

SAINT VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

CIVIL CLAIM NO. 39 OF 1994

BETWEEN:

CHESTER CLARKE
(Substituted pursuant to an Order of
Court made the 28th November, 1997)
And
MARTHE CLARKE (Joined Pursuant to an
Order of Court made the 3rd December, 1999) Claimant

AND

THE BANK OF NOVA SCOTIA
JULIAN COMPTON Defendants
AND
BERTRAM ARTHUR Third Party

Appearances:

Mr. Samuel Commissiong and Ms. Suzanne Commissiong
for the Claimant
Ms. Agnes Cato with Ms. Paula David for the first Defendant
Mr. Emery Robertson for the second Defendant

2003: November 4
December 15
2004: March 19
April 8

JUDGMENT

[1] **BLENMAN, J:** Julian Compton mortgaged two parcels of land to the Bank of Nova Scotia (hereafter the Bank) He defaulted on his payments and the bank advertised for the sale of his property. One parcel of land has a house, while the other is vacant. Mr. Bertram Arthur was the auctioneer. He sold the property to Chester and Marthe Clarke (the Clarkes). Leon Clarke acted as the Clarkes'

agent. He claims that he had bought both parcels of land for \$60,000 E.C. The Bank disputes this and asserts that the reserved price for both pieces of land was \$85,000; Leon Clarke only bought the lot that has the house for \$60,000, and paid \$6,000 or 10% as a deposit having signed the Agreement for Sale. The Deed of Conveyance was registered in favour of the Clarke's; it was in relation to one piece of land.

[2] The Clarkes sued the Bank claiming that they had also bought the other piece of land at the auction and were therefore entitled to receive that other piece of land. Witness Statements and pleadings were filed on behalf of all of the parties. The Bank filed a sole Witness Statement by Mr. Bruce Sali, who is its Manager. Mr. Enrique Russell was the Manager of the Bank at the time of the transaction. He no longer resides in St. Vincent and the Grenadines.

[3] The matter was fixed for trial. On the date of the hearing, Learned Counsel Mr. Samuel Commissiong objected to Bruce Sali's Witness Statement being used as evidence. He stated that it contains hearsay information and violates the Evidence Act Cap 158 Laws of Saint Vincent and the Grenadines, and should be struck out with costs. It is not disputed that Mr. Bruce Sali was not working at the Bank at the time of the transaction. Mr. Sali stated that the information, which he provided to the Court, was obtained from the Bank's records files and accounts. Ms. Agnes Cato Learned Counsel for the Bank asserted that the witness statement is admissible in evidence. The objection was dealt with as a preliminary issue on which both Counsel have kindly provided the court with written submissions.

[4] The issue to be determined is whether Mr. Bruce Sali's Witness Statement is admissible in evidence.

CLAIMANT'S SUBMISSIONS

- [5] Learned Counsel Mr. Samuel Commissiong asserts that in order for hearsay material to be admitted in evidence, the Bank ought to have complied with the relevant provisions of the Evidence Act Cap 158 Laws of Saint Vincent and the Grenadines. The Bank has failed to comply with the Act. There is no dispute that section 47 of the Act provides for “the admission in evidence of statements made by a person either orally or in a written document, whether or not the maker is called as a witness or not, subject to the section and the Rules of the Court.” Hearsay evidence is clearly admissible pursuant to the section. The parties also agreed that section 49 permits a statement to be admitted in civil proceedings, subject to the section and Rules of Court, as evidence of fact while direct oral evidence would be admissible if the document is or forms part of a record which was supplied by a person (whether acting under a duty or not) who had or may reasonably suppose to have had personal knowledge of the matter dealt with.
- [6] Mr. Commissiong stated even though section 49 of the Act enables documentary hearsay to be admitted into evidence the court must be satisfied that the document is or forms part of a record, which was supplied by a person who may reasonably suppose to have had personal knowledge of the matters. Section 51 of the Act states that where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 47, 49 or 50, it may, subject to Rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document) or of the material part thereof, authenticated in such a manner as the court may approve. Mr. Commissiong argued that the Bank has not complied with section 51 and this is fatal to its ability to utilize the Bruce Sali’s witness statement. The hearsay material the bank seeks to use, he argued, is not the records or part of the record, but rather statements extracted from the record, and the Court cannot permit this.

[7] Section 55(1) of the Act states that provision may be made by rules of Court as to the procedure, which, subject to any exceptions provided for in the rules, must be followed, and the other conditions, which must be fulfilled before a statement, can be given in evidence in civil proceedings by virtue of sections 47, 49 or 50. Section 55 (2) (a) states that Rules of Court made in pursuance of subsection shall in particular, subject to such exceptions (if any) require a party to any proceedings who desires to give in evidence such statement to give every other party such notice of his desire.

[8] The point of controversy is that Learned Counsel Mr. Commissiong stated that section 55(2) of the Evidence Act, which is mandatory, provides the procedure that should be adopted if a party wishes to have hearsay material admitted into evidence to prove the truthfulness of its contents. He contends that the Bank has completely ignored the requirements of section 55 of the Act and has not complied with any of the preconditions section; it has given no notice to the Clarkes its intention to use the hearsay material. The court cannot properly exercise its discretion to admit the statements since it has not been told how and by whom the files and records were compiled.

FIRST DEFENDANT'S SUBMISSIONS

[9] Learned Counsel Ms. Agnes Cato opposed the application to strike out Mr. Bruce Sali's witness statement. She posited that section 55 (2) gives authority for rules of court to be made as to procedure to be followed in order for hearsay information to be admitted in evidence. Section 55 (1) (2) (a) of the Act requires a party to give notice to the other party of any hearsay evidence it is proposed to lead pursuant to section 50 (1) or 51(3)(c). No rules have been made under the Evidence Act. However, section 55(12) of the Act states that unless rules of court are made under section 17 of the Eastern Caribbean Supreme Court Act, rules of court made for the various purposes of the Civil Evidence Act 1968 and 1972 of

the United Kingdom Parliament shall be deemed to have been made under the provisions of this Act. There is no evidence before the court as to what are the relevant rules of court, if any, in the United Kingdom.

[10] There is a new dispensation, the Civil Procedure Rules 2000 which were made under section 17 of the Eastern Caribbean Associated States Supreme Court Order 1967 and came into effect on the 31st December 2000. These Rules determine the procedures that should be adopted in civil litigation. Part 29.1 gives the court a discretion as to the issues on which it requires evidence. Part 29.4 and 29.5 require the service of witness statements and stipulate the details, which should be provided in the witness statement. The CPR 2000 do not override the substantive law, rather they have been introduced to complement the law and to enable the court to deal with matters justly. Part 29 (2) enables the court to strike out any inadmissible, scandalous, irrelevant matter from the witness statement.

[11] Ms. Cato stated that CPR 2000 have not dealt with the question of hearsay evidence save as referred to as Part 29.1 and Part 29.2, and no rules were made under section 55 (1) of the Evidence Act for the procedure to be adopted in relation to hearsay material, there is therefore no substantive legislation which requires that notice of hearsay evidence to be given. She argues that it will not be correct or fair for a party to be deemed to have admitted documents that are disclosed during discovery based on Part 28.18 and after to be able to come and dispute its authenticity. Part 28.18 (2) requires a party to serve the other a notice to prove a document at least 42 days before the trial. This was not done. In any event based on the CPR 2000, the service of the witness statement is sufficient notice of the Bank's intention to rely on the documents.

ANALYSIS

- [12] The Evidence Act, which is substantive law, stipulates the type of evidence that is admissible in civil proceedings. Hearsay evidence is either an oral or written statement made by a person other than the maker of the statement, which is tendered during a civil trial or matter, in order to establish the truth of the statement. Hearsay material is generally inadmissible in evidence except in accordance with the Evidence Act Cap 158 of the Laws of Saint Vincent. Bruce Sali was not the maker of the files, records or accounts to which he refers in his witness statement. The information that he provides from those records, files and account is hearsay. Section 47,49 and 55 of the Evidence Act enable him to provide the information in his statement once it is properly stated.
- [13] The conjoined effect of sections 47 and 49 of the Evidence Act, enable a party to utilize hearsay information in the documentary evidence contained in records to do so if the document is or forms part of the record. The person who supplied the record should have had personal knowledge of the information, and this should be stated in the witness statement. Mr. Bruce Sali's witness statement should include a statement about the maker of the record, if he intends for it to be regarded as his evidence in chief. The Case Management Order did not state that witness statements should stand as evidence-in-chief. Section 55(1)(2)(a) requires a party to any civil proceedings to give notice to every other party of the hearsay evidence it proposes to rely on. However, there is no evidence before the court to indicate what is the United Kingdom's position on the procedure to be adopted in giving notice. I will not in the interest of justice, require the Bank to serve notice of its intention to utilize the hearsay information.
- [14] The Civil Procedure Rules 2000 were made under section 17 of the West Indies Associated States Supreme Court Order 1967. It introduces a flexible and modern dispensation in relation to rules of procedure. The overriding objective of the Court is stated as enabling it to deal with cases justly and expeditiously. It does

not address the giving of notice under section 55(2) of the Evidence Act. CPR 2000 Part 29 (2) empowers the court to strike out any inadmissible, scandalous, irrelevant or oppressive matter. Hearsay evidence, which does not comply with the requirements of the Evidence Act, is inadmissible. In the absence of any specific procedure under CPR 2000 to address section 55(2) of Evidence Act, the Court at all times must seek to deal with the matter before it justly and expeditiously.

[15] Witnesses Statements take the place of evidence-in-chief, and serve to expedite the trial. Rule 29(5)(1)(e) states, that a witness statement must not include any matter of information or belief which are not admissible or where admissible, must state the source of any information or belief. Mr. Bruce Sali's witness statement must conform to the Evidence Act and the CPR 2000 for it to be admitted in evidence. Mr. Sali's witness statement does not conform to either CPR 2000 or the Evidence Act, since it contains inadmissible hearsay information.

[16] Inadmissible parts of the Witness Statement are liable to be struck out by the Court, based on an application made either at Case Management or Pretrial Review. In the exercise of my discretion and bearing in mind the overriding objectives of the Rules to ensure that cases are dealt with justly and expeditiously, I will not strike out Mr. Bruce Sali's Witness Statement but will grant the Bank leave to amend its witness statements.

CONCLUSION

[17] The Court will grant leave to the Bank to amend Bruce Sali's Witness Statement, so that it conforms both to the Evidence Act and Civil Procedure Rules Part 29(5) The Case Management Order permitted the Bank to file four Witness Statements; it has filed 1. I will in the interest of justice, grant leave to the Bank to file the additional witness statements if necessary. In order to ensure that the real issues

are dealt with, the Clarkes will also be granted leave to file two further witness statements, if necessary.

[18] In conclusion, it is hereby ordered as follows:

- (a) That leave is granted to the Bank of Nova Scotia to file and serve Bruce Sali's amended Witness Statement together with three additional witness statements if necessary, on or before 30th April 2004
- (b) Leave is granted to the Clarkes to file two additional Witness Statements, if necessary, on or before 15th May 2004.
- (c) The costs of these preliminary proceedings shall be costs in the cause.
- (d) Thereafter the matter is to be referred to the Registrar with a view to expediting it's hearing.

LOUISE ESTHER BLENMAN
High Court Judge

