

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF JUSTICE  
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2002/0055

BETWEEN:

JOHN DUGGAN, AS EXECUTOR OF THE ESTATE OF  
JEAN DUGGAN, DECEASED AND AS EXECUTOR OF  
THE ESTATE OF JOSEPH P. KELLY, JR., DECEASED

Respondent  
Claimant

-and-

(1) HMB HOLDINGS LIMITED  
(2) GALINA N. KLUGE  
(3) NATALIA M. QUERARD

Applicant  
Defendants

APPEARANCES:

Ms. Joyce Kentish with	
Mrs. Stacey Richards – Anjo	for 1 <sup>st</sup> and 3 <sup>rd</sup> Defendant
Ms. Ali – Schneider of Henry and Brunette	for 2 <sup>nd</sup> Defendant

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2009: February 19  
2009: May 29  
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DECISION

1. **Harris, J:** This concerns an application pursuant to Rule 29.5 of the CPR 2000. The applicant/First and third Defendant applied for an Order, that six (6) witness statements of the Claimant be struck out.
2. In the substantive action, the Claimant contends that the business and the affairs of the Defendant, HMB Holdings Ltd, have been carried on and conducted in a matter that has been oppressive and unfairly prejudicial to, and has unfairly disregarded the interest of, the

Claimant as a shareholder<sup>1</sup>. The Claimant has asked for several orders, declarations and Damages in the substantive action including:

*“(2) An Order requiring the defendants to produce to the Claimant financial statements since 1995.....”*

*(3) An Order for an accounting of all monies received and all profits made by HMB Holdings Ltd from 1989 to present.”*

3. Certainly, the substantive action has the potential to involve a sojourn into intricate accounting and financial detail over which the court would be motivated to seek expert assistance to demystify the detail and save time and expense. However, notwithstanding this, the matter does not appear to be a particularly complex legal matter and the issues are not likely to be particularly involved.
4. The application, now being placed in proper context, has as its grounds that which in set out below:
  1. *The witness statement of Maudlyn Christian is seeking to give opinion evidence and the witness Maudlyn Christian has not been deemed an expert.*
  2. *The witness statement of Terrence Orr is replete with hearsay and opinion evidence and is more prejudicial than probative; further parts are irrelevant and scandalous.*
  3. *The witness statement of Wilbur Harrigan seeks to give opinion evidence and the Witness has not been deemed an expert.*
  4. *The witness statement of John Duggan at paragraph 8 and 10 is opinion evidence and so usurps the function of the trial judge.*
  5. *The witness statement of Sir Louis Lockhart contains hearsay and opinion evidence and further contains matter which are none prejudicial than probative, irrelevant and scandalous.”.*

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<sup>1</sup> See the Amended Claim form filed March 31, 2006 at pp 10.

5. The Respondent/Claimant; John Duggan, submits that the application to strike out the witness statements must be dismissed on the grounds that the conjoint effect of section 11 of the Eastern Caribbean Supreme Court Act and section 12 of the Evidence Act of Antigua and Barbuda acts to incorporate the Civil Evidence Act 1995 of the U.K (“Civil Evidence Act”) The Civil Evidence Act provides that *“In Civil proceedings evidence shall not be on the ground that it is heresy”*... The Respondent/Claimant’s written submissions do not address the question with respect to; (i) opinion evidence (ii) irrelevant evidence and, (iii) scandalous evidence.
  6. Counsel for the Respondent/Claimant and Counsel for the Applicant/Defendants, HMB Holdings Ltd and Natalia Querard, reduced their submissions to writing as set out in the following paragraphs, which are a substantial reproduction of counsel’s arguments.

Respondent / Claimant’s Submissions (John Duggan I)

7. The Respondent submits that the rules of the court are subject to substantive law and in this case, more specifically S. 11 of the Eastern Caribbean Supreme Court Act and S.12 of the Evidence Act.
  8. Section 11 of the Evidence Act provides:  
*“The jurisdiction vested in the High Court in Civil proceedings, and in Probate, Divorce and Matrimonial causes, shall be exercised in accordance with the provisions of this Act and any other law in operation in Antigua and Barbuda and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law an practice administered for the time being in the High Court of Justice in England.”*
  9. Section 12 of Evidence Act provides:  
*“Every document, which, by any law now in force, or hereinafter to be in force , is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in*

*evidence in like manner, to the same extent, and for the same purpose, in any Court in Antigua and Barbuda, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence,"*

10. By virtue of these two sections, contends the Respondent, the U.K Civil Evidence Act 1995 is imported as the Law of Antigua and Barbuda in relation to heresay evidence. Section 1(1) of the Civil Evidence Act 1995 is clear, contend the Respondent, that *"In Civil proceedings evidence shall not be excluded on the ground that it is heresay"*. The Civil Evidence Act provides a regime for treating will heresay evidence and sets out how one weights such evidence."
11. In support of its contention, counsel for the Respondent relies on the authorities of *Barrings plc v Coopers and Ly brand* [2001] EWCA 1163 ("**Barring Plc**"); *Delores Christopher v Allan Parker BVIHCV 2006/0011("Delores Christopher")*; *First Caribbean International Bank (Barbuda) Ltd v Panache Ltd at al, SLUHCV 2002/0268 at 60("First Caribbean International Bank")*. *Polanski v Conde Nast Publication Ltd* [2005] UKHL 10, [2005] 1 WLR 637 ("**Polanski**").

The Applicant/1<sup>st</sup> and 3<sup>rd</sup> Defendants Submission (HMB Holdings/N.A Querard)

12. The Applicant submits that the Court does have the power to strike out inadmissible, irrelevant and scandalous matter from the witness statements<sup>1</sup> *"and to do so at this time pursuant to Rule 29. 5(2of the C.P.R 2000, and Rule 11. 3 of C.P.R 2000."*
13. The applicant points out that the Respondent does not deny that their witness statements contain heresay testimony. The application to strike out contends the Applicant; is resisted on the grounds that the heresay evidence of their witness is admissible on the grounds of the conjoint effect of S.11 of the Eastern Caribbean Supreme Court Act and S.12 of the Evidence Act of Antigua and Barbuda.

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<sup>1</sup> See Applicant written submission filed March 11, 2009.

14. The Applicants contend that where there is no applicable rule, statute or applicable law operating in Antigua and Barbuda or in the Rules of Court, the Court shall turn to and apply the current law and procedure in the U.K.
15. The Applicant contends that there are legal rules in operation in Antigua and Barbuda governing the admissibility of heresay evidence originating from two (2) sources being; the Evidence Act Cap 155 and the Common Law.
16. Citing Phipson on Evidence, 12<sup>th</sup> edit, para 624, the Applicant submits that *"It is a fundamental rule of evidence at Common Law that heresay evidence is inadmissible."*
17. This common law rule contends the Applicant, applies to both oral testimony of a witness as well as to documentary evidence.<sup>1</sup>
18. The Applicant submits that the UK Legislature intervened by way of several statutes over the years to ameliorate the hardship created by the Common Law heresay rule, culminating in the 1995 Civil Evidence Act of the UK.
19. However in Antigua and Barbuda parliament intervened only by way of the Evidence Act Cap 155 passed in April of **1876** and amended by implication, in 1994. This legislative inaction leaves in place the provision in section 11 of the Evidence Act of Antigua and Barbuda (an ambulatory clause) for resort to the law in force in the U.K from time to time, in relation to the treatment of documentary evidence only and indeed also leaves in place the common law in relation to oral evidence.
20. This contends the Applicant, leaves oral evidence to be deal with in the usual way – by the Common Law.

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<sup>1</sup> Phipson m Evidence 12<sup>th</sup> add para 630.

21. Apart from the common logic of this reasoning, the Applicant relies on in support of this contention, the Antiguan case of *Psalter Millwood v Dale Richards*, per Justice Mitchell Q.C. ANUHCV 1997/0121, pp 5.
22. The Applicant goes on to distinguish the *Delores Christopher* Case (Supra) relied on by the Respondent/ Claimant, on the ground that it is not a decision on the admissibility of oral heresay.<sup>1</sup>
23. Further still, the Applicant sought to distinguish the cases of *Polanski* (Supra) and *Barrings Plc* case (Supra) also submitted by the Claimant/Respondent in support of its case, on the grounds that both cases were decided under the U.K Civil Evidence Act and in any event, dealt with a question not applicable to the instant application.
24. The Applicant's basis for distinguishing the *First Caribbean International Bank* case however, is unclear to me.
25. The Applicant submits that oral heresay, not being governed by the U.K 1995 Civil Evidence Act; renders the specified witness statements in breach of the heresay rule and as a consequence their tender prohibited and must now be struck out on this application.
26. Further, or in the alternative, the Claimant submits that if the U.K Civil Evidence Act were to be found by this court to be applicable in the circumstances of this case, the court is directed to the objectionable aspects of the witness statement of Ms. Ritsma and that of Louis Lockhart.<sup>2</sup>

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<sup>1</sup> See Applicant's written submission filed March 17 2009 at pp 9.

<sup>2</sup> See Applicants written submission filed 17 March 2009 at pp 12 – 14.

## THE 2<sup>ND</sup> DEFENDANTS SUBMISSION

27. Counsel for the 2<sup>nd</sup> defendant adopts the Applicant/1<sup>st</sup> & 2<sup>nd</sup> Defendant's submissions.

## THE COURT'S FINDINGS

28. The core issue in this matter perhaps, is whether oral evidence is governed by the Common Law or by the U.K 1995 Civil Evidence Act (by virtue of the conjoined effect of the aforementioned Evidence Act of Antigua and Barbuda and Eastern Caribbean Supreme Court Act).
29. In answering this question, the court must determine whether a witness statement is to be treated as a 'document' contemplated by the evidence Act or as oral evidence.
30. The witness statement is really a witness proof. It foreshadows the oral testimony of a witness.<sup>1</sup> Pursuant to the CPR 2000 and in furthering the overriding objectives of the said CPR 2000, not least of which, for the saving of time, the court may order that the witness statement stands as evidence in chief.
31. This however, does not alter the essential character of witness statement as being a proof reflecting the oral testimony of that witness. These statements, as a matter of practice are not tendered in evidence in the normal way. For this reason the witness statement is not captured by the Antiguan & Barbudan Evidence Act as

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<sup>1</sup> See A Practical Approach to Civil Procedure, 4<sup>th</sup> edit., Stuart Sime para 29.1.1.; see also Blackstone's Civil Practice 2003 para 49.1; see Rule 29.2(1)(a) of the CPR 2000 for general rule as to how witness evidence is proved.

documentary evidence. The U.K. Civil Evidence Act and C.P.R make specific provision for the tender of a Statement in relation to its heresay character.<sup>1</sup>

32. Then, there is the application of S.12 of the Eastern Caribbean Supreme Court Act that provides for the High Court to exercise its "jurisdiction" in accordance with "... *any other law in operation in Antigua and Barbuda.*"

33. It is not entirely clear to me that this section, by reference to "*The jurisdiction vested in the High Court in the Civil Proceedings.....*" is intended to govern substantive issues such as the determination and application of the heresay rule to witness statements. Be that as it may, whatever its ambit, the words "...*Where no special provision is therein contained such jurisdiction.....*", in my view means what it says; that is, where for instance, the Common Law heresay rule applies to oral statements, the S.11 does not kick-in to import the "...*Law and practice administered for the time being in the High Court of Justice in England*"<sup>2</sup>

34. I accept the arguments of the Applicants on the question on the application of the Common Law heresay rule in Antigua and Barbuda in relation to oral statements only. Further, I can only adopt the reasoning for distinguishing authorities put forward by the Respondent/Claimant in their defence of this application. In leaving this issue, let me make the point that I recognize that having the admissibility of part of your evidence in an action dealt with by the common law with all its shortcomings and another part of the evidence being dealt with by a U.K. statute passed over there, without regard to any relevant circumstances prevailing in Antigua and Barbuda, is not a desirable state of affairs. Resolution of this dilemma is for the legislature however. I turn now to the content of the said witness statements in the context of the heresay rule, opinion evidence; and the contention that several of the statements are irrelevant and scandalous.

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<sup>1</sup> The state of our Law on this point is not a happy one.

<sup>2</sup> See s.11 of the Eastern Caribbean Supreme Court.



35. The Witness Statement of Maudlyn Christian is clearly that of an expert. She is not the company accountant that in the usual conduct of business produces the financial statements and is now seeking to explain her product. She seeks now to express an opinion on the financial statements of others. I believe we already have an expert for this purpose. In any event, her evidence runs counter to the rules of the CPR 2000 and the substantive law governing opinion evidence. **This statement of Maudlyn Christian is hereby struck out.**
36. The Witness Statement of Terrance Orr is replete with heresy and opinion evidence. Further, the relevance of this evidence is unclear having regard to the nature of the parties in the matter and the cause of action. Although there are several paragraphs that do not offend against the rule against heresy or opinion evidence; standing alone, their relevance is naught. As a result, their admissibility would follow their 'relevance'. **The Witness Statement of Terrance Orr is struck out in its entirety.**
37. The Witness Statement of Wilbur Harrigan appears to be mostly factual although the weight and relevance of the evidence appears borderline. The purpose of striking out a witness statement or part thereof is for the most part reserved for that statement or part thereof that is incontestably bad. This statement does not fall into that category or for that matter, any of the other categories variously described by the myriad authorities on point, as warranting striking out.<sup>1</sup> He is giving evidence of observations of; systems apparent to all those who care to observe it; activities and people, that in my view do not require expert opinion of the kind contemplated by CPR 2000 or the law. Companies hire accountants and auditors routinely and it cannot be said that non accountants cannot assess and/or understand their work, their systems and their product generally. After all, the accountants and auditors are retained by a company that must surely understand what work they hired the accountants and auditors to carry out. **The statement of Wilbur Harrigan is NOT struck – out.**

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<sup>1</sup> Reasoning in para 39 and 40 below also applied and followed in relation to this witness statement.

38. The Witness Statement of John Duggan appears to be a statement of facts known to him and perfectly admissible save perhaps for that part of the sentence in para 10 thereof that: "*I understand that my counsel has briefly reviewed these audited statements which verify that the company has consistently now at a deficit since 1995.....*". Determining whether or not a statement being tendered is heresy, depends on the purpose for which the statement is being tendered. This purpose can often times be gleaned from the context and contents of the witness statement, other witness statements and the statement of case. In this particular witness statement, the purpose for para 8 and 10 is not entirely clear from the context or the circumstances. Suffice it to say, that particular statement at para 10 cannot be tendered in support of the contention (if it be a fact in issue at all) that the "*...Company has consistently been run at a deficit since 1995...*" I add further, that if this statement at para 10 goes neither to any fact in issue in the matter nor to credit of any of the parties or witnesses, then I would admit para 10.

39. Para 8 of the said witness statement contains in line two (2) to line seven (7), a statement that offends against the heresy rule if it is to be tendered for its truth. That is to say, the truth of what Mrs. Ritsma told him. Again, It is not clear to me that this evidence goes to any issue or fact issue in the matter or to the credibility of any person relevant to this matter. All the facts and evidence in this matter relevant to my enquiry have, naturally, not been fully ventilated at this time.

40. **In relation to the witness statement of Mr. Duggan; it is NOT struck out**, with the caveat, that if at trial the context admits of an unlawful purpose for the tender of the sentence in para 10 or para 8; application be then made in the usual manner to strike it out.

41. The Witness Statement of Sir Louis Lockhart is a mix of factual statements, opinion and heresy. Some of the opinion stated could only realistically be

conveyed in that way<sup>1</sup>. The process of separating out the sentences, or parts of sentences; that offend against either the rule against hearsay or the rule against opinion evidence or further, separating out matters which are prejudicial more than probative; irrelevant and scandalous, from the witness statement of Sir Louis Lockhart is quite simply burdensome. In my view, no useful purpose is served at this time by calling in the parties to thrash out the details of what is to be excluded or included.

42. I can only cite the dicta in William and Humbert Ltd v. W and H Trade Marks (Jersey) Ltd [1986] A.C. 368 (3A) and quoted in Blackstones Civil Practice 2003 para 33.5, per Lord Templeman: *"If an application to strike out involves a prolonged and serious argument the judge should as a general rule, decline to proceed with the argument unless he not only harbors doubt about the soundness of the pleading but in addition, is satisfied that striking out will obviate the necessity for a trial or with substantially reduce the burden of preparing for trial or the burden of the trial itself."*
43. Further still, **Blackstone's** points out that a judge may refuse to hear a striking application if "... (b) the application will not be decisive or appreciably simplify the eventual trial."(**Morris v Bank of America National Trust [2000] 1 All ER 954**). The application of the principle is the same in my view, with respect to the stage of this application and adjudication. Carrying out this exercise of excising the offending words, sentences, paragraphs and parts of this statement, will not be decisive or appreciably simplify the eventual trial. Indeed, the applicant has not contended otherwise. In transposing this principle to that of a witness statement, I say further, that carrying out the "carving" exercise is unlikely to result in obviating the need for the trial or any substantial part of it, nor will it substantially reduce the burden of preparing for the trial.

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<sup>1</sup> See Blackstones Civil Practice 2003 para 52.2 for Law on opinion evidence and exception to the rule against opinion evidence. I note the specific offending paragraphs that the applicant refers to in these statement.

44. At the time of trial, the issues in the case being sufficiently clear then, the need to either lead or alternatively to contest the offending parts of this statement may even have dissipated.

45. **This witness statement of Sir Louis Lockhart, or any part thereof, for the reasons provided above is NOT struck – out.**

46. The content of Mrs. Kathryn Ritsma's witness statement is her evidence that the Respondent/Claimant will be asking to be admitted for its truth. Having regard to para 5 of her statement; where she states that her statement is based on reading and reviewing documents contain in her firm's files, I am unable to refuse the application to have it struck out. The statement is a combination of heresy and opinion evidence. It expresses opinion evidence on matters that are capable of being otherwise adduced.

47. Even if the U.K 1995 Civil Evidence Act was applicable to her testimony, I cannot at this time attribute to it, at most, more than nominal weight in the circumstances.

**48. The Witness Statement of Kathryn Ritsma is struck out in its entirety.**

49. For the reasons provided above it is hereby ordered as follows:

#### ORDER

**IT IS HEREBY ORDERED** that:-

1. The Witness Statement of Maudlyn Christian be struck out.
2. The Witness Statement of Terrence Orr is struck out.
3. The Witness Statement of Wilbur Harrigan is not struck out.
4. The Witness Statement of John Duggan is not struck out.
5. The Witness Statement of Sir Louis Lockhart is not struck out

6. The Witness Statement of Kathryn Ritsma be struck out.
7. Success on this application being evenly balanced; each party to bear its own cost of this application..

**David C. Harris**  
**High Court Judge**  
**Antigua and Barbuda**