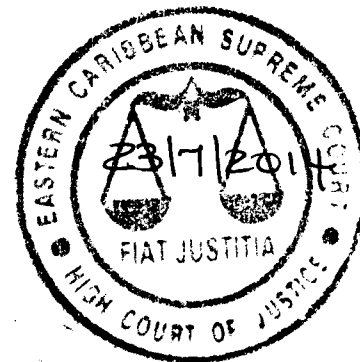


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
CLAIM NO. 84 OF 2009



BETWEEN:

**NORMA MARIA FREDERICK (by her duly appointed Attorney
on Record VERONICA PHILLIPS)**

CLAIMANT

-AND-

**ELFIC GRANT (Representative of the Estate of Keith Krispin
GRANT, Deceased)**

DEFENDANT

Appearances: Ms Keisal Peters for the Defendant/Applicant, Ms Annique Cummings and Mr Jadric Cummings for the Claimant/Respondent.

2014: July 9 & 23

JUDGMENT

[1] **Henry, J. (Ag.):** This is an application by the Defendant/Applicant¹ filed on June 5, 2014 for an order that:

(a) the Defendant be permitted to rely on the witness statement of Keith Grant, deceased filed on September 30, 2009;

¹ Referred to throughout as the "Defendant".

(b) solicitor for Keith Grant deceased, Mr McCauley Peters be allowed to give a witness statement;

(c) the Defendant be granted an extension of time to file the witness statement of Elfic Grant, Representative of the Estate of Keith Grant deceased;

(d) any other person with relevant evidence and deemed appropriate by the Defendant to file a witness statement within 4 weeks.

BACKGROUND

[2] The Claimant/Respondent² initiated legal proceedings against Keith Crispin Grant by Fixed Date Claim Form filed on March 13, 2009 seeking *inter alia* a declaration that property situated at Port Elizabeth Bequia registered as Deed No. 723 of 1964 vests in the Claimant and others or their heirs as tenants in common. Keith Crispin Grant filed a Defence on April 29, 2009 and other pleadings and affidavits until July 30, 2009 when directions were given for trial. He passed away on January 1, 2013. By order dated October 24, 2013 Mr Elfic Grant was appointed to represent Keith Crispin Grant's estate and substituted as the Defendant as personal representative of the estate of Keith Crispin Grant deceased.

[3] The Claimant obtained leave to and filed an Amended Fixed Date Claim Form on February 6, 2014 and another Amended Fixed Date Claim Form on March 25, 2014. The Defendant filed an Amended Defence on April 4, 2014. By order dated May 14, 2014, the Defendant was granted 21 days until June 5, 2014 to file and serve a further witness statement of Elfic Grant the personal representative of the estate of Keith Crispin Grant. At the hearing of the Application Counsel for the Defendant, Ms Cummings withdrew the request that an order be granted allowing any other person with relevant evidence and deemed appropriate by the Defendant to file a witness statement within 4 weeks. That aspect of the application is accordingly dismissed.

² Referred to throughout as the "Claimant".

ISSUES

[4] Three issues arise for consideration, namely whether the court should exercise its discretion to:

(a) permit the Defendant to rely at the trial, on the witness statement of Keith Grant, deceased filed on September 30, 2009;

(b) grant leave to the Defendant to file and serve a witness statement Mr McCauley Peters, solicitor for Keith Grant deceased;

(c) grant the Defendant an extension of time to file the witness statement of Elfic Grant, Representative of the Estate of Keith Grant deceased.

DEFENDANT'S SUBMISSIONS

[5] Learned counsel for the Defendant, Ms Annique Cummings made brief submissions at the hearing which she has since supplemented by written submissions. Ms Cummings contends that Keith Grant's witness statement is directly relevant to the issue at hand and should be admitted into evidence as the Claimant would not be prejudiced by such admission. Ms Cummings also submitted that the court is empowered to take Keith Crispin Grant's witness statement into account and to give it such weight as the court deems just. In this regard, she relied on the overriding objective contained in Rule 1.1 of the Civil Procedure Rules 2000 ("CPR") and sections 47 to 53 of the Evidence Act, Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines. In respect of the request for an extension of time to file the witness statement, Ms Cummings submitted the cases of **The Attorney General v Universal Projects Limited**³, **The Attorney General v Keron Matthews**⁴ and **C. O. Williams Construction (St. Lucia) Limited v Inter-island Dredging Co Ltd**⁵ as authorities for her submission that an application for grant of

³ [2011] UKPC 37

⁴ [2011] UKPC 38

⁵ Civil Appeal No. HCVAP2011/017

for extension of time does not necessitate a simultaneous or antecedent application for relief from sanctions.

- [6] Ms Cummings submitted that dicta by Her Ladyship Justice of Appeal Edwards (as she then was) in the **C.O. Williams case** is applicable in the instant case. She referred in particular to paragraph 56 of the judgment which reads:

*“The approach in **Sayers** does not require an applicant to file an application for relief from sanctions along with the application for extension of time. CPR 27.8 stipulates the circumstances that must exist for a party to apply for extension of time and relief from sanctions. That party would have to be seeking to vary a date which the court has fixed for either a case management conference; or a date set by a court order to do something and the order specifies a a sanction for non-compliance; or a date for pre-trial review, return of a listing questionnaire, or a trial; or where a party wishes to vary a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from the sanction to which the party has become subject under these Rules or any court order.”*

CLAIMANT’S SUBMISSIONS

- [7] Learned counsel for the Claimant, Ms Keisal Peters objected to the grant of the reliefs sought by the Defendant and submitted that it is questionable whether after trial directions have been given, the Defendant should be allowed to file additional witness statements. She submitted further that there is no rule of court under the CPR which empowers the court to take judicial attention of a witness statement of a

witness who is not available for trial. She added that rule 29.8(1) of the CPR stipulates that evidence given at a trial must be oral evidence which must be tested by cross-examination. She insists that she does not concede that rule 29.2(1) & (2) of the CPR allows the court to make an order to receive a witness statement into evidence. Ms Peters contends that if the defendant is permitted to rely on the witness statement of Keith Crispin Grant deceased, the Claimant would be at a disadvantage as she would not be able to cross examine the witness since he is deceased. She relies on the cases of **Millwood v Richards**⁶, **Yvonne Lewis v Anselm Lewis et al**⁷ and **Lynch et al. v. Coffee Commodities Limited**⁸.

[8] Ms Peters submitted further that the defendant should not be permitted to file a witness statement of attorney Mr McCauley Peters in this matter as he is on record in these proceedings having filed a number of applications. In this regard, she relied on the case of **Richard Frederick and Lucas Frederick v Comptroller of Customs and Attorney General of the Commonwealth of Dominica**⁹.

[9] Regarding the application for extension of time to file the defendant's witness statement, Ms Peters submitted that the procedure was improper and that the defendant was required to seek relief from sanctions in addition to seeking an extension of time, or alternatively seek relief from sanctions before applying for extension of time. In support of this submission she relied on the cases **Kyle David**

⁶ Claim No. HCVANU1997/121, Antigua and Barbuda

⁷ Claim No. HCVSVG2002/541

⁸ Claim No. BVIHCV2004/008

⁹ Civil Appeal No. HCVAP2008/037

v The Attorney General of Dominica¹⁰, Emma Reid v Owen Peter¹¹ and David Goldgar et al v Wycliffe Baird¹².

[10] Ms Peters also submitted that even if the Application could be viewed and considered as an application for relief from sanctions, it would fail because it does not satisfy all of the criteria of rule 26.8 of the CPR. The Antigua and Barbuda case of the **Attorney General v Antigua Aggregates Limited et al¹³** and the Commonwealth of Dominica case of **Frampton v Pinard et al¹⁴** are authorities in support she posited.

GROUNDS OF THE APPLICATION

[11] The Defendant has presented the following grounds for the application:

- (a) The original Defendant Keith Crispin Grant died on December 28, 2012.
- (b) The witness statement of the said Keith Crispin Grant, deceased was directly relevant to the issue at hand and is therefore supportive of his defence.
- (c) McCauley Peters was a close friend and Solicitor of Keith Crispin Grant, deceased and advised him on legal matters from time to time and is therefore in a position to testify to the issues in the case.
- (d) The new Defendant Elfic Grant was ordered to file a witness statement if necessary by June 5, 2014.
- (e) Elfic Grant requires more time to clarify the information necessary to complete his witness statement.

¹⁰ Claim No. HCVAP2013/004

¹¹ Claim No. HVCSLU2010/0715

¹² Claim No. HCVAP2007/013, St. Christopher and Nevis

¹³ Claim No. ANUHCV2005/0492

¹⁴ Civil Appeal No. 15 of 2005

(f) There has been no trial date and accordingly no prejudice to the Claimant if the order is granted.

[12] The affidavit of Glenda Barrow, Senior Legal Clerk at Cardinal Law Firm essentially repeats the grounds of the application and adds that the application is made promptly, that there is no sanction fixed for filing a witness statement after the time ordered by the court, that the defendant has complied generally with provisions of the CPR and would likely suffer severe prejudice if the application is not granted while the Claimant would suffer no prejudice if it is granted as the Claimant would be given an opportunity to respond to any witness statements filed by the defendant.

LAW AND ANALYSIS

Witness statement of Keith Crispin Grant deceased

[13] Section 47 (1) of the Evidence Act, Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines is applicable to the consideration of whether the witness statement of Keith Crispin Grant should be admitted into evidence. It provides:

*“47 (1) 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 and to rules of court, be admissible as evidence of any fact stated therein** of which direct oral evidence by him would be admissible.” (bold mine for emphasis).*

[14] Sections 51(1) and 52(1) provide respectively:

“51 (1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of sections 47, 49 or 50 it may, subject to any 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 manner as the court may approve.”

“52 (1) Subject to rules of court, where in any civil proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence by virtue of section 47-

(a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in those proceedings; and

(b) evidence tending to prove that, whether before or after he made that statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith, shall be admissible for the purpose of showing that that person has contradicted himself.”

[15] Rules 26.1 2)(f) 29.2 (1) & (2) and 29.8 of the CPR state respectively:

“26.1 (2) Except where these rules provide otherwise, the court may-
(f) direct that any evidence be given in written form;”

“29.2 (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at –

- (a) trial – by their oral evidence given in public; and
- (b) any other hearing – by affidavit.

(2) The general rule is subject to any –

- (a) **order of the court; and**
- (b) **provision to the contrary contained in these rules or elsewhere.”**

- 29.8 (1) If a party –
- (a) has served a witness statement or summary; and
 - (b) wishes to rely on the evidence of that witness;
- that party must call the witness to give evidence **unless the court orders otherwise.**
- (2) If a party-
- (a) has served a witness statement or summary; and
 - (b) does not intend to call that witness at the trial;
- that party must give notice to that effect to the other party not less than 28 days before the trial.” (bold mine)

[16] The combined effect of the foregoing provisions is to empower the court to admit into evidence any document including a witness statement which contains facts of which direct oral evidence would be admissible as evidence by the maker of the statement. The court is empowered by rules 26.1 2)(f) 29.2 (1) & (2) and 29.8 of the CPR to admit such statements into evidence. There is no ambiguity in the language of those provisions and in giving them their ordinary and plain meanings, there is no doubt that the court may admit witness statements into evidence. The case of **Millwood v Richards**¹⁵ does not assist the Claimant in her objections to the admission of the witness statement of Keith Crispin Grant. In delivering the decision His Lordship Justice Mitchell (as he then was) quoted rule 29.8 of the CPR including sub-rule (1)(b) which authorizes the court to “order otherwise”. In addition, he stated at paragraph [5] of the judgment that unlike in the Leeward Islands jurisdictions, the Windward Islands permit the UK Evidence Acts to apply and “hearsay evidence is there admissible in civil trials.”

¹⁵ Ibid.

[17] Similarly, the cases of **Lych et al v Coffee Commodities Ltd et al**¹⁶ and **Yvonne Lewis and Anselm Lewis et al**¹⁷ and can be distinguished from the instant case. The proposed witness was not deceased in either case. No explanation was provided to the court in either of those two cases regarding the reasons why the witness did not testify although present¹⁸, or why the witness was absent from the trial.¹⁹ No application appears to have been made to the court in either case to admit the witness statement and the court had made no order pursuant to rule 29.8(1)(b) of the CPR. In those circumstances the court was constrained from and rightly refused to consider those witness statements.

[18] Section 51(2) of the Evidence Act²⁰ permits the court to draw such reasonable inferences from the circumstances in which a statement was made or came into being and from other circumstance including the form and content of the document, to assist it in determining whether a statement is admissible in evidence. Likewise sub-section (3) provides guidance to the court in estimating the weight if any which should be attached to a statement admitted into evidence under section 47 of the Act. In light of these provisions, the court may allow the defendant to rely on the witness statement of Keith Grant, deceased filed on September 30, 2009. This relief is accordingly granted as prayed.

Witness Statement of McCauley Grant

[19] Mr McCauley Grant has represented the defendant at various stages during the instant matter. He has not applied to be removed as attorney for the defendant. The affidavit of Glenda Barrow does not evince any intention by him to be so removed. In

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ In case of the former

¹⁹ In case of the latter

²⁰ Ibid

the circumstances, the defendant's application for leave to file and serve a witness statement Mr McCauley Peters, would run afoul of the established principle that "it is most undesirable for counsel with conduct of a matter or application to swear an affidavit in that matter ... an unacceptable and wholly inappropriate practice".²¹ The court should not and does not countenance such a practice. The defendant is denied leave to file a witness statement of McCauley Peters in this matter.

Extension of time to file witness statement of Elfic Grant

[20] The application by the defendant for an extension of time to file the witness statement of Elfic Grant involves a consideration of rule 26.1(2)(k) of the CPR which states:

"Except where these rules provide otherwise, the court may-

- (k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

[21] Learned counsel Ms Peters' submissions that the defendant was required to apply for relief from sanctions simultaneously with or before applying for extension of time is without merit. The case of **C. O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging**²² establishes that the circumstances which mandate a party to make a simultaneous application for relief from sanctions and extension of time are restricted to instances where that party is seeking to vary a date:

- (a) which the court has fixed for case management;
- (b) set by a court order to do something and the order specifies a sanction for non-compliance;
- (c) for a pre-trial review, return of listing questionnaire, or a trial;
- (d) set by the court or the rules for doing any act which will affect any of the

²¹ Per George-Creque J.A. (as she then was) in **Richard Frederick et al v. The Comptroller of Customs et al**, *ibid*.

²² *ibid*

previously mentioned dates.

In delivering the judgment, Edwards J.A. (as she then was) opined:

“It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that CPR 27.8(4) requires that the party must apply for an extension of time and relief from the sanction to which the party has become subject under these rules or any court order.”.

[22] This decision does not conflict with the decision of the Privy Council in the case of **The Attorney General of Trinidad and Tobago v Universal Projects Limited**²³. In that case, the appellant was seeking extension of time to vary a timeline in respect of which a sanction for non-compliance was attached. That case fell squarely within the example at paragraph [21] (b) above and was accordingly held to be an application for relief from sanctions. The defendant in the instant case is making an application for extension of time *simpliciter*. It does not fit within any of the circumstances described at paragraph [21] and can accordingly be disposed of under rule 26.1 (2)(k) of the CPR provided that it is made promptly and that a good explanation is provided for the delay in filing the witness statement. Mindful of the overriding objective of the CPR to ensure that justice is done between the parties and taking into account that the Claimant would be given an opportunity to reply to any witness statement filed by the Defendant pursuant to an order for extension of time to file and serve the witness statement, the court is minded to grant leave to the defendant for extension of time to file the witness statement of Elfic Grant.

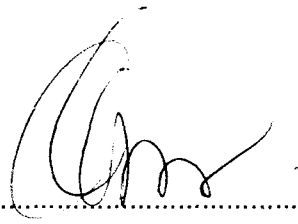
²³ *ibid*

ORDER

[23] It is accordingly ordered:

1. The defendant is permitted to rely at the trial on the witness statement of Keith Grant, deceased filed on September 30, 2009.
2. The defendant's application for leave to file and serve a witness statement of Mr McCauley Peters, solicitor for Keith Grant deceased is refused and dismissed.
3. The Defendant is granted an extension of time to August 6, 2014 to file the witness statement of Elfic Grant, Representative of the Estate of Keith Grant, deceased.
4. The Claimant is granted leave to file witness statements in response on or before August 29, 2014.
5. No order as to costs.

[24] I wish to express gratitude to Learned Counsel for their submissions and authorities.

A handwritten signature in black ink, appearing to read 'Esco L. Henry', is written over a horizontal dotted line.

Esco L. Henry

HIGH COURT JUDGE (Ag.)