

COMMONWEALTH OF THE BAHAMAS

**IN THE SUPREME COURT
Common Law and Equity Division
CLE/gen 1071 of 2014**

Between

**WHALE CAY GROUP LIMITED
Plaintiff**

AND

**THE PRIVATE TRUST CORPORATION LIMITED
Defendant**

Before: The Hon. Madam Justice Rhonda P. Bain

**Appearances: Mr. Ferron Bethell with Ms. Camille Cleare for
the Plaintiff**

**Mr. John Wilson with Mr. Lamarque Campbell
and Ms. Erin Turnquest for the Defendant**

6 October 2015 and 2 November 2015

(Ruling No. 1)

(1) By Summons filed 18 September 2015 the Plaintiff made application pursuant to Order 41 Rule 5 and/or Rule 6 of the Rules of the Supreme Court 1978 and under the inherent jurisdiction of the court for the following relief –

- “(a) that paragraphs 11, 13, 14, 21, 22, 23, 24 and 25 of the Second Affidavit sworn by Adrian Crosbie Jones of the Western District of New Providence on the 10th day of September 2015 and filed herein on the same day (“the Affidavit”) be struck out on the ground that the same contains hearsay evidence and does not set out the source of the information contained therein, and/or upon the ground that they are scandalous and/or frivolous and/or vexatious in that they state opinion, conclusion and submission.”

(2) This summons was supported by the Affidavit of Chinique Pratt-Kemp filed on 18 September 2015.

(3) By Summons filed 5 October 2015 application was made by the Defendant pursuant to Order 41 Rules 5, 6, and 8 of the Rules of the Supreme Court and/or under the inherent jurisdiction of the court for the following order –

- “(i) That paragraphs 6, 7 and 9 of the Affidavit of David Casoria sworn to and filed herein on 28 July 2014 be struck out on the ground that the said paragraph contain hearsay evidence and are otherwise scandalous, oppressive and/or irrelevant as the said paragraphs contain opinion, conclusions and submissions.
- (ii) That the entire Affidavit of David Casoria sworn to and filed herein on 28th July 2014 be struck out, having been filed in contravention of RSC order 41 Rule 8 (2).”

(4) This Summons was supported by the Affidavit of Michelle L. Deveaux filed on 6 October 2015.

(5) At the hearing on 6 October 2015 counsel for the Defendant agreed to withdraw his Summons, withdraw the Second Affidavit of Adrian Crosbie Jones filed 10 September 2015 and undertook to file a new Affidavit of Adrian Crosbie Jones by 8 October 2015.

(6) The Defendant refiled the Second Affidavit of Adrian Crosbie Jones on 8 October 2015. At the hearing on 2 November 2015 counsel for the Plaintiff objected to

paragraph 11 and 21 of the Second Affidavit of Adrian Crosbie Jones filed 8 October 2015.

(7) These paragraphs state –

- “11. I am advised and verily believe that at all material times Ralph and Alice Muller were the principals and beneficial owners of both AIP and R & D Muller Ltd.
21. WCG has made no payment to PTC in satisfaction of the covenant to repay in the 2012 Mortgage. I am informed by Mr. Larry Schone, US counsel for AIP and do verily believe that as of the date hereof WCG nor any person to its order or on its behalf has made payment of the amounts demanded by AIP or to any one on AIP's behalf.”

(8) The Court heard Submissions on 2 November 2015 and reserved its position on the Affidavit and agreed to hear the substantive application and rule on the admissibility of the paragraphs at the same time.

(9) Counsel for the Defendant objected to the application being made to strike out paragraphs 11 and 21 of the Second Affidavit of Adrian Crosbie Jones on the ground that the Plaintiff had not filed a Summons or Affidavit in support praying for the paragraphs to be struck out.

(10) Counsel for the Plaintiff acknowledged that he had not made formal application to strike out the offending portion of the Affidavit filed 8 October 2015. Counsel submitted that the court had the power to hear the application and ignore the offending paragraphs. The court determined that it had the power to hear the application to strike out paragraphs of the second Affidavit of Adrian Crosbie Jones.

(11) Counsel for the Plaintiff submitted that these are substantive proceedings, not interlocutory proceedings and therefore Order 41 Rule 5 Rules of the Supreme Court does not apply. As a result Mr. Crosbie Jones is not entitled to rely on hearsay evidence.

(12) Counsel submitted further that with respect to paragraph 21 Mr. Adrian Crosbie Jones could not give evidence of what was told to him by Mr. Larry Schone, US counsel for AIP. Counsel maintained that if the statement by Mr. Schone is to be admitted on evidence Mr. Schone should file an Affidavit.

(13) Counsel for the Defendant submitted that Section 39 of the Evidence Act, Chapter enables hearsay evidence to be admissible in civil trials under certain circumstances. Section 39 (2) of the Evidence Act provides –

“39. (1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.

(2) Hearsay evidence may be admitted —

- (a) where the statement is a necessary part of any fact or transaction which is being investigated by the court;**
- (b) where the knowledge, intention, motive, state of feeling, state of mind or state of body of any person is a fact in issue and the statement proves or disproves the said knowledge, intention, motive, state of feeling, state of mind or state of body;**
- (c) where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved but subject to the provisions of sections 14 to 19;**
- (d) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered, and where such person had an opportunity of replying to such statement;**
- (e) where the statement is contained in any official record, book or register, kept for the information of the Crown or for public reference and was made as the result of inquiry by a public servant in discharge of a duty enjoined by the law of the country in which such official record, book or register is kept;**

- (f) where the statement was made by a person since dead as to the cause of his death or as to any of the circumstances of the transaction resulting in his death in cases in which the person's death is the subject of a criminal charge:

Provided —

- (i) that the person at the time he made the statement was in actual danger of death and in the expectation of death, and
- (ii) that the statement was of such a nature that it could have been given in evidence in legal proceedings if the person making it had survived;

- (g) where the statement was made by a person, since dead, in the ordinary course of business, in discharge of a duty incumbent upon such person for the purpose of recording or reporting something which it was the duty of the person to perform, at or near the time when the matter stated occurred and of his own knowledge:

Provided that evidence of such statement shall not be admitted in order to prove any fact mentioned therein which it was not the duty of the person making it to embody in such statement;

- (h) (i) where the statement was made by a person since dead, whether by himself or by some person shown to be duly authorised in that behalf, and was made against his pecuniary or proprietary interest at the time he made it, and related to the circumstances of which he had special knowledge:

Provided that the person making it had no interest to misrepresent the matter stated,

- (ii) a statement charging a person with a liability in one part of it is a statement against his pecuniary or proprietary interest even though in another part, it may discharge him from such liability;

- (i) where the statement was made by a person, since dead, and gives the opinion of such person as to the existence of any public right or custom, or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when the statement was

made before any controversy as to the right, custom or matter, had arisen:

- (j) where the statement is tendered in proceedings in which the existence of any relationship of blood or marriage is a fact in issue and where the statement related to the existence of the relationship and is made by a person since dead and shown to the satisfaction of the court to be himself related by blood or marriage to the parties thereto:

Provided that the statement was made before the question in dispute had arisen;

- (k) where the statement was made by a deceased testator, whether before or after the making of his will, as to his testamentary intentions or as to the contents of his will —
 - (i) when the will has been lost and there is a question as to what were its contents;
 - (ii) when the question is whether an existing will is genuine or was improperly obtained;
 - (iii) when the question is whether any and which of more existing documents than one constitute the will;
- (l) where the statement consists of evidence given by a witness in any previous civil proceeding, or in a previous stage of the same civil proceedings when the witness is dead, has become insane, is so ill that he will probably never be able to travel, or is out of the jurisdiction of the court:

Provided —

- (i) that the person against whom the evidence is tendered had the right and the opportunity to cross-examine the person giving the evidence;
 - (ii) that the proceeding was between the same parties or their representatives in interest;
 - (iii) that the questions at issue are substantially the same;
- (m) where in a criminal trial the statement consists of a deposition that would be admissible in accordance with section 168 of the Criminal Procedure Code Act."

(14) Counsel for the Plaintiff pointed out that Section 39 of the Evidence Act referred to oral evidence and that on the evidence contained in an Affidavit Section 39 did not apply.

(15) Section 58 of the Evidence Act provides for admissibility of out of court statements as evidence of facts stated.

(16) Counsel for the Defendant referred to the **Private Trust Corporation Limited v Fajiv Vohra and Others 2001/CLE/GEN/00601** where Isaacs J cited with approval the dicta of Balcombe LJ in **Ventouris v Mouton (No. 2) [1992] 1 WLR 887** stated –

“The modern tendency in civil proceedings is to admit all relevant evidence, and the judge should be trusted to give only proper weight to evidence which is not the best evidence.”

(17) Additionally in the Affidavit of David Casoria filed on behalf of the Plaintiff on 28 July 2014 David Casoria confirmed the statement contained in paragraph 21 that the Plaintiff has objected to. In paragraph 9 of the affidavit of David Casoria he stated –

“To-date, more than twelve (12) years after the date of the First Mortgage, WCG has never made any payments to Leandenhall or PTC under the First Mortgage or any mortgage and the Trust Mortgage is now extinguished. Further WCG has never acknowledged any debt to Leandenhall or PTC.”

(18) After considering the submissions of counsel for the Plaintiff and counsel for the Defendant the court finds that the statements in paragraphs 11 and 21 are relevant and are necessary to consider the issue at hand between the Plaintiff and the Defendant.

Dated this 16th day of June 2016



Rhonda P. Bain
Justice