[2022] JMSC Civ 186

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: September 26 and October 11, 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. The application specifically raises the issue of whether certain statements made in the affidavit evidence of Mr Grant, are scandalous, irrelevant and/or otherwise oppressive in nature, such as to render them inadmissible.

[2] The application is encapsulated in a Notice of Application for Court Orders, which was filed on 20 November 2020, by virtue of which the Applicant/2nd Defendant, Mr Kirk Lee, seeks the following Orders: -

1. That paragraphs 9, 11, 13, 14, 15, 18, 19, 22, 23, 30 and the last sentence in paragraph 16 of the Affidavit of Jamar Grant in Support of Application for Interim Payment, filed herein on 29 September 2020, to wit, be struck out;

2. That paragraphs 7 and 8 of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, filed herein on 6 October 2020, be struck out;

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

4. That there be liberty to apply; and

5. 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(3) of the Civil Procedure Rules 2002, as amended ("CPR"), the court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit;

2. The Affidavit of Jamar Grant in Support of Application for Interim Payment, filed herein on 29 September 2020 and the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, filed herein on 6 October 2020, contain statements which are inconsistent with the 2nd Defendant's Further Amended Defence and statements which are inadmissible as a matter of law and are therefore scandalous, irrelevant and/or otherwise oppressive;

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

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

5. 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. The impugned evidence which is central to the instant application is contained in these two (2) affidavits.

The impugned evidence

[9] The impugned paragraphs in the Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 29 September 2020, are set out below: -

> *"9. The second defendant has effectively admitted that he was driving while intoxicated. I say so for the following reasons."*
>
> *"15. Thus, the second defendant has never denied that while waiting for the police to attend the scene of the collision, he went into the service station*

where he purchased water and chewing gum in an attempt to mask his intoxication."

"16. … So, the adoption of that method of pleading by the second defendant is an attempt to evade admitting the truth by breaching the Civil Procedure Rules, 2002."

"18. The second defendant has failed, refused and/or neglected to answer any of the questions."

"19. Further, the second defendant has never alleged that at the time of the accident he was sober."

"22. During the course of the case management conference Her Ladyship asked the second defendant, Mr. Kirk Lee, whether he had been subjected by the police to a breathalyzer test following the accident which is subject of these proceedings, to which he responded 'Yes.'"

"23. In addition, Her Ladyship asked Mr Wisdom whether Mr. Kirk Lee had been charged with driving while intoxicated to which Mr. Wisdom answered 'Yes, he was charged.'"

"30. So –

i) the second defendant has effectively admitted, on the pleadings, that he was intoxicated at the time of the accident;

ii) the second defendant has effectively admitted, on the pleadings, that while waiting for the police attend the scene of the accident, he bought water and chewing gum in an attempt to mask his intoxication;

iii) the second defendant has failed, refused and/or neglected to answer a request for information;

iv) the second defendant has admitted that he was subjected to a breathalyzer test; and

v) the second defendant has admitted that he was charged with a driving offence."

[10] The impugned paragraphs of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 6 October 2020, are as follows: -

> *"7. The second defendant has not denied that shortly after the accident, and while waiting for the police to arrive at the scene, he purchased water and chewing gum in an attempt to mask his intoxication."*
>
> *"8. The second defendant has effectively admitted that he was intoxicated at the time of the accident."*

[11] Learned Counsel Ms Sashawah Newby, in her submissions on behalf of the Applicant/2nd Defendant, Mr Kirk Lee, withdrew the complaint in relation to paragraphs 11, 13 and 14 of the Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 29 September 2020. Accordingly, it is not intended that this judgment will treat with those paragraphs.

[12] Additionally, Learned Counsel Mrs Tameka Jordan indicated, on behalf of the 1st Defendant, Ms Angela Lee, that her posture is to support the submissions advanced on behalf of the Applicant/2nd Defendant.

THE ISSUES

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

i. Whether the impugned paragraphs of the Affidavit and Second Affidavit of Jamar Grant in Support of Application for Interim Payment, each filed on 29 September 2020 and 6 October 2020, respectively, ought properly to be struck out;

[14] 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 within the impugned paragraphs are scandalous, irrelevant and/or otherwise oppressive in nature, rendering them inadmissible;

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

THE LAW

Interim payments

[15] Part 17 of the Civil Procedure Rules, 2002 ("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.

[16] 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".

[17] 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 evident, on the evidence presented.

[18] 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

[19] 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.

[20] 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."

[21] 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."

[22] 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

[23] 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]

[24] 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.*
>
> *29.1(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."*

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

SUBMISSIONS

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

The test for admissibility

[25] 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. 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

[26] Ms Newby submits that, on the basis of the authority of **Warner v Sampson**,[4] once an amended pleading is filed, it replaces and supersedes the original pleading filed.

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

[27] 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.**

[2] [1982] AC 429
[3] [2000] 1 FLR 759 D.C
[4] [1959] 1 QB 297

Hewthorne & Company Limited.[5] Ms Newby submits that the Jamaican Court of Appeal has pronounced, in the authority of **McNamee v Shields Enterprises**,[6] 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**,[7] 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**[8] 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.

Paragraphs 9, 15, 16, 19 and 30(i) and 30(ii) of the Affidavit of Jamar Grant in Support of the Application for Interim Payment

[28] Ms Newby submits that paragraphs 9, 15, 16, 19 and 30(i) and 30(ii) are inconsistent with paragraphs 7 and 9 of the Further Amended Defence which, *inter alia*, deny that Mr Lee was driving while intoxicated and that he purchased water and chewing gum, in any attempt to mask his intoxication. She maintains that, once filed, the Further Amended Defence, supersedes all previous pleadings filed and takes effect as at the time that the original Defence was filed.

[29] Furthermore, Ms Newby submits, issue has been joined, on the pleadings, among the parties, *inter alia*, in relation to whether Mr Lee was driving while intoxicated and whether he purchased water and chewing gum, in any attempt to mask intoxication. Ms Newby further submits that these paragraphs ought

[5] [1943] 2 All ER 35
[6] [2010] JMCA Civ 37
[7] [2012] JMCA Civ 53
[8] [2013] JMCA Civ 42

properly to be struck out as an abuse of the process of the court, or, alternatively, pursuant to rule 30.3(3) of the CPR. In the alternative, Ms Newby submits, these paragraphs ought properly to be excluded pursuant to rule 29.1(2) of the CPR.

Paragraphs 18 and 30(iii) of the Affidavit of Jamar Grant in Support of the Application for Interim Payment

[30] It is submitted that, on the basis of the Response to Request for Information, which was filed on 20 November 2020 and which was served on Mr Grant's Attorneys-at-Law, paragraphs 18 and 30(iii) of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, ought properly to be struck out for the reason that it is an abuse of the processes of the court. Alternatively, the impugned paragraphs ought properly to be struck out, pursuant to rule 30.3(3) of the CPR, for the reason that the evidence contained therein is irrelevant and or oppressive.

Paragraphs 22, 23, 30(iv) and 30(v) of the Affidavit of Jamar Grant in Support of the Application for Interim Payment

[31] Ms Newby contends that, in accordance with the judicial pronouncements made in the authorities of **Hollington v Hewthorne**,[9] **McNamee v Shields Enterprises**,[10] **Julius Roy v Audrey Jolley**[11] and **Patrick Thompson v Everton Eucal Smith**,[12] paragraphs 22, 23, 30(iv) and 30(v) should be struck out, as they invite the court to consider inadmissible material.

[32] 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

[9] supra
[10] supra
[11] supra
[12] supra

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.

Paragraphs 7 and 8 of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment

[33] Finally, Ms Newby submits that these paragraphs are also inconsistent with paragraphs 7 and 9 of the Further Amended Defence, which denies these specific allegations. She argues that these statements are therefore false and should be struck out as being scandalous, irrelevant and/or oppressive, pursuant to rule 30.3(3) of the CPR, or, alternatively, as an abuse of the processes of the court.

The submissions advanced on behalf of the Respondent/Claimant

Amended pleadings

[34] 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**.[13]

[35] Mr Reitzin asserts that the law in **Warner v Sampson**[14] 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**,[15] 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.

[13] [2012] JMSC Civ No. 50
[14] supra
[15] supra

[36] 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 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**,[16] **Pan Caribbean Financial Services Limited v Robert Cartade & Ors**,[17] and **Juici Beef v Yenneke Kidd**.[18]

[37] 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.

[38] In the alternative, Mr Reitzin invites the Court to treat with the assertions contained in paragraph 9 of Mr Grant's affidavit, as submissions.

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

[39] 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**,[19] and specifically to the dicta of Evan J Brown J (Ag.) (as he then was), who

[16] 2004 HCV 000361 & 2004 HCV 000362
[17] [2011] JMCA Civ 2
[18] [2021] JMCA Civ 29
[19] 2008 HCV 00201

referred to the authority of **Hollington v Hewthorne**.[20] 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.

The Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 29 September 2020

[40] 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.

[41] 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**.[21]

Paragraphs 22-26 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment

[42] In this regard, Mr Reitzin submits that the admissions referred to in the impugned paragraphs were voluntarily made.

The Second affidavit of Jamar Grant in support of the application for interim payment

[43] The submissions in respect of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, were contextually the same.

[20] supra
[21] Privy Council Appeal No. 19 of 1986

ANALYSIS AND FINDINGS

The approach of the Court

[44] 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.

[45] 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 application for interim payment; secondly, 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

[46] The impugned paragraphs are contained in the affidavit evidence of Jamar Grant, in support of an 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.

[47] 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.

[48] In the present instance, the application to strike out the impugned paragraphs contained in the several affidavits of Mr Grant is made against the background of the application for interim payment. It is in that context that the Court is urged to determine the relevance or otherwise of the statements contained in those paragraphs.

[49] 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.

[50] On this basis, Mr Reitzin submits that the impugned paragraphs of the several affidavits of Mr Grant contain demonstrable facts which are relevant to the tenor of his case.

[51] The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her knowledge.[22] 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.

Paragraph 9

[52] Paragraph 9 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, reads as follows: -

[22] See – Rule 30.3(1) of the Civil Procedure Rules, 2002

"9. The second defendant has effectively admitted that he was driving while intoxicated. I say so for the following reasons."

[53] This Court is of the view that paragraph 9 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment is problematic for the reasons that, firstly, the statements contained therein have the effect of deriving an admission of guilt from certain aspects of the pleadings which have been filed on behalf of Mr Lee; and secondly, the statements contained therein contain Mr Grant's opinion or conclusion that, at the time of the motor vehicle collision, Mr Lee was driving while intoxicated.

[54] The Court accepts the submissions advanced by Ms Newby that these statements are inconsistent with the Defence of the 1st and 2nd Defendants, which was filed on 7 November 2016 and the Amended Defence of the 1st and 2nd Defendants, which was filed on 3 July 2019. A proper examination of these documents reveal that Mr Lee denies that, at the time of the motor vehicle collision, he was driving whilst intoxicated and has put Mr Grant to strict proof in this regard.

[55] Mr Grant is not permitted to give evidence of his opinion or of a conclusion which he has drawn that, at the time of the motor vehicle collision, Mr Lee was driving whilst intoxicated. The Court finds that the evidence contained in this paragraph is baseless and is inconsistent with the Defendants' Statement of Case. It is irrelevant to the application for interim payment and is inadmissible and ought properly to be struck out.

[56] Additionally, this Court is unable to accept Mr Reitzin's submission that it is to treat with the statements contained in this paragraph as a legal submission. It is to be underscored that an affidavit is not the appropriate document in which a litigant and/or his counsel is to advance submissions.

Paragraph 15

[57] Paragraph 15 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, reads as follows: -

> *"15. Thus, the second defendant has never denied that while waiting for the police to attend the scene of the collision, he went into the service station where he purchased water and chewing gum in an attempt to mask his intoxication."*

[58] The Court finds that the statements made in this paragraph constitute inadmissible evidence which ought properly to be struck out, for the reasons that it is not an accurate representation of the Defendants' Statement of Case and is inconsistent with the Defence and Amended Defence filed on their behalf.

[59] By way of the Particulars of Claim, which was filed on 26 August 2016, Mr Grant alleges that the motor vehicle collision was caused by the negligence of Mr Lee.[23] The negligence on the part of Mr Lee is particularized at paragraph 10, which reads, in part, as follows: -

> *"10. The collision was caused by the negligence of the second defendant in and about his care, management and/or control of the Suzuki Swift.*
>
> ***Particulars of Negligence of the Second Defendant***
>
> *i) The second defendant was driving while intoxicated;*
>
> *ii) The second defendant's faculties were substantially impaired by alcohol;*
>
> *iii) The second defendant was unable to keep proper control over the Suzuki Swift;*
>
> *iv) The second defendant failed to keep to the left and was driving on the wrong side of the road;*
>
> *v) The manner of the second defendant's driving caused the claimant to fear that there was an imminent head-on collision and, therefore, to swerve to his right in an attempt to avoid such a collision;*
>
> *vi) The second defendant failed to keep any or any proper look-out;*

[23] See – Paragraph 9 of the Particulars of Claim, which was filed on 26 August 2016

vii) The second defendant was driving at a speed which was excessive in all of the circumstances;

viii) The second defendant failed, by steering or the application of brakes or otherwise to stop, slow down or in any other manner avoid the said collision.

11. …

12. 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****." **[Emphasis added]***

[60] Conversely, the Defence of the 1st and 2nd Defendants, which was filed on 7 November 2016 and the Amended Defence of the 1st and 2nd Defendants, which was filed on 3 July 2019, specifically treat with the assertions made at paragraphs 10 and 12 of the Particulars of Claim.

[61] Paragraphs 9 and 11 of the Defence, which was filed on 7 November 2016, read as follows: -

"9. ***Paragraph 10 of the Particulars of Claim is denied and all the averments of negligence therein and the Claimant is put to strict proof of same.*** *The 2nd Defendant will state that the Claimant acted negligently in his manoeuvring and control and/or management of his motor cycle on the day and time in question.*

…

11. ***The Claimant is put to strict proof of the averments in Paragraph 12 herein.*** *The 2nd Defendant will state that the said averments are presumptions and hearsay at best." **[Emphasis added]***

[62] Paragraphs 7 and 9 of the Amended Defence, which was filed on 3 July 2019, state as follows: -

"7. Further the Defendants deny Paragraph 10 of the Particulars of Claim and all the averments of negligence therein. The 2nd Defendant will say that the Claimant acted negligently in his manoeuvring and control/or management of his motor cycle on the day and time in question.

…

9. The Defendants neither admit nor deny Paragraph 12 of the Particulars of Claim. The Claimant is put to strict proof of the averments in paragraph 12 herein. The 2nd Defendant will state that the said averments are presumptions and hearsay at best."

[63] It is indisputable that a defendant is required to set out all the facts on which he intends to rely to dispute the claim.[24] Rule 10.5(3) of the CPR provides that a defendant must identify which allegations in the claim form or particulars of claim are either admitted, denied and are neither admitted nor denied, because the defendant does not know whether they are true but which the defendant wishes the claimant to prove.

[64] It is clear from a reading of the Defence and Amended Defence, that Mr Lee has conformed with the requirements of this rule and has specifically denied the allegation that, at the time of the motor vehicle collision, he was driving whist intoxicated. In this regard, Mr Lee has put Mr Grant to strict proof.

Paragraph 16

[65] Paragraph 16 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, reads as follows: -

"16. … So, the adoption of that method of pleading by the second defendant is an attempt to evade admitting the truth by breaching the Civil Procedure Rules, 2002.

[66] The Court finds that the statements contained in this paragraph are inflammatory in nature, prejudicial, irrelevant and inadmissible and ought properly to be struck out. The assertions made in the paragraph invite the Court to draw an adverse inference in respect of the conduct on the part of Mr Lee and, by extension, his legal representative. The basis or bases on which these assertions are made are not readily apparent to this Court and are made entirely without basis and are prejudicial in effect.

[24] See – Rule 10.5 of the Civil Procedure Rules, 2002, which details the defendant's duty to set out case.

Paragraphs 18 and 19

[67] Paragraphs 18 and 19 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, read as follows: -

> *"18. The second defendant has failed, refused and/or neglected to answer any of the questions."*
>
> *"19. Further, the second defendant has never alleged that at the time of the accident he was sober."*

[68] In this regard, Ms Newby maintains that these paragraphs ought properly to be struck out as an abuse of the process of the court, or, on the basis that the evidence is inadmissible, for the reason that a Response to Request for Information was filed, on Mr Lee's behalf, on 20 November 2020 and was served on Mr Grant's Attorneys-at-Law.

[69] On the other hand, Mr Reitzin contends that an affidavit speaks up to the date on which it was sworn and that the inconsistency is not a basis on which the statements contained in these paragraphs ought to be struck out. Mr Reitzin further asserts that the responses made to the request for information were such that they did not provide a response to the questions posed.

[70] The Court finds that paragraph 18 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment ought properly to be struck out for the reason that the evidence contained therein is irrelevant for the purpose of the hearing of the application for interim payment.

[71] The Court also finds that paragraph 19 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment ought properly to be struck out. The Court so finds for the reason that the statements made therein are inaccurate and inconsistent with the Defence and Amended Defence which were filed on behalf of the Defendants.

Paragraphs 22 and 23

[72] Paragraphs 22 and 23 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, read as follows: -

"22. During the course of the case management conference Her Ladyship asked the second defendant, Mr. Kirk Lee, whether he had been subjected by the police to a breathalyzer test following the accident which is subject of these proceedings, to which he responded 'Yes.'"

"23. In addition, Her Ladyship asked Mr Wisdom whether Mr. Kirk Lee had been charged with driving while intoxicated to which Mr. Wisdom answered 'Yes, he was charged.'"

[73] The Court accepts the submissions advanced by Ms Newby that the content of these impugned paragraphs is scandalous, oppressive, irrelevant and inadmissible and ought properly to be struck out. The Court accepts Ms Newby's submission that, whether or not Mr Lee was charged with a criminal offence or subjected to a breathalyser test, in the pursuance of criminal proceedings, as a matter of law, is inadmissible in the instant proceedings. The Court accepts Ms Newby's submissions that the prejudicial effect of the evidence contained in these impugned paragraphs outweigh its probative value and ought properly to be excluded.

[74] In the result, this Court is of the view that paragraphs 22 and 23 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment ought properly to be struck out.

Paragraph 30

[75] Paragraph 30 of the Affidavit of Jamar Grant in Support of the Application for Interim Payment, reads as follows: -

"30. So –

i) the second defendant has effectively admitted, on the pleadings, that he was intoxicated at the time of the accident;

ii) the second defendant has effectively admitted, on the pleadings, that while waiting for the police attend the scene of the accident, he bought water and chewing gum in an attempt to mask his intoxication;

iii) the second defendant has failed, refused and/or neglected to answer a request for information;

iv) the second defendant has admitted that he was subjected to a breathalyzer test; and

v) the second defendant has admitted that he was charged with a driving offence."

[76] This paragraph contains a summary and/or a reiteration of the statements contained in the impugned paragraphs discussed above. In the result, this Court is of the view that this paragraph ought properly to be struck out, for the reasons already stated.

Paragraph 7 and 8 of the Second Affidavit of Jamar Grant in Support of the Application for Interim Payment

[77] Paragraphs 7 and 8 of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 6 October 2020, read as follows: -

"7. The second defendant has not denied that shortly after the accident, and while waiting for the police to arrive at the scene, he purchased water and chewing gum in an attempt to mask his intoxication."

"8. The second defendant has effectively admitted that he was intoxicated at the time of the accident."

[78] The gist of the submissions which were made in relation to the impugned paragraphs contained within the Second Affidavit of Jamar Grant in Support of the Application for Interim Payment, are contextually the same.

[79] Further, the statements contained in these paragraphs are a reiteration of the assertions made in the first affidavit of Mr Grant. As a consequence, the Court finds that paragraphs 7 and 8 of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, ought properly to be struck out, for the reasons that have already been stated.

DISPOSITION

[80] It is hereby ordered as follows: -

(1) Paragraphs 9, 15, 18, 19, 22, 23, 30 and the last sentence of paragraph 16 of the Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 29 September 2020 are struck out;

(2) Paragraphs 7 and 8 of the Second Affidavit of Jamar Grant in Support of Application for Interim Payment, which was filed on 6 October 2020 are struck out;

(3) A redacted Affidavit of Jamar Grant in Support of Application for Interim Payment is to be filed and served on or before 28 October 2022;

(4) A redacted Second Affidavit of Jamar Grant in Support of Application for Interim Payment is to be filed and served on or before 28 October 2022;

(5) The Respondent/Claimant is refused leave to appeal.

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

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