

BRITISH VIRGIN ISLAND

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV 2006/0011

BETWEEN

DELORES CHRISTOPHER

Respondent/Claimant

And

ALLAN PARKER

Applicant/Defendant

Her Ladyship Honourable Justice Indra Hariprashad-Charles

Dates of Hearing: 2006: June 30

Date of Judgment: 2006: August 22

CATCHWORDS

Application to strike out reply – Reply filed and served out of time –No prejudice to defendant - Civil Procedure Rules, Rule 26.3 –Admissibility of documentary hearsay evidence – Documents irrelevant and not authenticated – Identification of handwriting by sister of deceased – Best evidence rule – Weight to be attached to documents

HEADNOTES

The Applicant and the Respondent's sister were divorced on 18 March 2004. By a Consent Order dated 14 December 2004, sole custody of the two minor children of the marriage was granted to his ex-wife. The Applicant was to have reasonable access to the children, particularly, he was to have them every other weekend. The Applicant consented to pay maintenance and school fees. On 9 December 2005 his ex-wife suddenly died and shortly after her sister applied for custody of the children.

On 1 June 2006 the Learned Master ordered, among other things, that the Claimant file and serve a reply to defence on or before the 9 June 2006. This was not done until 14 June 2006. Also on the 14 June 2006, the Applicant filed an application to strike out the reply to defence and Exhibits "DC2", "DC3", "DC4" and "DC5" to the Respondent's second affidavit. "DC 2" were copies of cheques received by the deceased from the Applicant with notations allegedly written on them by the deceased; "DC3" and "DC4" were documents purported to be written by the deceased and "DC5" was a letter to the Court written by the parents of the Respondent.

HELD:

1. Under CPR 26.3 the Court is invested with wide - ranging powers to strike out a case where there has been a failure to comply with an Order. The fact that a judge has the

unqualified discretion to strike out a statement of case does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.

2. The Reply to defence should not be struck out. To do so would be draconian as there was no prejudice to the Applicant by the late filing. There was also a good explanation for the failure to comply and the failure was not intentional.
3. In the unavoidable absence of the best evidence of documents, the court will accept secondary evidence. A party tendering it ought therefore to demonstrate that he is unable to obtain the best evidence.
4. The Court is bound to admit hearsay evidence if due notice was given and the maker of the statement is dead, beyond the seas, unfit by reason of his bodily or mental condition to attend as a witness or cannot with reasonable diligence be identified or found.
5. In estimating the weight to be attached to a statement, regard must be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and to the question whether or not statement was made contemporaneously with the occurrence or existence of the facts stated and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the fact.
6. The maker of exhibits "DC2, "DC3" and "DC4" is dead and the Respondent alleges that she can identify her handwriting, therefore those documents are admitted. They are relevant to the Respondent's case as she is alleging that the Applicant is an unfit father and a bad husband.
7. "DC5" is a letter written by the grandparents. They are both alive and present in the Territory as such "DC5" is inadmissible and struck out. The grandparents are available to give evidence and be cross-examined.

Cases referred to and considered in the judgment

- (1) Corporate – Pacific Heritage (M) SDN BHD v MRP Resources Limited BVIHCV 2002/0042 High Court of Justice, British Virgin Islands- judgment delivered 26 March 2003 [unreported].
- (2) Biguzzi v Rank Leisure plc [1999] 4 All E.R. 934

Appearances

Mrs. Susan V. Demers for the Applicant

Mrs. Lorna Shelly- Williams for the Respondent