IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. R-037 OF 2000

BETWEEN	**CURTIS REID**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**JENTECH CONSULTANTS LIMITED**	**2NDDEFENDANT**
AND	**WAYNE REID**	**3rd DEFENDANT**

Mr. P. Beswick and Mr. Terrence Ballantyne instructed by Ballantyne & Beswick for the Claimant; Mr. R. Braham and Mr. M. Hogarth instructed by Livingston, Alexander & Levy for the 2nd Defendant, and Ms. V. Allard and Ms. T. Watkins instructed by Vaccianna & Whittingham for the 2nd and 3rd Defendants.

Heard on July 19, 20 and 21, 2004.

ANDERSON, J.

This is an application by the Defendants herein to strike out certain portions of the Witness Statement of the Claimant, Curtis Keslake Reid, on the basis that it offends against the Hearsay Rule. It might be thought that an application of this nature would be unnecessary, and certainly undeserving of judicial time to produce this brief note on my ruling. However, as will be apparent from some of my comments below, despite its longevity, as witnessed by its existence for over four (4) centuries, the elusiveness of a perfect definition continues to plague litigants and courts alike. It is said that the origins of the hearsay rule can be traced to the trial of Sir Walter Raleigh in 1603, who was found guilty of high treason on the basis of testimony that someone had overheard someone else say they heard Raleigh would slit the King's throat.

It is not my purpose here to launch into some treatise on the law of hearsay. But I believe that at this particular time in our emerging jurisprudence and with the recent enactment of the new Civil Procedure Rules 2002, (The CPR), there is need to spend some time on this as it will be a matter which faces judges every time they are in a trial and must look at witness statements.

An Extract from The Law Commission for England and Wales Consultation Paper No 117 on "The Hearsay Rule in Civil Proceedings" and Part V "Provisional Conclusions" had this to say:

> "There can be little doubt that the rule excluding hearsay is the most confusing of the rules of evidence, posing difficulties for courts, practitioners and witnesses alike. Because litigants need to know in advance what evidence they should assemble, it is of particular importance that the rules should be as easy to understand and to apply as possible whilst continuing to serve the aims of evidence law. Any reform of the hearsay rule which succeeded in improving the clarity of understanding of its purpose and the manner in which it is to be applied would do much to improve evidence law as a whole".

It also concluded that:

> "The weakness of the exclusionary rule against hearsay cannot be remedied just by way of a clearer explanation of the present law: the present law is irremediably difficult to understand and explain to the wide audience that is expected to comply with it".

In England, the rigidity and complexity of the rule have been softened by a number of statutes amending the law of hearsay as it applies to both civil and criminal matters. Here in Jamaica, our own application has been modified by the amendment to our Evidence Act, as well as the facility to serve a "Notice of Intention to tender Hearsay Evidence" on the other side in litigation, requiring that other side to give notice that it will require the maker of the document in question to be present to give oral evidence.

But in this case, as in another that came before me in the recent past, the issue of hearsay evidence has been raised within the context of the CPR 2002. The issue which also became apparent in England when they introduced their new rules, arose from the fact that witness statements would now constitute the evidence in chief of witnesses in litigation. Since in many cases those witness statements would be crafted and even drafted by lawyers, there was found a tendency to "gild the lily", and to include in such witness statements, hearsay material. So, in the matter that had come before me earlier, there was an attempt to exclude an expert witness report on the basis that it contained hearsay evidence.

In the matter now before me, the importance of this issue of hearsay is increased because the court will be sitting with a special jury, and there is it seems to me, a greater danger of hearsay evidence, if let in, corrupting the findings of the jury in a way that may be less likely when a judge sits alone. It is worth noting in passing that the CPR 29.8 (2) now states:

> Where a witness is called to give oral evidence under paragraph (1), his or her witness statement shall stand as evidence in chief unless the court orders otherwise.

Thus, unless the court "orders otherwise", the only way in which the jury would get to "hear" the witness's testimony, would be by reading a copy thereof, as normally all that will take place before them, is the cross-examintion of the witness.

It was submitted by the defendants' counsel, that CPR 29.5 (1) (c) prevented the claimant's witness statement from including "any matters of information or belief which are not admissible". That, in effect, was a restatement of the rule against hearsay. The defendants in this case pointed to about thirty-four (34) instances in the claimant's witness statement where they submit that the statement has breached the rule against hearsay. I shall advert to the individual paragraphs below as I make my ruling on each one individually, and so I do not intend to set them out here. In fact, I shall deal with the response submissions of the claimant's counsel to the submissions that the particular paragraphs contravened the provisions of CPR 29.5.

Apart from the assertion that the allegedly offending paragraphs referred to by the defendants did not in fact constitute hearsay, the claimant's counsel suggested two bases for the court refusing to accede to the request to strike out. First, he submitted that the application coming at this time when the trial was to start, was too late in the day. It should at least have been made at the time of the pre-trial review and to grant the application at this time would be to offend against the principle of the rules to ensure the timely delivery of justice. My response to this is that the duty of the court to act justly (CPR 1.1) requires that the court should ensure that the issues placed before the court (and in this case the jury) should be proper issues not coloured by hearsay. To allow evidence which contravenes the hearsay rule would clearly breach CPR 1.1. Secondly, I agree with the submission that CPR 11.3 (2) provides a complete answer to the timeliness objection. That provision is in the following terms,

> Where an application is made which could have been dealt with at a case management conference or pre-trial review, the court must order the applicant to pay the costs of the application unless there are special circumstances.

The claimant's counsel also seemed to suggest that since there were similar statements in the witness statements of the witnesses for the defence, the allegedly

offending parts of the claimant's statement should be left untouched. It is noted that no specific application was made with respect to the exclusion of the purportedly offending parts of the defendants' witnesses. I do not agree that this provides the court a legitimate basis for denying the defendants' application. Nor, for completeness I should add, do I apprehend any assistance from the case cited by Mr. Beswick, **Reg v Halpin [1975] 2 All E. R. at page 1124.**

As I indicated above, the main submission of claimant's counsel, advanced with his accustomed forthrightness and conviction, was that the paragraphs or portions thereof cited, did not contravene the rule and were eminently defensible in most cases as being part of the *res gestae*. I should point out that there is a view that *res gestae* was not historically a common Law exception to the Hearsay Rule. I accept the characterization of res gestae by a writer on the subject in the following terms:

> Where the res gestae exception exists, a party is allowed to admit evidence which consists of, among other things, everything said and done in the course of the incident or transaction that is the subject of the trial.

It must however be spontaneous and contemporaneous, not retrospective and speculative. This exception therefore is certainly not wide enough to encompass interpretations or "understandings" arrived at or filtered through the perceptions of others whose capacity to judge the appropriateness of those responses, the court does not have the benefit of hearing.

In deciding whether and to what extent any of the claimant's witness statement should be excluded, I start with the following quote from Phipson on Evidence, 11th Edn. paragraph 632.

> Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.
>
> Simple as this fundamental is, in principle if not in application, there nonetheless exists "a superstitious awe ... about having any truck with evidence which involves A's telling the court what B said." Conspicuous uncertainty exists amongst practitioners, magistrates and judges as to what evidence does and does not fall within the hearsay rule. The reasons for this widespread misunderstanding are threefold.
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> 1. Failure to appreciate that the hallmark of a hearsay statement is not only the nature and source of the statement, but also the reason for which it is tendered.

2. The absence of any comprehensive judicial formulation of the rule-no doubt because "it is difficult to make any general statement about the law of hearsay which is entirely accurate." Per Lord Reid in **Myers v D.P.P. 1965 A.C. 1001 at p 1070.**
3. The multiplicity of formulations found in textbooks upon the subject.

I also accept the definition given by Cross on Evidence.

> "Express or implied assertions of persons other than the witness which is testifying, and assertions in documents produced to the court when no witness is testifying are inadmissible as evidence of that which was asserted."

But the following quote from Phipson I find particularly instructive.

> Even when a witness purports to be giving evidence of a fact, that evidence will be inadmissible under the rule *if based upon the knowledge of another*. (Emphasis mine)

I say this because in several instances where the witness said, "I understand", counsel suggested that such represented a conclusion of fact arrived at by the witness by virtue of his position and his job with the company. It is not an unreasonable inference that it is an understanding gleaned from knowledge of others and not by the witness himself. Thus, suppose for example, that the witness was in the 1st Defendant's offices at an office party after a meeting of the contracts committee, and members of the committee along with others were discussing the committee's reaction to a particular contract which had been before it, is a statement in his witness statement that: "my understanding was that the contracts committee was favourable to the particular contract", of any value? Is it not likely to be more prejudicial than of probative value? So the issue is not only that of hearsay narrowly construed, what counsel referred to as narrative hearsay, but the court must also take cognizance of otherwise prejudicial matters and opinions masquerading as facts. So that if the witness bases his conclusion which is now asserted as fact upon the conduct or words of persons who do not come before the court, then notwithstanding that it is gleaned in the course of his job, how is the court to evaluate it without knowing first hand the persons from who such was gleaned, their objectivity, reliability, truthfulness and accuracy? These ought not to be allowed to be put before a jury.

In this regard, I also accept the characterization of two types of hearsay as articulated in an article by an American legal scholar. He had this to say:

> Scholars frequently distinguish between (a) "assertion-centered" hearsay and (b) "declarant-centered" hearsay, as so do the Federal Rules of Evidence. The first type -- (a) assertion-centered hearsay -- is intended solely to prove the truth of some matter or crucial fact in the trial. For example, if a witness is called to say they heard the defendant was out-of-town at the time a murder was committed, this attempt at an alibi defense would be based on hearsay. The second type -- (b) declarant-centered hearsay -- depends upon the credibility of the witness. For example, if a scientific (forensic) expert is called to testify about the supposed reputation some scientific technique enjoys in the scientific community, then their testimony may or may not be hearsay depending upon the qualifications and credibility of that expert.

Despite Mr. Braham's apparent invitation implied in his throwaway comment that even if no application was made to exclude the offending evidence the court could on its own motion make the necessary excisions, I make no ruling in that regard, and I do not have to. I do however make the following rulings in relation to the allegedly offending paragraphs, in response to the application.

1. Paragraph 3. Delete words from "and advised that the firm Apec Consultants Limited who were consultants to JTC from the 1950s, was experienced in the standards of the company and I should be guided by them". The rest of the statement about Apec may remain as the witness is competent to say whether at the time he joined the 1st defendant, that firm was responsible for the majority of the building work.
2. Paragraph 4. Delete from "The contractual arrangement" down to "scale of fees and". The witness may be allowed to amplify this part of his testimony at the time he gives his evidence.
3. Paragraph 17. Delete from "I was advised" to "affected". Similar amplification to be allowed.
4. Paragraph 24. Delete from "I verily believe" to end of paragraph.
5. Paragraph 42. Delete "They appeared to be seeing a $16M project over-run" to "$26M". Delete last sentence entirely. Witness MUST in evidence-in-chief amplify why he thought Director Weise "appeared to understand and agreed to give the explanation to the contracts committee".
6. Paragraph 44. Delete last sentence unless the witness can delete the words "I verily believe that", and "the words "and that" in that sentence.

7. Paragraph 46. This paragraph can remain except the phrase "I understand that a survey of fees was carried out", unless the witness can delete the words underlined.
8. Paragraph 48. This can remain.
9. Paragraphs 47-56 will be allowed to remain in ONLY if the witness can say that these projects took place while he had responsibility for the Building Department and so are facts within his personal knowledge. He would be required to give an additional witness statement to this effect.
10. Paragraph 58. Delete "at the request of Mr. Lee".
11. Paragraph 63. Delete the last sentence of this paragraph. No basis is given upon which the witness was able to personally form any "perception".
12. Paragraph 64. Remains in.
13. Paragraph 65. Remains in.
14. Paragraph 71. Remains in.
15. Paragraph 72 is clear "narrative hearsay" as described by Mr. Beswick and must be deleted, except to the extent that the witness can say that "up to October 1998, I had not been told who to appoint to carry out the designs".
16. Paragraph 78. To be deleted. Clear hearsay.
17. Paragraph 80. To be deleted.
18. Paragraph 81. Unless Witness can provide in the additional witness statement the basis of his personal knowledge of the purported fact in this paragraph, the sentence "I became aware---------$27.5M in January 1998)
19. Paragraph 86. To be deleted unless witness can give in additional witness statement, the basis for his personal knowledge of the alleged facts as set out in that paragraph.
20. Paragraph 90. Can remain in although I have some concerns but I do not believe that it is so prejudicial that it must be removed.
21. Paragraphs 94 and 99. These can remain in.
22. Paragraph 101. Last sentence to be deleted.
23. Paragraph 103. Last sentence must be deleted.
24. Paragraph 104. Everything after the word "supervise" must be deleted.
25. Paragraph 106. Deleted unless the witness can still make the statement after deletion of the opening words: "I understand that".

26. Paragraph 111. Even counsel for the claimant recognized the inappropriateness of the words in the sentence commencing: "I have heard rumours", and that sentence must be deleted.
27. Paragraph 112. This is to be allowed and the witness can be cross-examined on his assertion.
28. Paragraph 114. Delete "Some of whom afterwards indicate orally to me" to the end of that paragraph.
29. Paragraph 115. This can remain in.

I so rule.