

IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

CLAIM NO. DOMHCV2013/0407

BETWEEN:-

ANTHONY MARTIN

CLAIMANT

AND

LIME DOMINICA LTD.

DEFENDANT

Appearances

Gina Dyer Munro of Dyer and Dyer for the Claimant

Danielle Wilson of Gerald Burton's chambers for the Defendant

2015: July 10

August 12th

2016: October 11th

2020: February 17th

[1] **Stephenson J.:** There have been a number of interlocutory applications and cross applications with the supporting affidavits filed thus far in this matter with quite a few appearances before the learned master culminating in a ruling handed down by the learned master on the 11th October 2016 where it was ordered that the defendant's application to strike the witness statement of Craig Nesty and Peter Bannis filed on behalf of the claimant herein is to be determined at Pre Trial Review by the Judge.

- [2] The parties both filed their Pre trial Memoranda in March 2017. Thereafter the file was misplaced in the confusion and fall out in the registry and the civil court as a result of the ravages of Hurricane and Maria including the onset of mold in the temporary court room assigned to the civil division thereby causing sever disruption in the court services to its users. This court wishes at the onset of this ruling to apologise profusely to the parties herein for the length of time it has taken for this file to surface and for this ruling to be delivered.
- [3] Before the court at this time is an application brought by the defendant Lime Dominica Ltd to strike out the witness statements of Craig Nesty, Peter Bannis and Walter Greenaway filed on the 10th July 2015. There is an affidavit of Jeffery Baptiste filed on even date in support of this application. The court has also considered the submissions filed by SC Alick Lawrence then appearing on behalf of the defendant filed on the 15th July 2015.
- [4] On the 12 August 2015, the claimant filed his affidavit in reply to the application to strike and due consideration has been given to the claimant's submission in response to the defendant's application to strike filed on the said 12th August 2015.

The application to strike:

- [5] The application to strike was file on the 10th July 2015 and the grounds stated in the said application is that the evidence which the claimant seeks to adduce through these witnesses is opinion evidence and is expert evidence which is being adduced without the requisite leave of the court in non compliance with Part 32 of the Civil Procedure Rule 2000 (CPR 2000). Further that the evidence which the claimant is seeking to adduce in these impugned witness statements usurps the role of the court by purporting to decide the ultimate issue namely the similarity between the post that was made redundant and that new post created thereafter.
- [6] In the affidavit¹ of Jeffery Baptiste the General Manager of the defendant company sworn in support of this application it is stated that he has read the impugned witness statements of Craig Nesty, Peter Bannis and Walter Greenaway that the evidence which the claimant is seeking to adduce through these witnesses is opinion evidence and expert testimony and or a determination by him that the post which the claimant held and a new one which followed are similar.
- [7] The deponent avers that he has been advised by counsel and verily believes that the evidence which the claimant seeks to adduce is impermissible and inadmissible and that in the circumstances of this case that the said witness statements be struck out.
- [8] The claimant filed his response to this application and affidavit on the 12 August 2015 and he averred as follows in response to the averments made in the affidavit of Mr Baptiste:

¹ Affidavit of Jeffery Baptiste filed on the 10th July 2015 at paragraph 3 & 5

- a. That Craig Nesty worked at LIME Dominica for several years and has personal knowledge of the facts as stated in his witness statement.
- b. That during his tenure at LIME Dominica Craig Nesty worked as Product Manager CPE and PBX and that he has been advised by his solicitor and verily believes that the Craig Nesty's evidence is not opinion evidence;
- c. That Peter Bannis worked with the defendant company for 20 years and his evidence is based on the knowledge and expertise acquired over that period of time; and
- d. That Peter Bannis is stating comparisons based on two job descriptions based on his personal knowledge which does not amount to expert testimony or opinion evidence; and
- e. That Walter Greenaway was part of the discussions with the Union and was a shop steward at the defendant company for some time and that the statements which he makes is of his own personal experience and knowledge and not opinion evidence.

[9] As it regards the impugned witness statements of Craig Nesty, Peter Bannis and Walter Greenaway Learned Senior Counsel Alick Lawrence submitted that:

- a. These witnesses seek to speak to their familiarity with the Product Management CPE and PBX but they do not state the basis of their familiarity;
- b. The witnesses do not state what fields they worked in at the defendant company;
- c. Nesty confirms that he is giving expert evidence when he states at paragraph 23 *"Based on my knowledge expertise, I can say that the role of the customer Solutions SME is the same as the role of the Product Manager PBS and CPE"*;
- d. That the evidence which the claimant is seeking to adduce through the witnesses Greenaway is opinion evidence and hearsay evidence
- e. All the witnesses seek what is opinion evidence in comparing the job descriptions of the of the two positions at the defendant company.

[10] It was further submitted by the Learned Senior Counsel Alick Lawrence that it is trite law that witnesses are not permitted to give opinion evidence unless it is expert testimony and to give expert testimony there must be compliance with the parts 32 of CPR 2000 more particularly parts 32.4(2) to (4) and Part 32 (6), (13) and (14).

[11] Learned Counsel Dyer Munro on behalf of the claimant opposed the defendant's application to strike out the witness statements of Nesty, Bannis and parts of the witness statement of Greenaway and asserted that:

- a. The application is premature in that the claimant pursuant to rule 29.9 (a) of CPR 2000 will have during the trial of the matter to amplify the evidence contained in the witness statements and accordingly the witnesses will be able to speak of their work at the defendant company and may give further evidence of their knowledge in that regard;
- b. evidence which is being adduced through these witnesses is not opinion evidence as submitted on behalf of the defendant but is evidence as to facts as is known personally to the witnesses.

[12] Learned counsel Dyer Munro cited the following passage extracted from “Zuckerman on Civil Procedure in support of her submission that the evidence which is being adduced through these witnesses is not opinion evidence

*“ We may therefore conclude that the test behind the inadmissibility of opinion does not rest on a sharp distinction between statements of fact and statements of opinion but on a more blurred distinction between statements of facts that are too general to be testimonially useful and statements of fact that are sufficiently detailed or concrete to be of real assistance in the determination of the issues.”*²

[13] The defendant filed their response³ to the claimant’s submissions in response to their submissions regarding the defendant’s application to strike out the witness statements of Bannis. Nesty and parts of the Greenaway witness statement . In his submissions learned Senior Counsel Alick Lawrence submitted as follows:

- a. That the claimant’s opposition to the defendant’s application on the ground that the application is premature is ill founded. That before evidence can be amplified that evidence must be admissible and the impugned witness statements breach Part 29(1)(e) of CPR 2000 which states

Part 29.1 “A witness statement must –

...

(e)not include any matters of information or belief which are not admissible or, where admissible, must state the source of any matters of information or belief;

...”

[14] It was further submitted that it is at case management that the irrelevant or inadmissible evidence is to be excised.

[15] In further submissions dated the 19th October 2018 regarding this application Counsel Dyer Munro on behalf of the claimant sought to the court’s attention that the ruling of Master Actie regarding the defendant’s application to strike out the witness statements of Bannis and Nesty and pointed out that the learned master ruled that “*evidence in the witness statements which the defendant is seeking to impugn appears to be factual statements based on the witnesses knowledge as employees in the senior positions with the defendant company over a number of years*”⁴

[16] Counsel further referred to the following statement made by the Learned Master later down in her judgment⁵:

² Zukerman on Civil Procedure 2nd Edition at paragraph 20.5

³ These submissions were filed pursuant to the order of Master Actie on the 28th September 2015

⁴ Paragraph 21 of the Ruling of Master Actie dated the 11 October 2016

⁵ Ibid at paragraph 37

“The court notes the factual evidence in the witness statement and summary of Mr. Craig Nesty, Peter Bannis and ... respectively who are all former longstanding employees of the defendant. The witnesses provided a comparative analysis of the two positions in dispute as is now being proffered by Nolan in his witness statement. The witnesses appear to be giving factual evidence from their knowledge as current and past employees of the defendant company. It is the duty of the court to allow parties to fully ventilate their cases and to assist the court with sufficient information to effectively deal with the case.”

[17] Learned Counsel Dyer Munro submitted that the Learned Master permitted the evidenced of Eugene Nolan and that the evidence that is being adduced by the witnesses Nesty, Bannis and Greenaway is of the same ilk as the evidence of Nolan and should be allowed. Counsel further pointed out that the defendants have failed to appeal the Master's decision reading the nature of the evidence being adduced through these witnesses and in the circumstances for this court to strike out the evidence contained in the witness statements of these witnesses would not be in keeping with the overriding objective of CPR 2000.

Court's considerations:

[18] I have reviewed the ruling of the Master Actie in this matter. Her ruling seems to address the defendant's application to strike out the parts of the witness statement of Nesty, Bannis and Telemaque. I agree with Counsel Dyer Munro that in her ruling the learned Master stated that the impugned paragraphs of the witness statements of these witnesses is factual evidence and not opinion evidence as urged by the defence.

[19] It is noted that the Learned Master later in her judgment said *“It is for the trial judge to distill the evidence filed by both parties. ... Any objection to the admissibility of any of the statements can be taken at Pretrial when all the evidence is in.”*⁶ The learned Master at the end of her judgment ordered as follows *“The defendant's application to strike out parts of the witness statements of Mr Craig Nesty, Peter Bannis ... is deferred to be determined by the judge at Pre-Trial Review.”*⁷

[20] It is therefore clear to this court that while the master stated an opinion as to the evidence adduced the witness statements of Nesty, Bannis and Telemaque this opinion was *“obiter dicta”* and was not a part of or the finding or ruling made by the master on the issue of the admissibility of the impugned statements. It is clear that the Learned Master was of the view that the question of the admissibility of the statements is for the trial judge at Pre Trial Review.

⁶ Ibid at Paragraph 40

⁷ Ibid at paragraph 43 (3)

The role of the Judge at Pre Trial:

[21] Pre Trial Reviews are convened in cases pursuant to part 38 of CPR 2000. The judge has all the powers of case management as provided in Parts 25 and 26 of the CPR 2000. The judge is required at Pre Trial Review to consider the course of proceedings and give all appropriate directions. It is intended that Pre Trial Reviews are conducted by the Trial Judge.

[22] The defendant's application which has to be dealt with is a challenge to the admissibility of evidence. It is the general rule that matters pertaining to the admissibility of evidence are best resolved by the judge at the substantive hearing of an application or at the trial of a claim, rather than at a separate preliminary hearing as this judge is expected to be better informed about the case, also, that the preliminary hearings on such matters can only cause unnecessary costs and delays. **Re: Stroude –v- Beazer Homes Ltd⁸** as applied in **Joseph W Horsford –v- Geoffrey Croft⁹**.

[23] The Learned Master in her judgment mentioned earlier opined that the evidence contained in the impugned witness statement of Nesty, Bannis and Greenaway “*appears to be factual statements based on the witnesses’ knowledge*” as former employees of the Defendant company. A look at the witness statements disclose the witnesses indicate that they have worked for a number of years at the defendant company and they are familiar with the Project Management CPE and the PBX and they proceed to make a comparison of the systems based on they having worked at the defendant company also as to the job descriptions of the two posts.

[24] I agree with Learned Counsel Dyer Munro when she says that at trial there would be the opportunity for the witness to possibly amplify his evidence. That is the witness would with leave of the court have the opportunity to expand on his statements without adding new evidence. The witnesses’ evidence will also be tested by cross examination. At the end of the day as the judge of fact in this case it is a matter of weight that the trial judge will give to the evidence that has been adduced, probably amplified and certainly tested by cross examination. It is well established law that the court will be reluctant of accepting a challenge to a witness statement in an interim application in the absence of cross examination. **Re: Wallis –v- Valentine¹⁰**. It is also noted that the court will only exercise its discretion to strike out witness statements or part thereof sparingly.

[25] It is general rule that opinion evidence is inadmissible. The general rule is a witness may only attest to facts which are within his or her personal knowledge and is not permitted to draw inference from those facts. A person who is not an expert can give his opinion however his evidence must be given in such a way so as to convey to the court relevant facts as perceived by him. Otherwise Opinion evidence is admissible if being adduced through a properly qualified expert on matters which fall within his or her particular area of expertise, if it is an expertise that the court does not possess.

⁸ [2005] EWCA 265

⁹ ANUHCVP2014/0006

¹⁰ [2002] EWCA 1034 as referred to in Blackstone’s Civil Practice 2009 at paragraph 32.16

[26] It is clear to this court that the statements which appear at first blush to be opinion evidence is evidence which the witnesses are speaking to based on and tied to their personal knowledge which they would have garnered during their employment at the defendant company and in the circumstances of the case at bar this court will not accede to the application to strike the witness statements of Nesty and Bannis or part thereof as applied by the defence.

[27] This court notes with some concern that this case has languished in the system for some while now due to the applications and cross applications and the logistical nightmare in the courts consequent to the natural disaster which befell Dominica. It is necessary that steps be taken immediately to prepare this matter for trial. It is noted that the Pre Trial Memoranda have been filed by both parties and this court proposed to have this matter scheduled for Pre Trial Review immediately.

[28] The order of the court is therefore the defendant's application to strike out the witness statements of Craig Nesty and Peter Bannis and parts of the witness statement of Walter Greenaway is hereby denied with costs to the claimant to be cost in the cause. Pre trial Review is to fixed by the court for the first possible opportunity.

M E Birnie Stephenson
High Court Judge

SEAL

BY THE COURT

REGISTRAR

