

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 17 OF 2003

BETWEEN:

RBTT BANK CARIBBEAN LIMITED
Formerly known as
CARIBBEAN BANKING CORPORATION LIMITED

Claimant

AND

OLSON ROBERTSON
MAURICE ROBERTSON

Defendants

Appearances:

Mr. Perry Joseph for the Claimant
Mr. Emery Robertson for the Defendants

2005: December 15
2006: January 16
2007: January 16
March 29

RULING

[1] **THOM, J:** This is a claim to recover money due under a written guarantee executed by the Defendants in favour of the Claimant on the 27th day of July 1992.

[2] This matter commenced on December 15, 2005 and was adjourned to January 16, 2006. On that day Learned Counsel for the Defendants was ill and the matter was adjourned to a

date to be fixed by the Registrar since I was scheduled to preside over the February 2006 Criminal Assizes. The matter continued on January 16, 2007.

- [3] On the hearing of this claim during the cross-examination of the Claimant's witness Mr. Arnold Dalrymple a manager of the Claimant, Learned Counsel for the Defendants sought to tender certain documents which were not disclosed pursuant to the case management order made on the 9th day of May 2005. The said Order required the parties to give standard disclosure on or before the 30th day of June 2005. The Defendants failed to comply with the Case Management Order and did not file a list of documents.
- [4] Learned Counsel for the Defendants submitted that the Defendants ought to be able to cross-examine the Claimant's witness on the documents and tender them in evidence through the Defendants when they give their testimony. Learned Counsel further submitted that it is an abuse of the process of the Court for the Claimant to raise an objection to being cross-examined on a document of which the Claimant is the maker. Learned Counsel referred the Court to sections 57 and 60 of the Evidence Act Cap 158, and Part 28 and Part 39 of CPR 2000.
- [5] Learned Counsel for the Claimant submitted in response that the provisions of Part 28.4 are mandatory. The substantive issue falls squarely on particulars elicited by documentary evidence. Learned Counsel referred the Court to Part 28.13(1) and submitted that to prevent the Defendants from using undisclosed documents at trial is not unfair but in keeping with Part 28:13. Further to permit the Defendants to use the documents would amount to ambush and surprise and be contrary to the overriding objective of CPR 2000.
- [6] The issue to be determined is whether the Defendants should be permitted to put documentary evidence to a witness in examination at trial and tender such documents in evidence where the Defendants have failed to comply with a Case Management Order to give standard disclosure.

[7] In Halsbury's Laws of England Vol. 13 (4th edition) paragraph 1 the Learned Authors in dealing with the functions of discovery stated:

"The function of discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in apprising the strength or weakness of their respective cases and thus provide the basis for the fair disposal of the proceedings before or at the trial."

Even though this statement was made prior to the coming into effect of CPR 2000 the purpose of discovery remains the same under CPR 2000.

[8] The relevant provisions of CPR 2000 are Part 28.4 and Part 28.13. Part 28.4 reads.

"If a party is required by any direction of the Court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings."

While Part 28:13 reads:

- (1) A Party who fails to give disclosure by the date ordered, or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection.
- (2) A party seeking to enforce an Order for disclosure may apply to the Court for an order that the other party's statement of case or some part of it be struck out.
- (3)
- (4) On an application under paragraph (2) the Court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out."

[9] Part 28.4 in effect provides that a party must comply with the direction of the court to make disclosure. If a party fails to comply with the direction of the Court, Part 28:13 provides the sanctions that may be imposed on that party. The sanctions are prevention of use of the document, the party's statement of case or part of it may be stuck, or the Court may make an "unless order".

[10] It must be noted that “may” in Part 28:13 is not mandatory but permissive. The Court has a discretion whether to impose the sanction. This discretion must be exercised in keeping with the overriding objective of CPR 2000. In exercising this discretion the Court must take into account the circumstances of the case.

[11] In this case the Claim Form was filed on the 15th day of January 2003. The Defence was filed on the 24th day of March 2005.

[12] The Defendants pleaded in paragraphs 5 and 6 of the defence as follows:

“(5) The Defendants will refer to a letter dated 11th July, 1992 and signed by Gordon and Monica Keddie at the trial of this matter for the full meaning and effect. The Bank obtained a copy of the said letter and was a party to this arrangement.

(6) The company held a Directors meeting on the 22nd day of July 1992 to confirm what they had discussed with the Claimant Bank. The Defendants sent a copy of their minutes to the Bank as requested, and they will refer to paragraphs (3) and (5) of their minutes for the full terms and effect.”

[13] The Case Management Order was made on the 9th day of May 2005. The case Management Order required standard disclosure to be made on or before 30th June, 2005 and the trial was scheduled for November 29, 2005.

[14] No application was made by the Claimant under Part 28:13 (2) to have the paragraphs mentioned above in the defence struck out.

[15] In his submission Learned Counsel for the Claimant did not refer the Court to any prejudice that the Claimant would suffer if the documents were admitted in evidence.

[16] In St. Kitts Development Ltd v Golfview Development Ltd and Michael Simanic Alleyne JA (as he then was) stated that the Respondents who had ample notice of the irregularities being failure to file witness statements within the time stipulated in the Case Management Order could and should have raised the issue ahead of the date of trial but sought instead

to revert to the techniques of trial by ambush which CPR 2000 seeks to discourage, and that they should not be allowed to benefit from their behaviour.

[17] In this case I find that the Claimant was aware that the Defendants were relying on the said documents referred to in the defence approximately nine (9) months prior to the commencement of the trial. Almost five (5) months elapsed between the date when the Defendants were required to give standard disclosure and commencement of the trial. The Defendants in their defence alleged that a copy of the documents were in the possession of the Claimant. No reply to the defence was filed by the Claimant. I find that the Claimant would not suffer any prejudice if the documents were admitted into evidence.

[18] In view of the above circumstances I will exercise my discretion and permit the Defendants to rely on the documents at trial.

[19] The Defendants are hereby ordered to serve a copy of the documents on the Claimant within seven days. Trial of this matter will resume on April 26, at 9:00 am.

Gertel Thom
HIGH COURT JUDGE