COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
2021/CLE/gen/FP/00030
BETWEEN

JOSEPH O'BRIEN

AND

MAUDE GARDINER O'BRIEN
Plaintiffs

SUPREME COURT REGISTRY
AUG 04 2022
FREEPORT,G.B.BAHAMAS

AND

CONET BAHAMAS LIMITED
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Paul Wallace-Whitfield for the Plaintiffs
Mrs. Cassietta McIntosh-Pelecanos for the Defendant

HEARING DATE: June 16, 2022

RULING

Hanna-Adderley, J

Introduction

1. This is an action commenced by the Plaintiffs alleging that the Defendant breached its agreement with the Plaintiffs by failing to or neglecting to manufacture or assemble or install the Plaintiffs' kitchen inclusive of quartz countertop with due care, skill or diligence or in a good or workmanlike manner; that the Defendant negligently misrepresented to the Plaintiffs the nature, quality and color of the "Swiss Chocolate" kitchen purchased by the Plaintiffs and as a result of the said breaches the Plaintiffs have suffered loss and damages. The Defendant denies the Plaintiffs' allegations and also counterclaims against the Plaintiffs as a result of

their failure to pay the remaining balance for the installation and purchase of the kitchen cabinets and countertops.

2. The trial for the substantive action is scheduled for August 8 and 9, 2022.
3. At the instance of the Court, the parties attended the home of the Plaintiffs and the showroom of the Defendant located on Queens Highway, Freeport, Grand Bahama collectively referred to hereafter as "the locus in quo" on divers dates for the purpose at the home of inspecting the installed cabinets and at the showroom the samples of the cabinetry and the workmanship to the countertop shown to the Plaintiffs. During the attendance at the locus in quo, the parties along with their respective Counsel, the Court (Justice Petra Hanna-Adderley), the Court Clerk, Arlington Farquharson and the Judge's aide, Mr. Mario Moss were present. The Court Clerk, Mr. Farquharson used his cellular phone to record video footage of what took place at the locus in quo.
4. Prior to the start of the trial of the substantive action, the Court advised the parties that the video footage would be made available to each of them. However, Counsel for the Plaintiffs, Mr. Wallace-Whitfield objected to the admissibility of the oral statements made by the parties during the visits to the locus in quo on the basis that the oral statements made by the parties were unsworn and as such those statements cannot be construed as evidence. In response, Counsel for the Defendant, Mrs. Cassietta McIntosh-Pelecanoes inquired as to whether Mr. Wallace-Whitfield's objection extended to the Court's notes as during each visit the Court took contemporaneous notes of what was said and seen.
5. Counsel has provided the Court with written submissions on the objection filed on July 12, 2022 on behalf of the Plaintiffs and July 13, 2022 on behalf of the Defendant. The Court has had an opportunity to review the video footage at the locus in quo and has considered the Plaintiffs' objection and the filed submissions on behalf of the parties.

Submissions

6. Mr. Wallace-Whitfield submits that pursuant to the provisions of Section 126 of the Evidence Act, all evidence shall be given on oath and that the use of the word "shall" renders the provision mandatory.
7. He further submits that Order 35, Rule 5 of the Rules of the Supreme Court, 1978 ("the RSC") governs the holding of a view of a locus in quo and refers the Court to the notes to the Supreme Court Practice, 1999 found at Order 35, Rule 8. Additionally, he states that these notes better elucidate the principles upon which the Court acts when executing a view of a locus in quo and refers to the authorities of **Tito v Wadell [1975]** 3 All ER 997; **Buckingham v Daily News Ltd. [1956]** 2 All ER 904; **Tameshwar et al v Reginam [1957]** 2 All ER 683; **R v Stephen McKinney [2021]** NICC 8 and **Ahmed v Maclean [2016]** EWHC 2798 (QB) in support of his submissions.
8. Mr. Wallace-Whitfield submits that evidence is not taken as it is within the confines of a courtroom, it is heard either before the Court visits the locus or it is taken afterwards. Therefore, it is his submission that if words spoken with a view toward being evidence in an action are to be considered evidence they must be spoken while a witness is giving sworn evidence or evidence on affirmation. As such he submits that any words spoken at the view held in December 2021 cannot be construed as evidence as no one had been sworn in prior to the "testifying."
9. Mrs. McIntosh-Pelecanoes submits in reply to the Plaintiffs objection that the Court derives its discretion to view the locus in quo from Order 35, Rule 5 of the RSC and also refers to the notes of the English Rules of the Supreme Court, 1978. In support she refers the Court to the authorities of **Buckingham v Daily News Ltd. (supra)**; **Minister Responsible for Works and Transport and another v The Treasurer of the Commonwealth of the Bahamas; the Attorney General of the Commonwealth of the Bahamas v Kashco Investment Limited [2015]** 2 BHS J. No. 20. She submits that those two authorities, in particular **Buckingham v Daily News Ltd. (supra)** is directly relevant as in that case the Judge viewed the locus in quo before the witnesses evidence was called

and by inference before any of the witnesses swore an oath. Further, she submits that that case is authority for the position that a Judge has discretion to form his/her own judgment on the real evidence of a view and by inference the video taken of the real evidence. Moreover, that the Judge's conclusion based on the real evidence of the view may form the sole reason for judgment in spite of evidence to the contrary provided by witnesses. It is her submission that this Court has the discretion irrespective of whether the video is made available to the parties, to form a judgment based upon the video taken at the locus in quo and that the Court in this matter should exercise the discretion and form its own view of the real evidence.

10. Mrs. McIntosh-Pelecanoes also submits that there is a distinction between oral evidence of witnesses that are given under oath and real evidence of a view and that the video recording taken by the Court of the real evidence of the view is a form of documentary evidence and fully admissible in the Court under the rules of evidence. She refers the Court to Sections 41 and 42 of the Evidence Act and states that for the parties to rely on the documentary evidence of the video recording, they must be provided with a copy of the video as primary evidence. She also refers to the Court to the case of **Tameshwar et al v Reginam (supra)** and submits that while the facts of that case are distinguishable to the instant case, the Privy Council's dicta on a view of the locus in quo coupled with a demonstration in civil cases is instructive and binding on this Court. It is her submission that the Judge has a wide discretion in the conduct of a locus visit and in the instant case the Judge opted to conduct the site visits prior to the commencement of the trial, all parties were present and the same cannot be deemed prejudicial as no party was disadvantaged as all were present. Lastly, she submits that as the Court's notes are derived from the same circumstances and will be read into the record, the recordings are also so derived and as such the video taken by the Court of the view coupled with a demonstration is admissible documentary evidence.

11. While the parties have provided the Court with submissions on the admissibility of the video recordings of the locus in quo and what the correct procedure on a view of the locus in quo in a civil action is, as I understand the objection made by Mr. Wallace-Whitfield during the hearing on June 16, 2022 the issue for determination is whether the oral statements made by the parties in December 2021 as captured by the video recordings in the absence of any witnesses and/or potential witnesses being sworn or affirmed can constitute as admissible evidence during the trial of this action.

Case Summaries

12. Both parties have helpfully referred the Court to what it accepts as the relevant authorities (**Tito v Wadell (supra); Buckingham v Daily News Ltd (supra)**) as to the principles that guide the Court when a view of the locus in quo occurs. Moreover, what is gleaned from those authorities in particular what was stated by Lord Denning in his Judgment in **Buckingham v Daily News Ltd (supra)** is that:-

> *"Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses."*

13. Lord Denning also stated in **Tito v Waddell (supra)** at page 685 :-

> *"I think that a view is part of the evidence, just as much as an exhibit. It is real evidence...What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the court room. Just as a portable object may be brought into court and being made an exhibit becomes real evidence, so, if the judge duly views a place or object which cannot be brought into court, that place or object provides real evidence through the medium of the judge's eyes, ears, touch, tongue or...nose. On this footing, the tendering of real evidence no longer depends on the res being portable."*

14. In **Buckingham v Daily News Ltd (supra)** a workman brought an action for damages for negligence against his employers as a result of injuries sustained

while cleaning the tucking blades of a rotary press with a swab held in his hand. He claimed that his employers failed to provide a safe system of work and during the trial called witnesses who gave evidence that the use of a swab held in the hand was dangerous. These witnesses were cross-examined however no rebuttal evidence was called by the plaintiff's employers. At the invitation of the parties, the judge of first instance inspected the press and saw a demonstration by the workman showing how it was cleaned and in his judgment reviewed the evidence of the workman's witnesses and held that any adult man using reasonable care would find no difficulty in cleaning the blades and that the workman's injury was due to his own carelessness. Following the decision the plaintiff appealed on the ground that the judge had substituted his own opinion formed on his view for the evidence of the workman's witnesses. The court on the appeal held that in a case of this nature which did not require expert/technical evidence, (the question was whether something was dangerous), a judge was entitled to take into consideration his own impression formed on a view of the subject-matter, which constituted part of the evidence in the same way as an exhibit or demonstration in court; and in the present case the judge had not relied on his own opinion to the exclusion of other evidence and had not given undue weight to the impression which he had formed on the view and his decision would be upheld.

15. In **Tito and others v Waddell and others (supra)** there was an application for the parties to attend the intended view to visit an island outside of the jurisdiction and that such application was in essence an application to tender certain evidence. However, the court in its determination stated that the proper approach on such an application was whether there were sufficient grounds for rejecting the application even if the adducing of such evidence was a matter for judicial discretion. The court held that Order 35, Rule 8(1) of the RSC was extended to cases where equity was concerned with land outside of the jurisdiction and that the decision to inspect was a proper exercise of a judicial discretion. Further, no litigant could compel or prevent a judge from holding a view and that while a judge would normally act on a joint submission by parties, the judge had such discretion

as to whether to hold a view even where the parties had an opposing view. Additionally, the function of a view was not just to allow a judge to follow the evidence but it was what the judge perceived on the view that was itself evidence.

16. In **R v Stephen McKinney (supra)** the prosecution asked the court to permit a view so that the jury could view the interior and exterior of the boat in question from the jetty and submitted that such view was necessary and photographs, maps and diagrams already provided to the jury and formed part of the evidence in the trial did not adequately convey the size of the boat and the jury would have a better understanding of the dimensions involved. The defence objected to the view and submitted that it was not necessary as no witness had given evidence to that effect and no evidence had been given to the effect that the maps and photographs did not adequately convey the true scale of the boat and that the jury had the benefit of the photographs, maps and detailed drawings. He also submitted that if such viewing was necessary the boat could be brought to the precincts of the court; that the prosecution had not established that the viewing was relevant to any issue in the case; that such viewing would create unfairness as there was potential for prejudice to the defendant as such viewing was to take place during the day and the incident occurred during the early morning hours. The court at paragraph 9 stated:-

> *"The function of a view is that it not merely enables a judge or juror to follow the case but the inspection review becomes just as much part of the evidence as the testimony of witnesses and unless the testimony of experts or other witnesses is required the judge may form a conclusion based on the inspection alone and even contrary to the evidence of witnesses."*

17. The court ultimately exercised its judicial discretion and permitted the view.

18. Counsel for the Plaintiffs has referred to other authorities in support of their submissions, however, they are indeed distinguishable on their facts such as **Ahmed v Maclean [2016]** EWHC 2798 where at paragraphs 64 to 68 the court merely set out its observation of the view of the locus.

Discussion/Analysis

19. It is not disputed between the parties that the view of the locus in quo occurred prior to the commencement of the trial of this action and was at the instance of the Court and that the parties and their respective Counsel did not object to the view. Further, Counsel for the parties and their respective witnesses all attended the Court directed view and at no point were there any objections by the parties to the conduct of the said view.

20. Therefore, considering the authorities above and the relevant excerpts as found in **Buckingham v Daily News Ltd (supra)** and **Tito and others v Waddell and others (supra)** and my understanding of Counsel for the Plaintiffs' objection during the hearing on June 16, 2022, I accept that the Court rightly exercised its judicial discretion to the hold the view and that the view that occurred in December, 2021 is a part of the evidence just as much as an exhibit and that such video recording of the said view constitutes as a part of the evidence.

21. I will now move on to the essence of the Plaintiffs objection as I understand it.

Issue(s)

22. The issue(s) the Court must determine by the Plaintiffs' objection is:-

    a. Whether the oral statements made during the view of the locus in quo and recorded on the video recordings should be admitted as evidence.

23. Mr. Wallace-Whitfield's objection is essentially that the oral statements made during the view and captured by the video recording were unsworn statements as the provisions of the Evidence Act require that all evidence shall be given on oath and that the use of the word "shall" renders the provision mandatory and as such does not and/or should not constitute evidence for the purposes of the trial.

The Law

24. Section 126 of the Evidence Act states "Subject to section 129 and to any other law to the contrary, all evidence shall be given on oath."

Discussion/Analysis

25. As stated in the above paragraphs, the view of the locus in quo occurred prior to the commencement of trial. Therefore, the video recording of the same has yet to be tendered as evidence before the Court during the trial of this action. Moreover,

as indicated above, the Plaintiffs objection as I understand it is not to the admissibility of the view nor the admissibility of the video recordings themselves but the admissibility of the oral statements made at the view which were captured by the video recording.

26. Both Counsel in their written submissions have referred the Court to **Tameshwar and another v Reginam (supra)**. In that case during the trial of two prisoners in British Guiana charged with robbery with aggravation the jury requested a view of the scene of the robbery and asked that the view was held in the presence of the accused, a superintendent of police, counsel for the prosecution and counsel for one accused. The jury were checked by the judge before leaving for the view and were warned not to have any communication or to engage in any discussion or argument. The judge did not attend the view. At the view the four witnesses pointed out various places. In addition three other witnesses also were present. On the following day the trial was resumed. Evidence was given of what happened at the view and the witnesses were available for cross-examination. The prisoners were found guilty. It was held that while there may not be anything wrong with a simple view, (a view of something without witnesses being present) a view where witnesses demonstrating part of the evidence with the judge being absent was a defect and vitiated the trial.

27. The instant case is distinguishable from **Tameshawar** as the Court (i.e. the Judge as seen from the video recordings) was present during the view of the locus in quo. However, both Counsel in their submissions readily identify portions of dicta of Lord Denning in the case which they submit are relevant to their submissions. For ease of reference I set out the portion below of the judgment found at page 686:-

> *"It is everyday practice for the jury in such a case to be taken to see the thing. The judge sometimes goes with them. Sometimes he goes by himself. But there are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a judge is not*

present. In a case of motor manslaughter, any member of the jury could go in the evening and look at the place by himself if he wished, without being guilty of any irregularity.

It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this", and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves on it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence. Whilst giving it the witness would still be bound by the oath which he had already taken to tell the truth. If he wilfully made a demonstration, material to the proceedings, which he knew to be false, he would be guilty of perjury.

In England, the Court of Appeal has clearly held in civil cases that a view, coupled with a demonstration, is part of the evidence. So much so that, if it takes place in the absence of one party without his consent, the trial is bad; see Goold v Evans & Co ([1951] 2 TLR 1189). Or again, it may of itself outweigh all the other evidence in the case, so that the judge can found his decision on it without more; see Buckingham v Daily News, Ltd ([1956] 2 All ER 904). Their Lordships have held likewise, in a criminal case in an appeal from British Guiana, that a view, at which witnesses give demonstrations, is part of the evidence; see Karamat v Reginam ([1956] 1 All ER 415)."

28. The Court notes that the video recording of the view has yet to be made available to the parties prior to the commencement of trial. While Counsel for the Defendant, Mrs. McIntosh-Pelecanoes has referred the Court to Sections 41 and 42 of the Evidence Act which state " 41. The contents of documents may be proved either by primary or by secondary evidence. 42. Primary evidence means the document itself produced for the inspection of the court.." As I understand the Plaintiffs' objection is to strike all oral statements captured by the video recording and not the admissibility of the video recording itself the parties will have the opportunity to admit the evidence of the view prior to their respective witnesses giving evidence.

29. Mr. Wallace-Whitfield has submitted that Section 126 of the Evidence Act is applicable as at no point during the view was any party and/or witness sworn and or/affirmed and as such their oral statements were not given on oath and do not constitute as evidence.

30. Phipson on Evidence, 13th Edition at 33-04 on page 745 under the rubric "3. Evidence usually tendered by viva voce examination of witnesses" states:-

> *"The general rule is that any fact required to be proved in proceedings, both criminal and civil must be proved by the examination of the witness orally in open court."*

31. Considering the above, I am inclined to agree with the submissions of Mr. Wallace-Whitfield on this point. As the trial has not commenced and the absence of any stenographer during the view of the locus in quo, the parties and/or witnesses (or potential witnesses) were not subjected to the swearing or affirming prior to attending the views. However, as stated above, in the absence of a stenographer, the Court took contemporaneous notes.

32. The Court has made a finding above that the view of the locus in quo does constitute as real evidence. The case of **Tameshwar and another v Reginam (supra)** is instructive, in that Lord Denning's assessment that a witness's demonstration to a jury at the scene of a crime is more effective than word as such is readily understood. He continues that to make such demonstration

intelligible a witness will say at the very least "I stood here" or "I did this" and will start to give evidence and whether he attempts to improve on evidence previously given that demonstration is itself evidence. Moreover Lord Denning states that while giving evidence the witness would still be bound by the oath which he had already taken to tell the truth. It is that assessment that the Court in the instant case can distinguish.

33. The parties and the witnesses and/or potential witnesses were not bound by any oath as provided for by the provisions of the Evidence Act and as such I find that the oral statements as recorded in the video recording cannot constitute as primary evidence during the trial of this matter.

34. However, there is nothing to preclude the Court from treating the said statements as out of court statements and the parties can cross-examine the witnesses as to what was said and done during the view of the locus in quo.

35. Therefore, the Court finds the video recordings, including the audio and out of court statements thereon real evidence upon which the parties will have an opportunity to examine and cross-examine the maker of such during the trial.

36. The Court will provide the parties with copies of the video recordings for their review and preparation of trial.

Dated this 2nd day of August A. D. 2022

Petra M. Hanna-Adderley
Justice