[2022] JMSC Civ 214

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2016 HCV 03614

BETWEEN	**JAMAR GRANT**	**CLAIMANT /RESPONDENT**
AND	**ANGELA LEE**	**1ST DEFENDANT**
AND	**KIRK LEE**	**APPLICANT /2ND DEFENDANT**

IN CHAMBERS

Mr Richard Reitzin instructed by Reitzin & Hernandez for the Respondent/Claimant

Mrs Tameka Jordan instructed by McDonald Jordan & Company for the 1st Defendant

Ms Sashawah Newby for the Applicant/2nd Defendant

Heard: November 18 and December 12, 2022

Civil Procedure – Interlocutory application to strike out impugned paragraphs contained in specific affidavits – Relevance – Whether the evidence contained in those affidavits is relevant – Admissibility – Admissibility of evidence contained in specific affidavits – Whether the statements contained in the affidavits are scandalous – Whether the statements contained in the affidavits are irrelevant or otherwise oppressive rendering them inadmissible – Whether the statements contained in specific affidavits if allowed to remain would impede the just disposition of the matter – Whether the prejudicial effect of the

statements contained in specific affidavits outweigh their probative value – Civil Procedure Rules, 2002, rules 17.5(5), 17.6, 29.1(1), 29.1(2), 30.3(1) and 30.3(3)

A. NEMBHARD J

INTRODUCTION

[1] This is an application to strike out portions of the affidavit evidence of the Respondent/Claimant, Mr Jamar Grant. The salient features of the application surround the admissibility of portions of the affidavit evidence of Mr Grant, in respect of the hearing of an interlocutory application for interim payment, as well as that of other interlocutory applications which remain extant. The application specifically raises the issue of whether certain statements made in the affidavit evidence of Mr Grant and that adduced on his behalf, are scandalous, irrelevant and/or otherwise oppressive in nature, such as to render them inadmissible.

[2] By way of a Notice of Application for Court Orders, which was filed on 25 May 2021, the Applicant/2nd Defendant, Mr Kirk Lee, seeks the following Orders: -

1. That lines 4 to 6 of paragraph 10 of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment and other Applications, filed herein on 14 January 2021, to wit: - "*and further, that it is reasonable to infer therefrom that General Accident Insurance Company Limited was, and remains, willing to pay me the policy limit, which he, Mr. Reitzin, is aware is $3 million*", be struck out;

2. That the Affidavit of Winston Stewart, filed herein on 21 April 2021, be struck out, or, alternatively, that paragraphs 12, 13, 16, 18, 19, 20, 21 and 22 of the Affidavit of Winston Stewart, filed herein on 21 April 2021, be struck out;

3. That paragraphs 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17 of the Affidavit of Jamar Grant in Support of Several Applications, filed herein on 3 May 2021, be struck out;

4. That the Affidavit Regarding Arguments made by the Defendants' Attorneys at the Case Management Conference, held on 24 November 2020, filed herein on 11 May 2021, be struck out;

5. That the costs of this application be awarded to the 2nd Defendant;

6. That wasted costs be paid by the Claimant's Attorney-at-Law;

7. That there be liberty to apply, and

8. That there be such further or other relief as this Honourable Court deems just.

[3] The application is made on the bases that: -

1. Pursuant to Part 30.3(1) of the Civil Procedure Rules, 2002, as amended ("CPR"), the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge;

2. Pursuant to Part 30.3(3) of the CPR the court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit;

3. The Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment and other Applications, filed herein on 14 January 2021, the Affidavit of Winston Stewart, filed herein on 21 April 2021 and the Affidavit of Jamar Grant in Support of Several Applications, filed herein on 3 May 2021, contain statements, some of which the deponent is not able to prove from his own knowledge; which are scandalous, irrelevant or oppressive; and which are

inadmissible, as a matter of law and are therefore scandalous, irrelevant and/or otherwise oppressive;

4. That the Affidavit Regarding Arguments made by the Defendants' Attorneys, at the Case Management Conference held on the 24 November 2020, filed herein on 11 May 2021: -

    a. Improperly attempts to re-litigate the Notice of Application to Call and Put in Expert Evidence, which was refused by the Honourable Mrs Justice Tara Carr (Ag.), on 24 November 2020, a judge of co-ordinate jurisdiction, and is an abuse of the court's process;

    b. Contains statements that are irrelevant or oppressive;

    c. Misrepresents facts, including the basis for the Honourable Mrs Justice Tara Carr's (Ag.) refusal of the Notice of Application to Call and Put in Expert Evidence, stating, contrary to the several bases referred to by Her Ladyship, that, "her Ladyship was only concerned that the letter of instructions was not attached to the medical reports" and is therefore an abuse of the court's process;

    d. Does not advance the overriding objective of saving expense and allotting an appropriate share of the court's resources to the matter;

    e. Is sworn by the Claimant's Attorney-at-Law, in breach of the Legal Profession Act and the Legal Profession (Canons of Professional Ethics) Amendment Rules, 1983;

5. Further, pursuant to the inherent jurisdiction of the court, the court may strike out any matter which is an abuse of process or which is likely to impede the just disposition of the claim;

6. Pursuant to rule 64.13(2) of the CPR, the court may, by order, direct an attorney-at-law to pay the whole or part of any wasted costs;

7. That the Claimant's Attorney-at-Law has acted improperly and unreasonably, as outlined in the grounds herein.

8. That it is in the interests of justice and in the furtherance of the overriding objective of the CPR, to grant the relief sought;

9. That, unless the relief claimed is granted, the 2nd Defendant will suffer undue prejudice and tremendous hardship.

BACKGROUND

The factual substratum

[4] On 26 August 2016, the Respondent/Claimant, Mr Jamar Grant, filed a Claim Form and Particulars of Claim, which initiated an action against the 1st Defendant, Ms Angela Lee as well as the Applicant/2nd Defendant, Mr Kirk Lee. The Claim emanates from a motor vehicle collision which allegedly occurred on 3 October 2015, along Mannings Hill Road, in the parish of Saint Andrew. At the time of the alleged collision, Mr Grant was riding a 2014 Power K motor cycle, registered 5499 J ("the motor cycle"), when he observed a black 2003 Suzuki Swift motor car, registered 4062 DZ ("the Suzuki Swift"), approaching from the opposite direction. Mr Grant alleges that, at the time of the motor vehicle collision, the Suzuki Swift was being driven by Mr Lee in its incorrect lane. Mr Grant contends that he veered to his right at the same time that Mr Lee veered to his left and that, in those circumstances, both vehicles collided.

[5] It is further alleged that, at the time of the motor vehicle collision, Mr Lee was acting as the servant and/or agent of Ms Lee, the registered owner of the Suzuki Swift.

[6] Mr Grant asserts that, as a consequence of the alleged motor vehicle collision, he sustained injury, damage and loss.

[7] On 29 September 2020, Mr Grant filed a Notice of Application for Interim Payment. By way of that application, Mr Grant seeks an Order mandating Ms Lee to make an interim payment in the sum of Three Million Dollars ($3,000,000.00), or, such other sum as the court may deem appropriate.

[8] The application for interim payment is supported by the Affidavit of Jamar Grant, which was also filed on 29 September 2020. Subsequent to that, on 6 October 2020, the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, was filed.

[9] On 14 January 2021, the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment and other Applications, was filed.

[10] On 21 April 2021, the Affidavit of Winston Stewart, was filed.

[11] On 3 May 2021, the Affidavit of Jamar Grant in Support of Several Applications, was filed.

[12] On 11 May 2021, the Affidavit regarding Arguments made by the Defendants' Attorneys at the Case Management Conference, was filed.

[13] The impugned evidence which is central to the instant application is contained in these affidavits.

The impugned evidence

[14] Mr Lee challenges lines four (4) to six (6) of paragraph ten (10) of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment and other Applications, which was filed on 14 January 2021. That portion of the affidavit evidence reads as follows: -

> *"10. … and, further, that it is reasonable to infer therefrom that General Accident Insurance Company Limited was, and remains, willing to pay me the policy limit which he, Mr Reitzin, is aware is $3 million."*

[15] The application to strike out seeks to have the Affidavit of Winston Stewart struck out in its entirety, or, alternatively, that the following paragraphs be struck out: -

"12. I saw tyre skid marks on the roadway. One skid mark began on the gas station side of Mannings Hill Road, i.e. the east side, and curved slightly along Mannings Hill Road to the embankment side, i.e. the west side of Mannings Hill Road and ended at the right rear wheel of the Suzuki Swift."

"13. I saw another skid mark on the roadway which started on the gas station side of Mannings Hill Road, i.e. the east side, and curved to the right and also ended at the right rear wheel of the Suzuki Swift."

"16. Someone said to him "How you a think bout your mother's car and the man there dead." The driver did not respond."

"18. The driver of the Suzuki Swift walked up to the door. His eyes were red, bloodshot. He looked "frass". I held the door open for him. He walked in. As he did so, I could smell liquor, alcohol, on his breath."

"19. I watched him as he bought chewing gum and 2 bottles of water."

"20. The cashier told me something after he made his purchase."

"21. I have seen a photograph showing the scene of the accident. I didn't take the photograph myself, however, I can say that the photograph shows perfectly accurately the scene of the accident very shortly after it happened. The photograph shows Mannings Hill Road, facing south i.e. in the direction of the intersection of Mannings Hill Road and Constant Spring Road. It shows a part of the entrance to the gas station, the white centre line of Mannings Hill Road, the Suzuki Swift which was damaged in the front, the embankment and tyre skid marks."

"22. Exhibited hereto and marked 'WS-1' for identification is a true copy of said photograph."

[16] The impugned paragraphs of the Affidavit of Jamar Grant in Support of Several Applications, which was filed on 3 May 2021, are set out below: -

"6. I also refer to paragraph 12 of my particulars of claim in which I alleged that while waiting for the police to attend the scene of the collision, the second defendant went into the service station where he purchased water and chewing gum in an attempt to mask his intoxication."

"7. I am reliably informed by my attorney, Mr Reitzin, and I believe it to be true, that that allegation was addressed in paragraph 11 of the defence filed on 7 November, 2016 and that my said allegation was not denied."

"8. I am further reliably informed by Mr Reitzin, and I believe it to be true, that my said allegation was also addressed in paragraph 9 of the amended defence filed on 3 July, 2019 and on that occasion my said allegation was neither admitted nor denied."

"9. I am further reliably informed by Mr Reitzin, and I believe it to be true, that in the further amended defence filed on 20 November 2020, the second defendant denied paragraph 12 of my particulars of claim and purported to put me to strict proof of the 'averments' therein; the second defendant also asserted that the 'averments' were presumptions and unfounded hearsay at best and that at the material time the second defendant was neither intoxicated nor did he purchase water and chewing gum in any attempt to mask his intoxication."

"10. For over 4 years the second defendant did not deny that he had purchased chewing gum and water in an attempt to mask his intoxication. When the second defendant instructed his third attorney/firm, the second defendant went from not denying that waiting for the police to attend the scene of the collision the second defendant went into the service station where he purchased water and chewing gum in an attempt to mask his intoxication to denying it."

"12. I am further reliably informed by Mr Winston Stewart, and I believe it to be true, that Mr Stewart was working as a security guard at the nearby gas station at the time of the collision; that shortly following the collision, but before the police arrived, the second defendant came out of a Suzuki Swift and said "Look how me mash up me mother's car."

"13. I am further reliably informed by Mr Winston Stewart, and I believe it to be true, that shortly following the collision, but before the police arrived, the second defendant went into the nearby gas station; that Mr Stewart noticed that the second defendant's eyes were red, bloodshot; that the second defendant looked "frass"; and that he, Mr. Stewart, could smell liquor, alcohol, on the second defendant's breath."

"14. I am reliably informed by a Miss Jones, and I believe it to be true, that she was a cashier working at the said gas station at the time of the collision; that shortly following the collision, the second defendant came into the shop at the gas station accompanied by another man; that the second defendant came into the shop at the gas station accompanied by another man; that the second defendant purchased from Miss Jones 4 packets of chewing gum and bottles of water; that the second defendant told Miss Jones to "maths it up quick"; that the second defendant appeared to her to be nervous; that the second defendant was telling the man who accompanied him how the collision had happened; that the man who accompanied the second defendant appeared to Miss Jones to realize that Miss Jones was close enough to hear their conversation; and that the said man then called the second defendant outside where they continued to speak with one another."

"15. Approximately a month after I was discharged from Kingston Public Hospital, I went to see Constable Duvane Connage at the Constant Spring Police Station. He showed me a document and said to me words to the effect of "This is the breathalyser result of the driver that hit you." The document appeared to me to be an official looking document which had both typing and handwriting on it but I do not recall any of its contents at this time. I am reliably informed by Constable Connage and I believe it to be true that the driver of the car that hit me was drunk at the time of the collision. Constable Connage said to me words to the effect of "Even if you were in the wrong, you will get the right because the driver was driving drunk." He also said to me words to the effect of "The driver was charged and has to go to court." Constable Connage told me the date that the driver was to go to the Traffic Court but I do not recall the date at this time."

"16. At a case management conference held on 16 September 2019 the second defendant admitted to The Honourable Miss Justice Y. Brown that following the accident he had been subjected to a breathalyzer test and Mr Monroe Wisdom, Attorney-at-Law who was appearing for the defendants, admitted to Her Ladyship that the second defendant had been charged with driving while intoxicated. In this regard, I refer to, and rely upon, my affidavit sworn on 17 September 2019 and filed on 18 September 2019."

"17. I am reliably informed by Mr Reitzin, and I believe it to be true, that on 8 July 2019, my attorneys filed and served a request for information on the

attorneys then acting for the second defendant; further, that the said request included a question addressed to the second defendant as to the reading resulting from the second defendant being breathalysed; further, that for a long period of time the attorneys for the second defendant failed to answer the request for information; that my attorneys filed an application to compel the second defendant to answer; and still further, that, on or about 20 November 2020, the third attorney (or firm) instructed by the second defendant purported to answer the request for information by asserting in relation to each and every question in the request for information, that the second defendant objected to responding on the stated basis that it was unnecessary for the clarification of any matter in dispute or to enable me to prepare my case or to understand the case I have to meet and that there was no ambiguity in the further amended defence and, alternatively, that it was a "fishing request" and, thus, outside the scope of Part 34 of the Civil Procedure Rules, 2002."

[17] Additionally, Mr Lee seeks to have the Affidavit Regarding Arguments made by the Defendants' Attorneys at the Case Management Conference held on 4 November 2020, which was filed on 11 May 2021, struck out.

THE ISSUES

[18] The application raises the following primary issue for the Court's determination: -

i. Whether the impugned paragraphs of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment; the Affidavit of Winston Stewart; the Affidavit of Jamar Grant in Support of Several Applications, as well as the Affidavit regarding Arguments made by the Defendants' Attorneys at the Case Management Conference, each filed on 14 January 2021, 21 April 2021, 3 May 2021 and 11 May 2021, respectively, ought properly to be struck out.

[19] In order to determine the primary issue raised by the application, the following sub-issues must also be resolved: -

(a) Whether the statements contained in the impugned paragraphs are relevant to the determination of the application for interim payment;

(b) Whether the statements contained in the impugned paragraphs are scandalous, irrelevant and/or otherwise oppressive in nature, rendering them inadmissible;

(c) Whether the statements made in the impugned paragraphs are likely to impede the just disposition of the matter.

THE LAW

Interim payments

[20] Part 17 of the Civil Procedure Rules, 2002, as amended ("the CPR"), empowers the court to make orders with respect to an array of interim remedies or interim relief. One of the orders which a litigant may seek is an order for interim payment. An interim payment, as contemplated by rule 17.1(1)(i) of the CPR, is a payment by a defendant of a sum on account of any damages, debt or other sum, which the court may find him liable to pay.

[21] Rule 17.5 of the CPR outlines the general procedure to be observed on an application for interim payment. Rule 17.5(5) of the CPR prescribes the content of an affidavit which supports an application for interim payment. The rule provides as follows: -

"17.5(5) The affidavit must –

(a) Briefly describe the nature of the claim and the position reached in the proceedings;
(b) State the claimant's assessment of the amount of damages or other monetary judgment that are likely to be awarded;
(c) Set out the grounds of the application;
(d) Exhibit any documentary evidence relied on by the claimant in support of the application; and

(e) If the claim is made under any relevant enactment in respect of injury resulting in death, contain full particulars of the person or persons for whom and on whose behalf the claim is brought".

[22] Rule 17.6 of the CPR deals with the circumstances in which a court can properly make an order for interim payment. The language of the rule is mandatory in nature and makes it clear that the court is empowered to exercise its discretion, if and only if, the conditions outlined in the rule are apparent, on the evidence presented.

[23] Rule 17.6 of the CPR reads as follows: -

"17.6(1) The court may make an order for an interim payment only if –

(a) The defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
(b) The claimant has obtained an order for an account to be taken as between the claimant and the defendant and for any amount found due to be paid;
(c) The claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;
(d) Except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or
(e) …

(2) In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is –

(a) insured in respect of the claim;

(b) a public authority; or

(c) a person whose means and resources are such as to enable that person to make the interim payment.

(3) In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if –

(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and

(b) paragraph (2) is satisfied in relation to each defendant.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account –

(a) contributory negligence (where applicable); and

(b) any relevant set-off or counterclaim."

Affidavit evidence

[24] Part 30 of the CPR is entitled "Affidavits" and outlines the applicable practice and procedure in relation to affidavit evidence as well as the parameters to be observed in respect of the content of that evidence. Rule 30.3(1) of the CPR provides that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

[25] Rule 30.3(3) of the CPR states: -

"30.3(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."

[26] Generally, evidence relevant to an issue between the parties is deemed to be admissible, once it falls within the parameters of the rules of evidence. Evidence must be relevant in order to be admissible but not all relevant evidence is in fact admissible. For evidence to be considered relevant, it must be relevant to some issue of fact that is in dispute in the trial. "Relevance" has

been defined by Stephen in his Digest of the Law of Evidence (12th edn, 1936), p 3, art 1 as: -

> *"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other."*

[27] The 12th edition of the text, Cross and Tapper on Evidence, at page 72, indicates that: -

> *"The admissibility of evidence, on the other hand, depends first on the concept of relevancy of a sufficiently high degree, and second, on the fact that the evidence tendered does not infringe on any of the exclusionary rules that may be applicable to it."*

The power of the court to strike out

[28] Under the CPR, the court has augmented powers to control the evidence before it and to exclude evidence if it so directs, irrespective of whether such evidence is relevant or otherwise admissible.[1]

[29] Part 29 of the CPR outlines the court's extensive powers to regulate, marshal or preclude evidence that is given at any trial or hearing. Rules 29.1(1) and 29.1(2) of the CPR detail the power of the court to control evidence. The rules read as follows: -

> *"29.1(1) The court may control the evidence to be given at any trial or hearing by giving appropriate directions as to –*
>
> *(a) the issues on which it requires evidence;*
>
> *(b) the nature of the evidence which it requires to decide those issues; and*
>
> *(c) the way in which the evidence is to be placed before the court, at a case management conference or by other means.*

[1] See – **Grobbelaar v Sun Newspapers Ltd** (1999) Times, 12 August, CA

29.1(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

SUBMISSIONS

The submissions advanced on behalf of the Applicant/2nd Defendant

The test for admissibility

[30] Ms Newby asserts that the primary test for admissibility is relevance. For evidence to be admissible, it must be relevant or probative of the facts in issue. The mere fact that evidence is relevant does not mean that it is automatically admissible, for the reason that it may be rendered inadmissible if it breaches an exclusionary rule or a principle of the law of evidence.

[31] Ms Newby submits that the court has a general discretionary power to control evidence at common law and under the CPR. Additionally, Ms Newby maintains that, pursuant to the inherent jurisdiction of the court, the court may strike out any matter which is an abuse of the processes of the court, or, which is likely to impede the just disposition of a claim. To buttress these submissions, Ms Newby relies on rules 29.1(1), 29.1(2) and 30.3 of the CPR, as well as section 31L of the Evidence Act. She also relies on the authorities of **Hunter v Chief Constable of the West Midlands Police**[2] and **Attorney General v Barker**.[3]

Amended pleadings

[32] In this regard, Ms Newby submits that the Order of the Honourable Mrs. Justice Tara Carr, permitting the Defendants' Further Amended Defences to stand as filed, was made over two (2) years ago, on 24 November 2020. Ms Newby further submits that that Order is one of a judge of concurrent jurisdiction, which can only be set aside by the Court of Appeal. To support

[2] [1982] AC 429
[3] [2000] 1 FLR 759 D.C

this submission, Ms Newby referred the Court to the authority of **Strachan v The Gleaner Co. Ltd.**[4]

[33] In the result, Ms Newby maintains, the issue of the filing of the Defendants' Further Amended Defences is *res judicata* and/or, in the alternative, Mr Grant is estopped from challenging same.[5]

The admissibility of evidence of a previous conviction for a criminal offence in civil proceedings

[34] Ms Newby asserts that evidence of a previous conviction for a criminal offence is inadmissible in subsequent civil proceedings, as evidence of the facts upon which the conviction is based. Ms Newby maintains that this is the law in Jamaica and directed the Court to the authority of **Hollington v F. Hewthorne & Company Limited**.[6] Ms Newby submits that the Jamaican Court of Appeal has pronounced, in the authority of **McNamee v Shields Enterprises**,[7] that an acquittal of a criminal charge may not be treated as evidence that the defendant did not commit the wrong for which he was charged in subsequent civil proceedings. It is further submitted that, in the authority of **Julius Roy v Audrey Jolly**,[8] the court pronounced that the learned trial judge was wrong to admit into evidence, testimony from the appellant that the respondent had been charged for and convicted of the offence of Assault Occasioning Actual Bodily Harm. Ms Newby also relies on the authority of **Patrick Thompson v Everton Eucal Smith**[9] and submits that, in that authority, the learned trial judge erred in allowing the respondent's Attorney-at-Law to cross examine the 2nd appellant, as to his conviction and sentence for the offence of careless driving; and that the learned trial judge erred in giving any consideration to the fact of the 2nd appellant's conviction, as a factor relevant to the issue of his liability in negligence in civil proceedings.

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[4] [2005] UKPC 33 at paragraphs. 32-33.
[5] See – **Strachan v The Gleaner Co. Ltd.**
[6] [1943] 2 All ER 35
[7] [2010] JMCA Civ 37
[8] [2012] JMCA Civ 53
[9] [2013] JMCA Civ 42

[35] In the alternative, Ms Newby urges the Court to find that the content of the impugned paragraphs is scandalous, irrelevant and or oppressive and ought properly to be struck out. Ms Newby reiterates that, whether or not Mr Lee was charged with a criminal offence or subjected to a breathalyser test, in the pursuance of criminal proceedings, is inadmissible in these proceedings. It is further submitted that the prejudicial effect of any such evidence would outweigh its probative value and ought to be excluded, on the basis of section 31 L of the Evidence Act or rule 29.1(2) of the CPR.

Lines 4-6 of paragraph 10 of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment

[36] Ms Newby asserts that the statements made at lines four (4) to six (6) of paragraph ten (10) of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment, contain second-hand hearsay evidence. Ms Newby further asserts that, for the statements made therein to be rendered admissible, Mr Grant would have had to have indicated which of the statements made are matters of information and belief and would have had to have stated the source(s) of that information and belief.

The affidavit evidence of Winston Stewart

[37] In this regard, Ms Newby submits that Mr Stewart is not a witness of any relevant fact in dispute in the matter. It is further submitted that Mr Stewart has no first-hand knowledge of or information about any fact in issue in the present instance. Ms Newby contends that the affidavit evidence of Mr Stewart does not identify any party to this action nor does it identify any of the motor vehicles which were involved in the motor vehicle collision. As a consequence, Ms Newby submits, the affidavit evidence of Mr Stewart is irrelevant. Additionally, Ms Newby asserts that the affidavit evidence of Mr Stewart appears to be at large, for the reason that it is not identified as being in support of any of the interlocutory applications that remain extant.

The submissions advanced on behalf of the Respondent/Claimant

Amended pleadings

[38] For his part, Learned Counsel Mr Richard Reitzin maintains that the Further Amended Defence of Mr Lee is the subject of challenge, for the reason that he failed to seek and obtain the requisite leave or permission of the court to file same. This, in accordance with the principles identified, expressed and applied in the authority of **Index Communication Network Limited v Capital Solutions Limited & Ors**.[10]

[39] Mr Reitzin also relies on the authority of **Commonwealth v Verwayen ("Voyager case")**,[11] which he contends is a highly authoritative exposition of the law as it relates to the failure to take an objection and an application for leave to raise it at a later stage. Mr Reitzin submits that this authority is applicable to the issue of whether Mr Grant should be permitted to argue that the principles identified and applied in the **Index Communication** case support the contention that the Defendants' Further Amended Defence ought properly to be struck out.

[40] Mr Reitzin asserts that the law in **Warner v Sampson**[12] is not applicable in Jamaica. The ratio decidendi of that authority was that the defendants' original general traverse survived for the purposes of the argument as to its true effect. It was neither replaced nor superseded nor was it overtaken by the amendment to the defendant's pleading. At the time of **Warner**,[13] the existing regime in relation to pleadings differed from the modernized regime which currently requires a party to certify the truth of the statements of fact contained therein.

[41] Mr Reitzin maintains that **Warner** did not concern affidavit evidence and that it had nothing to say in relation to the effect, if any, of amended pleadings on affidavit evidence. The principle of law espoused in **Warner**, the doctrine of relation back, applies only to pleadings which are properly filed. Where there

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[10] [2012] JMSC Civ No. 50

[11] [1990] HCA 39; (1990) 170 CLR 394 (5 September 1990)

[12] supra

[13] supra

is a failure to seek the leave of the court to file the Further Amended Defence and to adduce any evidence in an effort to establish a real prospect of success, in relation thereto, the authority of **Warner** does not assist. To substantiate this submission, Mr Reitzin relied on the authorities of **National Housing Development Corporation v Danwill**,[14] **Pan Caribbean Financial Services Limited v Robert Cartade & Ors**,[15] and **Juici Beef v Yenneke Kidd**.[16]

[42] It is further submitted that Mr Lee's pleadings contain a series of non-admissions and non-denials. The purported Further Amended Defence changes Mr Lee's position from one of a non-denial of his having attempted to mask his intoxication, to one of an outright denial. This, Mr Reitzin maintains, if allowed, would have an adverse effect on Mr Grant, for the reason that Mr Grant would be seeking to rely on Mr Lee's denial. Further, the non-admission and non-denial were accompanied by an invitation to Mr Grant to prove the allegation in respect of which they were made. This, Mr Reitzin asserts, Mr Grant has done.

The admissibility of evidence of a previous conviction for a criminal offence in civil proceedings

[43] In this regard, Mr Reitzin submits that there is a critical distinction between convictions on the one hand and admissions against interest, on the other. Mr Reitzin referred the Court to the authority of **Amos Virgo v Steve Nam**,[17] and specifically to the dicta of Evan J Brown J (Ag.) (as he then was), who referred to the authority of **Hollington v Hewthorne**.[18] Mr Reitzin asserts that the critical point, as stated by Goddard LJ, is that "*an admission can always be given in evidence against the party who made it*". Mr Reitzin maintains that Mr Grant's impugned affidavit evidence, which was filed on 29 September 2020, simply gives evidence of admissions made by, on behalf of and in the presence of, Mr Lee.

[14] 2004 HCV 000361 & 2004 HCV 000362
[15] [2011] JMCA Civ 2
[16] [2021] JMCA Civ 29
[17] 2008 HCV 00201
[18] supra

[44] Mr Reitzin submits that the notion that affidavit evidence can be "overtaken" by a subsequently filed pleading such as a further amended defence and be retrospectively rendered scandalous, irrelevant and/or otherwise oppressive or alternatively, an abuse of process, is utterly bereft of support in law.

[45] To buttress this submission, Mr Reitzin cited the authority of **Kenneth Gordon v Daniel Chokolingo as Executor of the Will of Patrick Chokolingo (deceased) and Others**.[19]

ANALYSIS AND FINDINGS

The approach of the Court

[46] In its approach to its consideration of the primary issue raised by this application, the Court has regard to the law of evidence, which by now is trite, that, for evidence to be admitted in court, it must be relevant and material. It is equally trite that, evidence is admissible if it relates to the facts in issue and lends itself to making those facts either probable or improbable. To be deemed relevant, that evidence must have some tendency to help prove or disprove some fact and must have some probative value.

[47] The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her knowledge.[20] The deponent is required to give evidence of facts which are within his or her personal knowledge. Where there are statements of information and belief, it is required that the source(s) of that information and the bases for that belief are to be stated.

[48] The application to strike out the impugned affidavit evidence is made against the background of the following interlocutory applications, which remain extant: -

(i) The Notice of Application to strike out Defence or for Order compelling answers to Request for Information, which was filed on 19 August 2019;

[19] Privy Council Appeal No. 19 of 1986
[20] See – Rule 30.3(1) of the Civil Procedure Rules, 2002

(ii) The Notice of Application to strike out portions of the First Defendant's Further Amended Defence and Counterclaim, which was filed on 26 November 2020;

(iii) The Notice of Application to strike out the Second Defendant's Further Amended Defence, which was filed on 30 November 2020;

(iv) The Amended Notice of Application for Interim Payment, which was filed on 12 January 2021; and

(v) The Notice of Application for Summary Judgment, which was filed on 28 April 2021.

It is in this context that the Court is urged to determine the relevance or otherwise of the impugned affidavit evidence.

[49] In order to resolve the primary issue raised by this application, the Court must determine firstly, whether the impugned evidence is relevant to the determination of the amended application for interim payment; secondly, whether the impugned evidence is relevant to the determination of any of the interlocutory applications which remain extant; thirdly, whether that evidence is scandalous, irrelevant and/or otherwise oppressive in nature, such as to render it inadmissible; and finally, whether the statements contained in the impugned paragraphs of the several affidavits are likely to impede the just disposition of the matter.

The impugned evidence

[50] Portions of the impugned evidence are contained in the affidavit evidence of Mr Grant, in support of the amended application for interim payment. To grant an order for interim payment, the court must make an assessment of the claim and must determine whether the sum of money sought by virtue of the application, is a sum which would likely be awarded to the applicant at trial. This means that the affidavit evidence must satisfy the requirements of rules

17.5 and 17.6 of the CPR, in order to be considered relevant for the determination of an application for interim payment.

[51] The language of rules 17.5 and 17.6 of the CPR is mandatory in nature. Rule 17.5(5) of the CPR delineates five (5) constituent parts which must be evident on the affidavit evidence which supports an application for interim payment. Rule 17.6 of the CPR outlines the conditions required to be satisfied and the matters which a court must take into account, on an application for interim payment. It is clear from the language of the rules that the court is not at liberty to exercise its discretion, in favour of granting an order for interim payment, unless and until the conditions and matters outlined in the rules are evident on the affidavit evidence which supports the application.

[52] The main contention of the Claim brought by Mr Grant, as the Court understands it, is that, at the time of the alleged motor vehicle collision, Mr Lee was driving whilst intoxicated and, as a consequence, so negligently manoeuvred the Suzuki Swift in a manner which caused the said collision. It is further alleged that, subsequent to the said collision, whilst awaiting the arrival of the police on the scene, Mr Lee went to a nearby service station to purchase water and chewing gum. Mr Grant asserts that Mr Lee did this in an attempt to mask his intoxication.

[53] On this basis, Mr Reitzin submits that the impugned evidence contains demonstrable facts which are relevant to the tenor of Mr Grant's case.

Lines 4-6 of paragraph 10 of the Third Affidavit of Jamar Grant in Support of the Amended Application for Interim Payment

[54] Mr Lee challenges lines four (4) to six (6) of paragraph ten (10) of the Third Affidavit of Jamar Grant in Support of Amended Application for Interim Payment and other Applications, which was filed on 14 January 2021.

[55] Lines four (4) to six (6) of the affidavit evidence reads as follows: -

> *"10. … and, further, that it is reasonable to infer therefrom that General Accident Insurance Company Limited was, and remains, willing to pay me the policy limit which he, Mr Reitzin, is aware is $3 million."*

[56] The Court finds that these lines ought properly to be struck out for the reason that the statements made therein contain second-hand hearsay. The Court accepts the submissions advanced by Ms Newby in this regard and finds that Mr Grant has failed to identify the source of his knowledge or the source of the information of which he purports to give evidence.

The affidavit evidence of Winston Stewart

[57] The complaint made in respect of the Affidavit of Winston Stewart, which was filed on 21 April 2021, is that it is not immediately apparent that that affidavit has been filed in specific reference to any of the interlocutory applications which remain extant.

[58] In this regard, the Court accepts the submissions advanced by Ms Newby and finds that the complaint made, in respect of the affidavit evidence of Mr Stewart, is a valid one. Notwithstanding, it is still open to Mr Grant to seek the permission of the court to rely on this evidence, for the purpose of any or all of the interlocutory applications which remain extant. For that reason, the Court declines to strike out the affidavit evidence of Mr Stewart, in its entirety. The Court is of the view, however, that an examination of the content of the affidavit evidence of Mr Stewart is important.

[59] The Court finds that there is nothing objectionable to the evidence contained in paragraphs 12 and 13 of the Affidavit of Winston Stewart, which was filed on 21 April 2021. The Court so finds for the reason that Mr Stewart seeks to give evidence of his personal observations of the scene of the motor vehicle collision and at the time of the said collision.

[60] As a consequence, the application to strike out paragraphs 12 and 13 of the Affidavit of Winston Stewart, which was filed on 21 April 2021, is denied.

Paragraph 16

[61] The Court finds that paragraph 16 of the Affidavit of Winston Stewart ought properly to be struck out on the basis that it contains inadmissible evidence. The Court so finds for the reasons that the person to whom these words have

been attributed has not been identified and that there is no affidavit evidence or witness statement from that individual.

Paragraph 18

[62] The Court finds that paragraph 18 of the Affidavit of Winston Stewart ought properly to be struck out for the reason that the prejudicial effect outweighs the probative value of the evidence contained therein. There is no evidence as to the reason for the appearance of the eyes of the driver of the Suzuki Swift, which are described by Mr Stewart as being "red" and "bloodshot". It cannot be said that the inescapable inference is that the eyes of the driver of the Suzuki Swift appeared as they did, as described by Mr Stewart, by virtue of his [the driver] being inebriated. For those reasons, this Court agrees with the submissions advanced by Ms Newby that the prejudicial effect of the evidence contained in this paragraph far outweighs its probative value and that it ought properly to be struck out.

Paragraph 19

[63] This Court is of the view that paragraph 19 of the Affidavit of Winston Stewart ought properly to be struck out. This is for the reasons firstly, that the evidence contained therein is irrelevant to any of the issues to be determined on any of the interlocutory applications which remain extant; and secondly, that the evidence contained therein seeks to invite the court into speculation.

Paragraph 20

[64] The Court finds that the evidence contained in paragraph 20 of the Affidavit of Winston Stewart is inadmissible hearsay evidence and is not relevant to any issue raised by way of any of the interlocutory applications which remain extant. Mr Stewart does not purport to identify the cashier nor is there any affidavit evidence from this individual before the Court. In those circumstances, any evidence from Mr Stewart of the content of the conversation between himself and the cashier would be inadmissible hearsay evidence. For this reason, this Court is of the view that paragraph 20 of the Affidavit of Winston Stewart ought properly to be struck out.

Paragraphs 21 and 22

[65] This Court is of the view that paragraphs 21 and 22 of the Affidavit of Winston Stewart ought properly to be struck out for the reasons that there is no evidence before the Court in relation to the integrity of the photograph or of the chain of custody in respect of same. Mr Stewart does not give any evidence as to who took the photograph; when the photograph was taken; how long after the motor vehicle collision the photograph was taken; whether the photograph was taken at day or at night; and whether the representations made in the photograph is an accurate representation of the scene of the collision at the material time.

The Affidavit of Jamar Grant in Support of Several Applications

Paragraphs 6-10 inclusive

[66] Paragraphs 6 to 10, inclusive, of the Affidavit of Jamar Grant in Support of Several Applications read similarly to affidavit evidence which has already been ruled inadmissible by this Court. This Court finds that the content of these paragraphs is irrelevant to any issue raised by any of the interlocutory applications which remain extant and seeks to invite the court into speculation.

Paragraphs 12 and 13

[67] The content of paragraphs 12 and 13 of the Affidavit of Jamar Grant in Support of Several Applications mirrors the statements made in paragraphs 18 and 19 of the Affidavit of Winston Stewart, which was filed 21 April 2021. The Court finds that these paragraphs ought properly to be struck out on the basis that they invite the court into speculation.

Paragraph 14

[68] This Court is of the view that paragraph 14 of the Affidavit of Jamar Grant in Support of Several Applications ought properly to be struck out on the basis that it contains inadmissible hearsay and second-hand hearsay evidence.

Additionally, the Court finds that the prejudicial effect of this evidence outweighs its probative value.

Paragraph 15

[69] The Court finds the content of the affidavit evidence contained in paragraph 15 of the Affidavit of Jamar Grant in Support of Several Applications to be an egregious breach of the rule against hearsay evidence. The paragraph contains inadmissible evidence of a criminal charge having being laid against Mr Lee, as a result of the alleged motor vehicle collision. The prejudicial effect of the statements contained in this paragraph far outweigh their probative value.

Paragraphs 16 and 17

[70] The Court finds that the evidence contained in paragraphs 16 and 17 of the Affidavit of Jamar Grant in Support of Several Applications is both irrelevant and inadmissible. The Court finds that the prejudicial effect of the statements contained in these paragraphs far outweigh their probative value.

The Affidavit Regarding Arguments made by the Defendants' Attorneys at the Case Management Conference held on the 24 November 2020

[71] The Court finds that this affidavit ought properly to be struck out in its entirety. The statements contained therein are both irrelevant and inadmissible and are highly prejudicial.

Costs

General provisions in relation to costs

[72] Part 64 of the CPR contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.[21]

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[21] See – Rule 64.6(1) of the CPR

[73] Rule 64.3 of the CPR provides that the court's power to make orders about costs include the power to make orders requiring any person to pay the costs of person arising out of or related to all or any part of any proceedings.

[74] Rule 64.5 of the CPR states as follows: -

> *"(1) A person may not recover the costs of proceedings from any other party or person except by virtue of –*
>
> *(a) an order of the court;*
>
> *(b) a provision of these Rules; or*
>
> *(c) an agreement between the parties."*

[75] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.[22]

[76] In all the circumstances in the present instance, this Court is of the view that there is nothing which warrants a departure from the general rule that the unsuccessful party is required to pay the costs of the unsuccessful party.

[77] In the result, the costs of this application are awarded to the Applicant/2nd Defendant against the Respondent/Claimant and are to be taxed if not sooner agreed.

Wasted costs

[78] The term "wasted costs" means any costs incurred by a party: -

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such an attorney-at-law; or

[22] See – Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

(b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.[23]

[79] The court may, by order, in any proceedings, disallow, as against the client of any attorney-at-law; and/or direct the attorney-at-law to pay, the whole or part of any wasted costs.[24] [25]

[80] Whilst the Court appreciates that an application is made for an Order of wasted costs, as against the Respondent/Claimant's Attorney-at-Law, the Court declines to make such an Order, at this time.

DISPOSITION

[81] It is hereby ordered as follows: -

1. Lines 4 to 6 of paragraph 10 of the Third Affidavit of Jamar Grant in Support of the Amended Application for Interim Payment and other Applications, which was filed on 14 January 2021, are struck out;

2. A redacted Third Affidavit of Jamar Grant in Support of the Amended Application for Interim Payment and other Applications, which was filed on 14 January 2021, is to be filed and served on or before 27 January 2023;

3. The Court declines to strike out in its entirety, the Affidavit of Winston Stewart, which was filed on 21 April 2021;

4. The application to strike out paragraphs 12 and 13 of the Affidavit of Winston Stewart, which was filed on 21 April 2021, is denied;

5. Paragraphs 16, 18, 19, 20, 21 and 22 of the Affidavit of Winston Stewart, which was filed on 21 April 2021, are struck out;

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[23] See – Rule 64.13(2)(a) and (b) of the CPR
[24] See – Rule 64.13(1)(a) and (b) of the CPR
[25] See also – Rule 64.14 of the CPR, which outlines the procedure to be observed for wasted costs orders.

6. A redacted Affidavit of Winston Stewart, which was filed on 14 January 2021, is to be filed and served on or before 27 January 2023;

7. Paragraphs 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17 of the Affidavit of Jamar Grant in Support of Several Applications, which was filed on 3 May 2021, are struck out;

8. A redacted Affidavit of Jamar Grant in Support of Several Applications, which was filed on 3 May 2021, is to be filed and served on or before 27 January 2023;

9. The Affidavit Regarding Arguments made by the Defendants' Attorneys at the Case Management Conference held on the 24 November 2020, which was filed on 11 May 2021, is struck out in its entirety;

10. Costs are awarded to the Applicant/2nd Defendant against the Respondent/Claimant and are to be taxed if not sooner agreed;

11. The Court declines to grant an Order of wasted costs against the Respondent/Claimant's Attorney-at-Law;

12. The Applicant/2nd Defendant's Attorneys-at-Law are to prepare, file and serve these Orders.