

COMMONWEALTH OF THE BAHAMS
IN THE SUPREME COURT
Commercial Division
Claim No. 2022/CLE/GEN 00233

BETWEEN

ETIENNE FARQUHARSON II

Claimant

AND

MORTON BAHAMAS LIMITED

Defendant

Before: The Honourable Madam Justice Camille Darville Gomez
Appearances: Mr. Halson Moultrie for the Claimant
Mr. Oscar Johnson, KC and Keith Major Jr. for the Defendant
Hearing Date: May 15, 2024

**REASONS FOR DECISION TO STRIKE OUT CERTAIN PARAGRAPHS OF THREE
WITNESS STATEMENTS PURSUANT TO RULE 29.5 OF THE CPR, 2022**

Darville Gomez, J

The Application

- [1.] By Notice of Application filed on April 5, 2024 and an Affidavit in Support filed on April 8, 2024 the Defendants sought to have certain paragraphs of three witness statements struck out pursuant to Rule 29.5(2) of the Civil Procedure Rules, 2022 (“CPR”) as follows:
- (a) The Witness Statement of Etienne Farquharson II filed on June 23, 2023 (the “Second Farquharson Statement”)
 - (b) The Witness Statement of Jeffrey Arnette filed on February 21, 2023 (the “Arnette Statement”); and
 - (c) The Witness Statement of Elvis Palacios filed herein on February 21, 2023 (the “Palacios Statement”).
- [2.] The grounds of the instant application are that:

(a) The said paragraphs or parts of paragraphs of the Claimant's Witness Statements represent:

- (i) An attempt to introduce material which is un-pleaded;
- (ii) Material which is commentary or submissions;
- (iii) Material which is hearsay;
- (iv) Material which is irrelevant; and/or
- (v) Material which is inadmissible, scandalous, or otherwise oppressive.

[3.] I thank Counsel for their helpful submissions.

[4.] The Defendant by letter dated July 16, 2023 notified the Claimant of their objection to the paragraphs in the three witness statements however, it was one day prior to the trial. The trial did not proceed on July 17, 2023 due to the unavailability of the sole defence witness and was rescheduled to March 18 and 19, 2024. The Judge hearing the action at the time ordered that any interim applications be filed by November 24, 2023.

[5.] The action was then transferred to this Court and the action first came on for hearing on March 8, 2024; ten (10) days before the trial had been scheduled. On that date, the trial date was vacated and the instant application set down for May 15, 2024.

Analysis and Disposition

[6.] In order to consider and determine the application the following pleadings were considered: (i) the Writ of Summons filed on February 21, 2022; (ii) the Defence filed March 28, 2000 ; (iii) the Reply filed on April 6, 2022; the Witness Statements of Etienne Farquharson II filed on June 23, 2023 (the "Second Farquharson Statement"); Jeffrey Arnette filed on February 21, 2023 (the "Arnette Statement"); Elvis Palacios filed on February 21, 2023 (the "Palacios Statement"); the Statement of Facts and Issues for the Claimant and the Defendant filed on June 1, 2023 and July 5, 2023 respectively; and the Affidavit of Marc Barrett filed on April 8, 2024.

[7.] I observed that the issue to be determined is whether the Claimant's idea submitted pursuant to the Idea Management Program (the "Program") of the Defendant for the use of an already owned generator at a part of its facilities known as the Lighthouse Pump Station on a full-time basis instead of purchasing electricity from Bahamas Power and Light Company Limited amounted to a costs savings entitling him to compensation per the Program. There is no dispute that the Program existed and that if the idea was accepted and implemented that compensation would be paid to the respective employee. The Claimant in his Statement of Claim alleged that it was accepted and implemented and the Defendant has failed/refused to compensate him. The Defendant has admitted that the idea was submitted however, denied that it was implemented/adopted and therefore, that no compensation is due/owing to the Claimant.

[8.] The issue to be determined at trial is a factual one as to whether the Claimant's idea was implemented/adopted thereby entitling him to compensation in accordance with the Program. Therefore, this is the perspective that I considered the Defendant's application to strike out the paragraphs in the three witness statements.

- [9.] The Defendant referred to Rule 29.5 of the CPR which sets out the requirements of witness statements and I note in particular at rule 29.5(e) that a witness statement must not include any matters of information or belief which are not admissible and must state the source of any matters of information or belief. Further, at part 29.5(2) the Court is provided with the authority to order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.
- [10.] The Defendant also relied upon sections 37-39 of the **Evidence Act, 1996** where the concept of hearsay was defined and established a statutory prohibition except in certain instances of reliance by a party upon hearsay evidence. It was submitted that throughout the Claimant's witness statements that the witnesses purported to rely upon hearsay evidence and that the Court ought to disregard any and all such instances.
- [11.] The Defendant submitted that the three witness statements which are the subject of the instant application are not in compliance with the requirements of rule 29.5 and also contain hearsay evidence and therefore, those offensive paragraphs should be struck out.
- [12.] The Claimant submitted that the application is disproportionate and is an abuse of the CPR in that it seeks in an interlocutory application to destroy the substratum of the Claimant's claim. The portions of the witness statement in his submission provide factual and relevant information of the witnesses on the Program, actual experiences and knowledge. Further, that the paragraphs could have been considered and if necessary addressed during cross examination.
- [13.] Finally, Claimant's Counsel objected to certain paragraphs in the Defendant's witness statement of La-Keisha Wilmott (including paragraphs 7, 8, 9, 10, 11, 12-16 and 17) on the basis of opinion, hearsay, innuendo, speculations and submitted that they should be excluded and struck out. However, while he identified these objectionable paragraphs he submitted that an interlocutory application should not be used to subvert the course of justice and that he will rely upon cross examination to dispense with such irregularities at trial.
- [14.] Both Counsel referred to a miscellany of authorities which were useful in the consideration of the issues and I commence by reference to the case relied upon by the Claimant, **Wilkinson v West Coast Capital [2005] EWHC 1606 (Ch)** where the court similarly had to consider an application at a pre-trial review to strike out paragraphs in witness statements on the grounds of obvious irrelevance and/or disproportionality. The Judge cautioned against exercising the discretion to strike out portions of a witness statement prior to the trial because the court is less likely to have a full picture of the overall issues in the case. The dicta referred to by Mann J was useful and I refer to it as follows:

“However, desirable though the power to control evidence obviously is, particular care must in my view be taken when it is sought to exercise the power before a trial.

A court which is asked to approach these questions at the interlocutory stage is much less likely to have that picture, and should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and/or disproportionate.

In my view, I should only strike out parts of the witness statements which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant or, if relevant will never be sufficiently helpful to make it right to allow the party in question to adduce. With evidence of this nature, that is likely to be quite a heavy burden.”

[15.] In Vardy v Rooney [2022] EWHC 946 QB, a case cited by the Defendant, Steyn, J ordered the deletion of paragraphs or portions of a substantial amount of the paragraphs of the impugned witness statement. Steyn J, referred to the Wilkinson v West Coast Capital (supra) and cited with approval the paragraph set out above.

[16.] There is no real dispute as to the legal principles that the Court must apply in determining whether to strike out certain paragraphs in the three witness statements. The question that arises is how they should be applied in the instant case.

[17.] I commence with the Second Farquharson Statement at paragraphs 5 which reads as follows:

“5. That Andrew Patton whom I am made to understand has been recently terminated, introduced apartheid type policies with respect to initiatives for staff at the Defendant simply because it appeared that he just did not believe that employees should share in any cost reduction of profit generating opportunities for the Defendant.”

[18.] This paragraph was challenged by the Defendant on the basis that it represents material which is commentary or submissions; represents material which is hearsay; represents material which is scandalous, or otherwise oppressive or is irrelevant.

[19.] The Claimant submitted that the paragraph was relevant to his claim because it showed a change in policies at the Defendant.

[20.] This paragraph clearly contains hearsay evidence and the Claimant did not proffer that it came within any of the exceptions to the rule. Additionally, I found that the statement was irrelevant to the issue at hand and references to “the introduction of apartheid type policies” and “that he just did not believe that employees should share in any cost reduction of profit generating opportunities for the Defendant” to be nothing short of scandalous.

[21.] Therefore, I order that this paragraph be struck from the witness statement.

[22.] The Arnette Statement at paragraphs 4- 8 read as follows:

“4. That I accepted the challenge and submitted the Idea to make steps from the discarded conveyor belt rubber. Due to the corrosive environment, the iron steps for the salt stacking conveyors deteriorate quickly and create a hazard and unsafe condition.

5. That my idea was approved and implemented so I made steps from the conveyor belts and enhance the safety of their production operation.

6. That on that occasion, I received from Morton Bahamas Limited the one-time payment financial reward for my Idea.

7. That I again, during the period, the year 2018 and 2019, submitted an Idea for the design and reconstruction of Morton Bahamas Limited harvesting machine, which is needed to put the newly fresh made solar salt into the hauling trailers. This idea was more feasible with a tremendous cost saving than purchasing a brand new Harvester.

8. The Idea was approved and implemented but to date, I have not been compensated and I am currently working with Legal Counsel to help obtain my earned compensation."

[23.] The Claimant acknowledged that these paragraphs showed the historical perspective of the program and was therefore, relevant to the issue at hand.

[24.] This was challenged by the Defendant on the basis of relevance. It was suggested by the Defendant that the Claimant was attempting to proffer this as similar fact evidence to corroborate or bolster his case.

[25.] While I agree that the witness' statement addressed the history of the Program, it is not relevant because the existence of the Program is not disputed and therefore, the witness's involvement with the Program is irrelevant to the court's determination of the sole issue at hand. Additionally, I find paragraph 8 to be scandalous.

[26.] Therefore, I order that these paragraphs be struck from the witness statement.

[27.] The Palacious Statement at paragraphs 3-5 read as follows:

"3. That along with my co-worker, Francionn Cox, now deceased, we presented an Idea to break the rims on the heavy equipment by designing and constructing a Tool which would eliminate the use of a Traxcavator Equipment with two 2 inch x 4 inch wood and simultaneously improve the down time turn around for the Equipment in the Production and Shipping of Solar Salt.

4. That the Idea was submitted in accordance with the guidelines the Idea Management brochure and approved and implemented.

5. That I received the one-time financial payment for the Idea and shared the payment equally between myself and co-worker."

[28.] The references to paragraphs 3-5 again referred to the historical perspective of the program. This was challenged by the Defendant on the basis of relevance.

[29.] For the same reason given above, I agree that they are irrelevant to the sole issue to be determined by the Court and order them struck out.

Costs

[30.] The Defendant has sought that costs be paid forthwith in the event that they are successful.

[31.] The Claimant had submitted that the acceptable procedure is that if a party does object to the contents of a witness statement, they should notify the other party of their objection within 28 days after service of the statement and the parties should seek to resolve the matter. However, I recognize that the trial was scheduled for July 17, 2023 in the first instance and the Second Farquharson Statement was filed on June 23, 2023 less than twenty eight (28) days prior to the

trial, in fact it was about three weeks prior. Therefore, in the circumstances this was not possible.

- [32.] However, on the other hand I am mindful of the conduct of the Defendant in relation to the bringing of the application; that is on the eve of the first trial date which did not proceed in any event due to the illness of their sole witness. Additionally, these objections could have been raised at the trial prior to the witnesses giving evidence. If that had been done, the issue of costs would not have arisen because it would have been addressed at the conclusion of the trial. Therefore, in the circumstances I do not award any costs to the Defendant.

Conclusions

- [33.] For the reasons I have given:

- (i) I order that the following paragraphs be removed:
 - (a) Paragraph 5 in the Second Witness Statement of Etienne Farquharson filed on June 23, 2023
 - (b) Paragraphs 4 through 8 inclusive of the Witness Statement of Jeffrey Arnette filed on February 21, 2023; and
 - (c) Paragraphs 3 through 5 inclusive of the Witness Statement of Elvis Palacios filed herein on February 21, 2023 .
- (ii) No order as to costs.
- (iii) Trial is now scheduled for September 17, 2024 at 10:00 am via Zoom.

Dated this 30th day of May, A. D., 2024



Camille Darville Gomez
Justice