

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0137



IN THE MATTER OF THE INTERNATIONAL BUSINESS COMPANIES (AMENDMENT AND
CONSOLIDATION) ACT CAP 149 OF THE 2009 REVISED EDITION OF THE LAWS OF SAINT
VINCENT AND THE GRENADINES

AND

IN THE MATTER OF TFB LIMITED (A Winding Up Petition)

BETWEEN

IAN WALLBANK

DECRON LIMITED

Of Unit 14 Primrose Business Park, Primrose Road
Clitheroe, Lancashire, BB7 1 DR, England

PETITIONERS

AND

TFB LIMITED

t/a 'CAESAR'S TRADING'

RESPONDENT

Appearances

Mr. Chevanev A. Y. Charles for the petitioners.

Ms. Patina Knights for the respondent.

2019: May 15
Jun. 20



DECISION

INTRODUCTION

- [1] **Henry, J.:** Mr. Ian Wallbank and Decron Limited ('the petitioners') have petitioned¹ the court for an order winding up the operations of Tfb Limited trading as 'Caesar's Trading' ('Tfb'); and for an order that their expenses be paid from the realizable assets of the winding up. Mr. Wallbank filed two affidavits in support on 27th September and 18th December 2017 respectively². Tfb has objected to portions of the affidavits on the ground that they constitute hearsay and that they failed to authenticate documents downloaded from the internet.
- [2] The parties were invited to file written submissions. They have done so. The court is required to examine the objections and assess their respective merits. I have found that some of the objections are meritless while others should be upheld.

ISSUE

- [3] The issue is whether the impugned portions of the referenced affidavits should be struck out.

LAW AND ANALYSIS

Issue – Should the impugned portions of the affidavits be struck out?

The First Affidavit

- [4] Tfb contended that the petitioners are seeking to adduce hearsay evidence by paragraphs 5, 19, 20 and 22 of the first affidavit. They argued that those statements consist of statements made by other persons to prove the truth and are therefore hearsay and inadmissible. Tfb relied on **Subramanian v Public Prosecutor**³ where the court articulated the applicable rule of law regarding hearsay. The Court will be guided by that statement in this case.

¹ By petition filed on 27th September 2017.

² They are referred to elsewhere in the decision as 'the first affidavit' and 'the second affidavit' respectively.

³ [1956] 1 W. L. R. 965 at p. 970, [1956] UKPC 21.

[5] In rendering the Board's decision, Mr. L. M. D. De Silva opined:

'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.'³

[6] It is appropriate to set out the impugned statements from the first affidavit. The relevant portions of paragraphs 5, 19, 20 and 22 state respectively:

'5. I am informed and do verily belief that the forex market is the largest, most liquid market in the world, with average traded values that can be trillions of dollars per day.'

'19. '... I was told that there was an "IT error" was allegedly that the Live Trading Server had swapped over to a Demo Trading Server, this error apparently was under review and a suitable remedy would be found.'

'20. I was told by Leo Dally that all my earned profits made 23rd December, 2016 onwards would be removed and my accounts would be reset.'

'22. ... a true copy of this email is affixed and marked "IW3", this email stated that the IT issues were now fixed and further to this I could not withdraw any of my accrued profits as I had not met "certain conditions".'

[7] At paragraphs 5, 19 and 20, Mr. Wallbank repeats information which he indicated was relayed to him respectively by an unnamed source and one Leo Dally. Paragraph 22 refers to an email received allegedly from one 'Gerry'. Mr. Wallbank did not indicate whether Leo Dally or Gerry is a servant or agent or other party who is connected to the respondent. The respondent denied knowledge of those matters.

- [8] The petitioners argued that the Court should dismiss the objections. They submitted that the Court has a residual discretion 'to allow a hearsay statement to be given despite non-compliance with the rules or where refusal might otherwise compel one side to call an opposing party.' They contended that if the Court finds that the impugned statements contain hearsay that it may and should exercise its residual common law and statutory powers to admit them in the interests of justice.
- [9] In relation to the first affidavit, the petitioners submitted that it should be accepted in totality as it is representative of direct experiences endured by them. They contended that 'its weight, relevance and probity can be tested adequately by opposing counsel' and the Court may be then invited to draw appropriate inferences. In relation to paragraph 5 of that affidavit, the petitioners argued that the statement 'speaks to Ian's state of belief as to the state of the foreign exchange market', after he was informed through his research methods.
- [10] The petitioners submitted that the statement is contextual and should be admitted into evidence as part of the *res gestae* because it is a general knowledge comment 'based on his experience and research as a FOREX trader. They contended that the statement forms part of an explanatory contextual basis and that the nature of the comment is such that the possibility of concoction or distortion could be disregarded. They argued further that the statement is relevant to the issues at the heart of the matter. They submitted that the precise characteristics of the FOREX market are not at issue in the case.
- [11] The petitioners argued alternatively that Mr. Wallbank is a FOREX trader by profession and traders are presumed to know matters of common knowledge and matters which a FOREX trader ought to know, 'such as a working knowledge... of the industry.' They submitted that it is clear that he has 'engaged research methods for this to form part of his knowledge and something, as a trader he ought to know.' Mr. Wallbank did attest to having conducted such research.
- [12] The petitioners relied on the case of **R. v Andrews (Donald Joseph)**⁴ and **Phipson on Evidence**⁵. In the **Andrews case**, the trial judge ruled that certain statements were admissible as exception to

⁴ [1987] A.C. 281.

⁵ 19th Ed. para. 16-03.

the hearsay rule where they were made by the deceased victim shortly after he was wounded. The Court of Appeal dismissed an appeal by the accused. It held that the circumstances under which the victim informed the witness of what had transpired, were so unusual, startling or dramatic as to dominate the deceased's thoughts and exclude the possibility of distortion or concoction in respect of the violent, traumatic incident. The Court held that the statements made by the victim in those circumstances and so soon after he was wounded were admissible as to their truth, as an exception to the hearsay rule.

- [13] The learned author of Phipson described this exception to the hearsay rule in Chapter 16 of the referenced work.⁵ The author explained that 'certain contemporaneous assertions by a person as to his ... own state of mind or body' may be given in evidence by another person as an exception to the hearsay rule. However, the exception applies only where the physical condition, emotions or state of mind of the originator of the statement are in issue or a directly relevant to an issue.
- [14] In the case at bar, the petitioners invoke the state of mind of the deponent and not the state of mind of another person. The impugned statements in paragraph 5 do not fall into the exception to the hearsay rule contended for by the petitioners. The information outlined in it is of a technical nature and no qualifying data as to its source is adduced. The petitioners seek to rely on it to establish its truth. It therefore constitutes hearsay and is inadmissible. It must be excised from Mr. Wallbank's affidavit.
- [15] The petitioners argued that the impugned statements in paragraphs 19 and 20 relate to direct conversations between two persons in the context of business. They submitted that those statements can be tested by opposing counsel in cross-examination. Both sets of statements are attributed to persons who are not named as parties to these proceedings. The context within which they are outlined appears to link them to an associate, servant or agent of Tfb.
- [16] It appears to be pre-emptive to strike them out at this juncture without affording the parties an opportunity to probe their veracity and relevance at trial. Such testing of the evidence might reveal that the statements do not constitute hearsay. This is equally applicable to the email mentioned in paragraph 22. For these reasons, I refrain from ruling that they are hearsay or excising them at this juncture.

The Second Affidavit

[17] Tfb objected to portions of paragraphs 11, 12, 14, 16, 18, 19, 22, 23, 25, 26, 27, 36, 38 and 46 of the second affidavit. Mr. Wallbank deposed that he and his legal advisers had conducted detailed research as to the true owner of the business operating as Caesar Trade. He purported to outline the extent of the research and his findings in the following paragraphs included those which form the basis of the remaining objections.

[18] In those paragraphs Mr. Wallbank:

1. expressed the belief that the company operates from Israel;
2. referred to a number of websites including timesofisrael.com⁶; forexpeacearmy.com⁷; pforex.com⁸; companiesoffice.govt.nz⁹; and youtube.com¹⁰;
3. rehearsed portions of the data extracted from websites regarding 'Governing Law'¹¹, 'dispute resolution'¹²; and a website that carries the Caesar logo and indicates that CaesarTrade Binary is owned and operated by CFTC Ltd. and is registered in St. Vincent with registration number 22580¹³; and
4. said that his research revealed that Caesar was originally owned by a New Zealand Company CFTC Ltd;¹³ the New Zealand address was Munroe Street, Napier; and had on director and

⁶ Paragraph 11.

⁷ Paragraphs 12 and 36.

⁸ Paragraph 18.

⁹ Paragraph 22.

¹⁰ Paragraph 46.

¹¹ Paragraph 14.

¹² Paragraph 16.

¹³ Paragraph 19.

shareholder Eric Pesach Harbor and was registered with the new Zealand Financial Services provider Register on 7th November 2013;¹⁴ was de-registered on 10th March 2015 as an FMA directed Deregistration;¹⁵ FMA refers to the Financial Markets Authority the New Zealand regulatory body and that it had many problems at the time;¹⁶ that the UK registration number for CFTC Technology and Administration was 09758825 and corresponds with the license number mentioned on the Caesar website¹⁷.

[19] Tfb submitted that the petitioners and their legal advisers have carried out research primarily through internet searches. They argued that the data presented in the referenced paragraphs illustrate that all of that information was fed into a computer by a human mind and are statements of other persons to show their truth. It submitted that the petitioners have not authenticated any of the documents which have been printed from the internet and have provided no information regarding the persons responsible for managing the computer operations, for supplying the information to the computer or certifying that the computer was operating properly at the time.

[20] Tfb submitted that some of the websites from which material was garnered are fora to which anyone can go to share their views, such as YouTube. It submitted that the data has not been proved and is therefore irrelevant and of no probative value.

[21] The petitioners rejoined that the common law principles applicable to admissibility of computer generated records must be considered. They argued that admissibility depends in the first instance on whether the document displays information fed into the machine by a person. They accepted that at common law when a digital document is 'relied on to prove what it states and what it states depends in whole or in part on information supplied by a person, the evidence is classified as hearsay.' They submitted however that the concern should be with the accuracy of the statement.

¹⁴ Paragraphs 23 and 25.

¹⁵ Paragraph 26.

¹⁶ Paragraph 27.

¹⁷ Paragraphs 37 and 38.

[22] The Evidence Act¹⁸ has codified the position in Saint Vincent and the Grenadines regarding admissibility of computer generated documents. It establishes certain parameters for the admission of information¹⁹ produced by a computer. It stipulates that no such statements are admissible unless:

1. the computer from which the document was generated was regularly used to store or process information for the purposes of any activities regularly carried out by a person or other entity, for profit or otherwise, over the relevant period;
2. that during that period information of the kind contained in the document, or from which such information could be derived, was regularly supplied to the computer during the course of the referenced activities;
3. that the computer was operating properly during the relevant period; and if it was not, that appropriate information is provided to explain that during such period of inoperability nothing happened which would affect the production of the document or the accuracy of its contents; and that the information in the document reproduces or is derived from data supplied to the computer during the ordinary course of the referenced activities.

[23] Mr. Wallbank and Decron Limited did not aver that those stipulations have been satisfied in respect of the impugned paragraphs and the information referred to in them. They contended that the overall aim of the second affidavit is to respond to Tfb's assertion of mistaken identity. They argued that it is clear that he did his research. They submitted that to exclude the impugned statements by virtue of the hearsay rule would be an affront to justice based on the reasoning in Phipson at paragraph 28-28. That extract outlines the common law principles articulated by the petitioners as outlined earlier. Suffice it to say that the position in Saint Vincent and the Grenadines is based on legislation and not the common law.

[24] The petitioners submitted that paragraphs 11, 12, 14, 16, 18 and 19 contain detailed research carried out by Mr. Wallbank and their legal advisers. They argued that the concern raised by Tfb

¹⁸ Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

¹⁹ Section 50.

appears to be whether those statements can be attributed to Mr. Wallbank or their lawyers. They contended that it is clearly Mr. Wallbank's findings.

- [25] In relation to paragraph 21, the petitioners submitted that it contains information about a link on Caesar Trade's website. They insisted that it is a statement of fact which can be tested in cross-examination. Regarding paragraphs 22, 23, 25, 26 and 27 they submitted that those statements relate to the ownership of Caesar trade and were made by Mr. Wallbank as a result of his research. The petitioners indicated that they did not understand the objections made in respect of the referenced paragraphs.
- [26] The petitioners described paragraphs 36 and 38 as 'a screenshot of the page'. They argued that at first blush it seems to be hearsay but it should be allowed because the Wayback Machine is an established internet resource and independent contemporaneous evidence. They made no submissions in respect of the objection taken to paragraph 46 of the affidavit.
- [27] The petitioners have not refuted that the materials and statements to which Tfb has objected (in relation to the second affidavit) have been exclusively obtained from the internet and are not original documents created by them or their servants, agents or associates. They have not accounted for how they were created, the source of the data contained in them or the identity of the creators of those documents. They therefore constitute hearsay and are inadmissible unless they fall within the hearsay exceptions. I find that they do not. They must accordingly be excised from Mr. Wallbank's testimony.

Costs

- [28] Tfb's application was successful. It is entitled to its costs. The petitioners shall pay to Tfb costs to be assessed on application to be filed and served by the Tfb on or before 10th July, 2019.

ORDER

- [29] It is accordingly ordered:

1. Ian Wallbank's affidavit filed on 27th September 2017 is amended by excising paragraph 5.

2. No order is made excising paragraphs 19, 20 or 22 of Ian Wallbank's affidavit filed on 27th September 2017.
3. Ian Wallbank's affidavit filed on 18th December 2017 is amended by excising paragraphs 11, 12, 14, 16, 18, 19, 22, 23, 25, 26, 27, 36, 38 and 46.
4. Ian Wallbank and Decron Limited shall pay to Tfb costs to be assessed on application to be filed and served by Tfb on or before 10th July, 2019.

[30] I wish to express sincere gratitude to counsel for their written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court
REGISTRAR'S OFFICE
[Signature]
ST. VINCENT AND THE GRENADINES
Registrar

