

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2013/0362

BETWEEN:

MABLE PHILLIP
(Acting through her Attorney Nancy Mc Kenzie Greene)

Claimant

and

CORRINE CLARA

Defendant

Appearances:

Ms. Pauline Hannibal for the Claimant

Mrs. Celia Edwards, Q.C and Ms. Shireen Wilkinson for the Defendant

2014: April 10;
June 30

JUDGMENT

[1] **MOHAMMED, J.:** There are two applications before the Court for determination. They are the Defendant's application filed on 17th March 2014 ("the striking out application") to strike out certain parts of the witness statement of Nancy Mc Kenzie Greene filed on 27th February 2014 ("the witness statement"), and the Claimant's application filed on the 1st April 2014 seeking an order of the Court to issue a witness summons for an employee of Republic Bank Limited ("the Bank"), Garnett Ross, to produce certain documents ("the witness summons application"). Both applications came up for hearing at the Pre-trial review. Although the Claimant made

submissions on alleged hearsay evidence in the Defendant's witness statement, there was no formal application filed for the Court to address.

- [2] This action was instituted on the 4th July 2013. The Claimant's case is that the Defendant withdrew large sums of money from her account #11123778 ("the account") at the Bank and did not apply or use it for her. The Claimant pleaded that on 29th April 2006 she gave a Power of Attorney to the Defendant to manage her affairs, including her financial affairs. This was revoked in March 2013. The Defendant was added to the account around 2004 as a joint holder for convenience to handle the financial affairs of the Claimant.
- [3] At paragraph 13 of the amended statement of claim filed on 31st October 2013 the Claimant pleaded that she obtained from the Bank a statement of the account for the period 1st January 2012 to 17th May 2013, a copy of which was annexed. At paragraph 14 she pleaded that she also applied and obtained a statement of account for the period 2006-2011, which was also annexed as "D".
- [4] The Defendant denies that she withdrew large sums of money and denies liability to account. She also alleges that the Claimant operated an account with one Ruby Gilbert, who withdrew large sums of money, the implication being that another person and not the Defendant withdrew the money.

The Striking Out Application

- [5] The Defendant seeks to strike out paragraphs 3, 4, 5, 6, 8, 9, 14, 16, 19, 21, 25, 26, 27, 28, 29, 33, 34, 36, 38, and 41 or such parts of the witness statement pursuant to CPR 29.5(2) on the basis that they constitute hearsay evidence, are highly prejudicial and are of no or no sufficient probative value and therefore inadmissible.
- [6] She contends that: the Claimant has not filed any witness statement in the action but instead Nancy Mc Kenzie Greene, who had not seen the Claimant for many years and was not present when arrangements were made between the Claimant and the Defendant, has filed a witness statement and therefore she could not know

of the matters which she purports to give; such evidence is therefore hearsay and if admitted into evidence would be prejudicial to the Defendant since she would not be able to test the veracity of the evidence in cross-examination; Nancy Mc Kenzie Greene insists that the Claimant is mentally competent but physically frail and that frailty of the body is no impediment to a witness of full mental capacity giving evidence since there are provisions in the rules for the evidence *de bene esse* to be taken if the witness cannot attend to the court; the Claimant has not made any such application and there is no justification for such application; section 36E of the Evidence (Amendment) Act 2000 ("the Act") cannot assist the Claimant since no notice was given, and 36E (3) gives the Defendant a right to require the Claimant to give evidence.

[7] The Claimant's position is the aspects of the witness statement, which the Defendant seeks to strike out, do not come within the definition of hearsay and in paragraphs 25, 27, 28 and 29 where they contain elements of hearsay evidence, they are covered by Section 36E (1) of the Act. The requirements of notice under section 36E (2) refers to 21 days before the date the statement is to be tendered, which is the trial, and no trial date has been set in this matter, and that the service of the witness statement on the Defendant constitutes sufficient notice. She admits that under the Act the Court can exclude evidence if the prejudicial effect outweighs the probative value.

[8] Hearsay evidence is evidence given by a testifying witness of a statement made by some other person when such evidence is tendered to prove the truth of the statement¹. At common law, hearsay evidence is not admissible. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made. Hearsay may be first hand when a witness says what he heard someone else say, or second hand (or even more distant) when he relates what he was told that someone else said². Section 36E of the Act provides for the admission of first-hand hearsay statements subject to compliance with certain conditions.

¹ Para 11 Halsbury's Laws of England 4th ed Vol 17

² Para 53 Halsbury's Laws of England 4th ed Vol 17

[9] Section 36E of the Act provides:

- (1) Subject to section 36G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall, subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
- (2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.
- (3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.
- (4) The party intending to tender the statement in evidence shall not be obliged to call as a witness the person who made the statement if it is proved to the satisfaction of the Court that such person –
 - (a) is dead;
 - (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
 - (c) is outside of Grenada and it is not reasonably practicable to secure his attendance;
 - (d) cannot be found after all reasonable steps have been taken to find him;
 - (e) is kept away from the proceedings by threats of bodily harm.
- (5) Where in any civil proceedings a statement which was made otherwise than in a manner and admissible by virtue of this section, by the person other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.
- (6) The Court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection (2).

(7) Where the party intending to tender a statement of evidence has called as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the Court.”

[10] Under section 36E of the Act, first hand hearsay is admissible as evidence of any facts stated but not the truth of the statements once the following conditions have been satisfied: first hand hearsay evidence is not automatically admissible if conditions are not satisfied; the party tendering the hearsay statements has given to the other parties at least 21 days notice before the hearing at which the statement is to be tendered; those to whom notice have been given have stated that they do not require the presence of the maker of the statement; however if the other party wishes to have the person who made the statement called as a witness, the party who is tendering the statement in evidence is only excused from calling that person if it satisfies the Court that the person is dead, unfit by any mental or physical condition, outside of Grenada and it is impracticable to secure his attendance, cannot be found or is kept away from the proceedings by threats of bodily harm. The Court has a discretion to dispense with the requirements for notice.

[11] The following statements are made from the direct knowledge of the witness Nancy Mc Kenzie Greene are therefore *not hearsay*:

- (a) The first two sentences in paragraph 3
- (b) The entire paragraph 4 save and except the first sentence
- (c) The second sentence in paragraph 5
- (d) The first and third sentences in paragraph 8
- (e) (e)The last sentence in paragraph 9
- (f) Paragraph 19
- (g) The third, fourth and fifth sentences in paragraph 29
- (h) Paragraph 34 only the words “and having examined them with the Claimant I discovered that many large withdrawals were made by the Defendant”
- (i) Paragraph 41.

- [12] The information containing first hand hearsay statements are:
- (a) last sentence of paragraph 3
 - (b) the first sentence of paragraph 6
 - (c) the second sentence in paragraph 8
 - (d) the first two sentences in paragraph 9
 - (e) paragraph 14, paragraph 25
 - (f) the last sentence in paragraph 26, 27, 28
 - (g) the first two sentences in 29 and
 - (h) in paragraph 34 the words "a copy of the statement ... 16th January 2014".
- [13] While I agree that the Claimant has satisfied the condition for notice in section 36E since the witness statement was served long before the trial, and no trial date has been set I have not been satisfied that the other conditions in section 36E of the Act have been met which will deem the first hand hearsay admissible.
- [14] In opposing the striking out application the Defendant has stated that it requires the maker of those first hand hearsay statements to be present since the Defendant ought to be given the opportunity to test the veracity of the statements under cross-examination. Therefore condition 36E (3) has not been met. Secondly, there is no reason for the Court to dispense with the attendance of the maker of the said statements, who is the Claimant, since the Court is not satisfied that the Claimant has met any of the conditions under 36E (4).
- [15] Indeed, paragraph 41 of the witness statement indicates that the Claimant is still in Grenada, and although at paragraph 6 of the affidavit of Nancy Mc Kenzie Greene asserts that *"Mable Phillip herself would have been able to give evidence of it she was physically able to testify herself"*, no medical evidence has been provided to support this assertion.
- [16] In any event, CPR 33.7 makes provision for a deposition of a witness to be taken by an examiner before the trial in circumstances where the witness does not even have to attend to the Court. The examiner can conduct the examination in private at the witness's home or even a hospital. These are the lengths by which the rules of Court

have gone to accommodate persons who may be incapacitated by frailty of body. But no such application has been made.

- [17] In the circumstances, the aforementioned paragraphs or parts thereof in paragraph 12 aforesaid are struck out.
- [18] The following parts of the witness statement are also struck out since they do not state the source of the information or belief (CPR 29.5):
- (a) The first sentence in paragraph 5
 - (b) Paragraph 6 save and except the first sentence
 - (c) Paragraph 16
 - (d) Paragraph 21
 - (e) The first sentence of paragraph 26
 - (f) Paragraph 34
 - (g) Paragraphs 33, 36, 38.
- [19] While the Court has the discretion to strike out parts of the witness statement which are prejudicial and contains no or no sufficient probative value, I have not been satisfied that the parts of the witness statements which now remain are prejudicial to the Defendant.

The Witness Summons Application

- [20] The witness summons application is supported by an affidavit of Nancy Mc Kenzie Greene. The information which the Claimant seeks to have the witness produce are: a copy of a document dated between 9th December 2004 to 20th December 2004 setting out the reasons why Mable Phillip set up the account adding Corrine Clara as joint holder thereof; a copy of the Bank Standard Form signed by Mable Phillip in December 2004 in respect of the account, and withdrawal slips for the period 20th July 2007 to 6th March 2013.

- [21] The three grounds in support of the witness summons application are:
- (a) The information contained in these documents is crucial for determining the facts in issue in the matter since the Claimant alleges that the Defendant withdrew certain sums of money from her account which was not applied for her benefit;
 - (b) The Defendant denies that she withdrew these sums and denies liability to account for them. The documents will show the purpose for which the joint account was set up and whether the Defendant made these large withdrawals or not; and
 - (c) The Claimant's attorney applied to the Bank on the 21st February 2014 for the said documents and the Bank through its attorney-at-law directed that a Court order should be obtained for production of these documents.
- [22] The Defendant has opposed the witness summons application on the basis that:
- (a) It is in substance an application to discover and use specific documents which were in existence since 2004 to 2013 before the institution of the instant action;
 - (b) The time for disclosure and inspection of documents has passed;
 - (c) The Claimant ought to have known of the need to discover the said documents and filed an application if she knew they were not forthcoming;
 - (d) There is no explanation proffered by the Claimant why the application was not made within the terms of the CPR and she will suffer severe prejudice since she filed witness statements on 3rd March 2014 .
- [23] There are two issues arising for determination from the witness summons application namely:
- (a) Is the witness summons application in substance an application for specific disclosure?
 - (b) Should the Court exercise its discretion to grant the witness summons application?

Is the Witness Summons Application in Substance an Application for Specific Disclosure?

- [24] CPR 28.5 concerns the specific disclosure of documents. It allows a party to apply to the Court to obtain an order for another party in the proceedings to disclose certain documents or class of documents, carry out a search for documents or disclose any documents located as a result of the search. However, the rule is limited only to the parties in the matter and does not extend to non-parties. It is not in dispute that the Bank is not a party to the matter so this rule is inapplicable.
- [25] In my view, the nature of the relief which the Claimant is seeking is specific disclosure by a non-party. However, the CPR is silent on the procedure to be followed in such applications. In recognizing this lacuna in the rules, the learned authors of the **Caribbean Civil Court Practice 2011** are of the view that where there is no provision for disclosure from a non-party the appropriate procedure to be followed is that set out in 33.16. At page 287 they stated:
- “The Barbados and ECSC CPR do not contain any specific power by the court to order disclosure by a person who is not or whom it is not intended to join as a party to proceedings. Once proceedings have started, then, of course, in any jurisdiction the documents may be obtained by the issue and service of a witness summons for a time prior to trial.”
- [26] CPR 33.16 provides for the early appointment to produce documents. It states:
- “(1) The court may permit a party to issue a witness summons requiring any person to attend at a date, time or place specified in the summons prior to the date of the trial for the purpose of producing one or more documents.
- (2) The only type of document that a summons under this rule can require a person to produce is a document which that person could be compelled to produce at trial.”
- [27] In my view, CPR 33.16 is the appropriate rule for the Claimant to apply for the disclosure of the documents by the Bank since there is no specific rule making such provision.

Should the Court exercise its discretion to grant the Witness Summons Application?

[28] CPR 33.16 is silent on the factors the Court should consider in exercising its discretion. In **Treasure Isles v Audubon Holdings Ltd**³ Saunders CJ (Ag.) in examining the approach the Court must take in exercising its discretion when applying the rules stated:

“... the overriding objective does not in or by itself empower the Court to do anything or grant to the Court any discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself.

[29] Rule 33.16 was designed to prevent the element of surprise at the trial. It empowers the Court to order a non-party to produce documents before the trial where it is in the interest of justice to produce the documents which would assist in clarifying or determining any issue. Just as in applications for disclosure by a non-party, any application under this rule ought to be made during case management and certainly before the filing of witness statements. In my view, the only means for the representative from the Bank to produce the documents for them to form part of the evidence is if he files a witness statement but the deadline for doing so has passed. The timing of this application places the Defendant at a distinct disadvantage. If the purpose of the rule is to assist in clarifying the issues, surely it should be done during case management since to do so afterwards makes case management an exercise in futility especially, when the party making the application, knew that such application was required long before the Case Management directions were complied with.

³ BVI CIV APP 22 of 2003

[30] If the order is granted I would not be giving effect to the overriding objective since it would place the parties on an unequal footing for the following reasons:

- (a) The application was not made expeditiously. Although CPR 33.16 does not prescribe a time within which to make such an application, the Court cannot ignore that the Claimant stated that since 21st February 2014 she was aware that she needed to obtain an order from the Court for the said documents to be produced. At that time the matter was still being case managed since all the deadlines for the directions given at case management in December 2013 had not passed. The Claimant has admitted the importance of the documents on the matter as a whole yet she chose to make the application some five weeks after she became aware of this information but, more importantly, after the deadline for filing the witness statements. In my view, this was not expeditious.

- (b) No explanation why the application not made during case management or earlier. The only explanation provided for making the application on the 1st April 2014 was set out at paragraph 8 of the affidavit of Nancy McKenzie Greene, which is that her attorney requested the information on the 21st February 2014 and she was subsequently advised by the Bank's attorneys that the documents would only be produced if so ordered by the Court. It appears to me that based on the Claimant's position she knew that the documents were in existence before the commencement of this action and therefore the onus was on her to make this application during case management and certainly before the filing of witness statements. In my view she has failed to provide any reason to the satisfaction of the Court for her failure to make this application during case management.

- (c) Prejudice to the Defendant. The Claimant has stated that the withdrawal slips would assist both parties and that the other documents would assist her case. The Claimant is in effect attempting to have additional evidence produced after the Defendant has filed her witness statement, which at this stage would severely prejudice the Defendant.

ORDER

- [31] The following parts of the witness statement are struck out:
- a) The last sentence of paragraph 3
 - b) The first sentence in paragraph 5
 - c) Paragraph 6
 - d) The second sentence in paragraph 8
 - e) The first two sentences of paragraph 9
 - f) Paragraph 14
 - g) Paragraph 16
 - h) Paragraph 21
 - i) Paragraph 25
 - j) Paragraph 26
 - k) Paragraphs 27 and 28
 - l) The first two sentences in 29
 - m) Paragraphs 33, 34, 36 and 38.
- [32] The Defendant having succeeded partially in the striking out application, I order the Claimant to pay the Defendant one half of the costs of the striking out application. Cost is assessed in the sum of \$750.00.
- [33] The witness summons application is dismissed. The Claimant to pay the Defendant's costs of the said application. Cost is assessed in the sum of \$1000.00.

Margaret Y. Mohammed
High Court Judge