitted pursuant to the rule in Subramaniam.

<table>
<tr>
<td></td>
<td>17, lines 1-4,

“By implying ownership or operatorship of these vessels, Comprehensive represented to Bankers that Maritima had the capacity to recover product proximate to that gained in former years. The table below indicates these estimates:-

<table>
<tr><th>Ship</th><th>Oil recovered per year per (barrels)</th><th>Value of oil recovered</th></tr>
<tr><td>Toisa Pisces</td><td>189,079</td><td>$14,180,925.00</td></tr>
<tr><td>Bourban Opale</td><td>88,187</td><td>$6,614,037.00</td></tr>
<tr><td>ECO III</td><td>159,804</td><td>$11,985,300.00</td></tr>
</table>
</td>
<td>The judge struck out this evidence.</td>
<td>The Judge’s decision to strike out upheld but on different grounds. The implications and the conclusions to be drawn from the statements made by Comprehensive for the Judge. Struck out.</td>
</tr>
<tr>
<td></td>
<td>18, lines 1-3

“I recall that Mr. Neil Gosine of Comprehensive represented to me orally that Maritima had an established track record in this area and that the Company was well experienced to handle the contract”.</td>
<td>The judge allowed this evidence.</td>
<td>This is sought to be admitted pursuant to the hearsay notice but is second hand hearsay. But admitted pursuant to the rule in Subramaniam.</td>
</tr>
<tr>
<td></td>
<td>20, lines 2-4

“indicating that the Bond was urgent and that Bankers should not hesitate to accept business since the company was well established and solid”.</td>
<td>The judge allowed this evidence.</td>
<td>This is sought to be admitted pursuant to the hearsay notice but the words “since the company was well established and solid” are second hand hearsay. These words are not admitted pursuant to Part 30 but are admissible pursuant to the rule in Subramaniam. The rest of the statement admitted pursuant to Part 30.</td>
</tr>
</table>

	22, lines 2-4 "advising that the bond was urgent since it affected the awarding of the Contract and that he needed the Bond urgently. He further advised me that he would be sending over Mr. Jeffrey Clarke, who is the client's local agent in Trinidad to collect the Bond at our offices".	The judge allowed this evidence.	Sought to be admitted pursuant to the hearsay notice. The Judge's decision upheld but on different grounds. Admitted pursuant to Part 30.
	23, lines 4-5 "needed the Bond to take to Petrotrin the same day"	The judge allowed this evidence.	Admitted pursuant to the rule in Subramaniam.
	25,lines 1-5 "advising that he was at Comprehensive's office and indicated to me that Maritima was seeking to obtain Workmen's Compensation and Public Liability insurances and I informed him that we can provide a quotation but I did not hear further from him on this request"	The judge struck out this evidence.	Admitted pursuant to the rule in Subramaniam.
	27,lines 1-6, "Mr. Ali informed me that he received a telephone call from Mr. Khalid Hassanali of Petrotrin who informed him that Petrotrin were having problems with Maritima and he wanted to know the financial state of Bankers. I am informed by Mr. Ali and verily believe that he advised Mr. Hassanali that the Bond was reinsured with Lloyd's of London and that the Reinsurers are A rated".	The judge struck out this evidence.	Admitted pursuant to the rule in Subramaniam.

Marlene Samuel	16, lines 1-4 "he informed me that he had quoted a premium of TT$670,499.24 inclusive of tax to Mr. Neil Gosine of Comprehensive and once it was accepted to go ahead and prepare the bond document and invoice for same"	The judge allowed this evidence.	Objection withdrawn.

22. Accordingly the appeals are allowed in part in accordance with these reasons.

A. Mendonca
Justice of Appeal

Judith Jones
Justice of Appeal

P.Rajkumar
Justice of Appeal