EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2014/0030

FRANCISCUS PETRUS VINGEHOEDT
(also known as Frans Vingerhoedt)

Appellant

and

STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION)
(Acting by and through its Joint Liquidators, Marcus A. Wide and Hugh Dickson)

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Ms. E. Ann Henry, QC, with her, Ms. C Debra Burnette for the Appellant
Mr. Malcolm Arthurs, with him, Ms. Nicolette Doherty for the Respondent

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2014: November 24;
2015: January 26.

Civil appeal – Hearsay evidence – Whether the learned trial judge erred in admitting transcript into proceedings – Whether the trial judge admitted hearsay evidence under section 29 of the Evidence (Special Provisions) Act, 2009

The respondent filed an application to adduce hearsay evidence from the transcripts of US criminal proceedings ("US Transcript"), in the case of United States of America v Robert Allen Stanford. It relied on sections 29 and 30 of the Evidence (Special Provisions) Act, 2009 ("the Act"). Alternatively, they sought to rely on the transcript as a non-hearsay record of what was said at the criminal trial and not for the truth of what was stated in order to show that the joint liquidator's understanding of the fraud is consistent with the evidence given by witnesses in the criminal proceedings. The learned trial judge ordered that the US Transcript be allowed into evidence as evidence and proof of the words that were spoken in those proceedings and by whom they were spoken, but not as evidence of the truth of what was stated. The appellant filed an application for leave to appeal that order

on the main basis that the probative value of the hearsay evidence is outweighed by the prejudicial effect. The application was treated as the appeal.

Held: dismissing the appeal and awarding costs on the appeal to the respondent to be assessed unless agreed within 30 days, that:

1. Section 29 of the Act does not make hearsay evidence admissible in circumstances where it would otherwise be inadmissible. It merely obviates the need for formal proof of its authenticity which was otherwise required by common law. Moreover, it does not provide an exception to the hearsay rule. The test as to whether the evidence falls within an exception to the hearsay rule so as to be admissible without formal proof under section 29 of the Act must still be applied. If the evidence is hearsay evidence not falling within any exception to the rule then such evidence will be inadmissible whether or not section 29 of the Act exists.

   Section 29 of the **Evidence (Special Provisions) Act, 2009** applied; **Merck & Co. Inc v Apotex Inc. (T.D.)** [1998] 3 FC 400 applied.

2. Evidence of a statement made to a witness by a person who was not himself called as a witness is not hearsay evidence and is admissible when it seeks to establish by the evidence not the truth of the statement but the fact that it was made. The learned trial judge explicitly stated that it was for that purpose he was admitting the US Transcript. Given that the US Transcript was not admitted as evidence of the truth of what is stated therein, but rather as evidence in proof of the fact of what was stated and by whom, there has been no breach of the hearsay rule.

   Subramaniam v Public Prosecutor [1956] 1 WLR 965 applied.

JUDGMENT

[1] **PEREIRA, CJ**: The appellant sought leave to appeal the decision of the learned trial judge in respect of an order made on 1st August 2014, in which, on application of the respondent to adduce hearsay evidence, he ordered that the transcripts of the US criminal proceedings in the case known as United States of America v Robert Allen Stanford, which took place between 23rd January 2012 and 8th March 2012 ("the US Transcript") are allowed into evidence as 'evidence and proof of the words that were spoken in those proceedings and by whom they were spoken, but not as evidence of the truth of what was stated'. The trial window which was fixed for November was no longer feasible as the appellants, being dissatisfied with that

order, sought leave to appeal on 15th August 2014 as well as a stay of the proceedings in the court below pending the determination of the appeal.

[2] The application came on for consideration before a single judge of the Court on 23rd September 2014 whereupon the application was referred to the Full Court under rule 62.2(5) of the **Civil Procedure Rules 2000**. The Full Court at its sitting in November 2014, with the consent of the parties, treated the application for leave to appeal as the appeal.

The appellant's complaint

[3] The gravamen of the appellant's complaint is essentially that the hearsay evidence will be of no probative value (not being admitted as proof of the truth of what was said) but on the other hand will be highly prejudicial to the appellant who will be unable to test the evidence by cross-examination and that substantial excerpts from the US Transcript are included in the witness statement of Mr. Marcus Wide[1] on which he has expressly relied as the basis on which he reached certain conclusions which are highly prejudicial to the appellant.

[4] As the basis supporting the application for a stay, the appellant says that the US Transcript is voluminous and if it is to be included in the bundle for trial it will considerably impact on the amount of time for the trial and the attendant costs thereof. The stay was not resisted by the respondent as it was considered the appropriate course pending the delivery of the Court's decision as to the correctness of the learned trial judge's decision.

[5] It is common ground between the parties that the common law rule against the admissibility of hearsay evidence subject to known exceptions represents the state of the law in Antigua and Barbuda. This is unlike the UK where the common law rule has been statutorily modified by the **Civil Evidence Act 1995** of the UK which permits the admission of hearsay evidence in civil proceedings once certain procedures are followed.

[1] Mr. Wide is one of the joint liquidators of the respondent.

The decision of the trial judge

[6] The learned trial judge delivered an oral ruling which has been captured and produced from the transcript of the proceedings. He noted that the respondent had given notice of their intention to adduce the US Transcript (with a copy served on the appellant) and that the respondent wished to have the US Transcript admitted as evidence and proof of its contents and relied on section 29 of the **Evidence (Special Provisions) Act, 2009** ("the Act")[2] as well as section 30 of the said Act. Of relevance, is section 29(1) which states as follows:

> "(1) Evidence of a proceeding or record of, in or before a court in Antigua and Barbuda, Great Britain, a British Overseas Territory or Dependency or a foreign country may be given in a proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal or hand of the court, without any proof of the authenticity of the seal or signature."

The learned trial judge opined, rightly in our view, that section 29 of the Act does not in terms say that evidence of such proceeding or record is evidence of the truth of such statements contained in the proceedings or record. He further opined that section 29 of the Act did more than merely provide for proof of the fact that a certain proceeding had occurred, as advanced by counsel for the appellant, as in his view, section 29 spoke not only to evidence of a proceeding but spoke also to evidence of a record.

[7] The learned judge also noted that the respondent had also contended that:

> "If the Court is not persuaded of the claimant's primary case, the Claimant will seek to rely on the transcript as a non-hearsay record of what was said at the criminal trial and not for the truth of what is stated in order to demonstration (sic) that the joint liquidator's understanding of the fraud is consistent with the evidence given by witnesses in the criminal proceedings."

[2] No. 5 of 2009, Laws of Antigua and Barbuda.

[8] The learned judge cited from the Irish decision of **Peter Cullen v William Clarke**[3] relied upon by counsel for the appellant which gave the classic statement of principle in relation to the rule against hearsay. Kingsmill Moore J put it this way:

> "In view of some of the arguments addressed to the Court, it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions, that evidence of the speaking of such words **is inadmissible to prove the truth** of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross examination and has not the sanctity of an oath. This is the rule known as the rule against hearsay. … [E]**vidence may properly be given of words uttered by persons who are not called as witnesses … where the utterance of the words may itself be a relevant fact, quite apart from the truth or falsity of anything asserted by the words spoken.** To prove, by the evidence of a witness who heard the words, **that they were spoken, is direct evidence, and in no way encroaches on the general rule against hearsay**".[4] (Emphasis added).

[9] The learned trial judge most carefully reminded himself that there is a distinction (and I agree) to be drawn between a statement as evidence of the proof of what a person said, on the one hand, and a statement as evidence of proof that what was said was true, on the other. After considering the Canadian case of **Merck & Co. Inc v Apotex Inc. (T.D.)**[5] on which counsel for the appellant placed much reliance as to the construction to be placed section 29(1) of the Act which is said to be in pari materia to section 23 of the **Canada Evidence Act**,[6] as well as having regard to other authorities such as **Subramaniam v Public Prosecutor**,[7] **Myers v Director of Public Prosecutions**[8] and other well-known texts on the law of evidence including **Phipson on Evidence**[9] and the several common law exceptions to hearsay evidence therein stated, concluded thus:

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[3] [1963] IR 368.
[4] At pp. 378 and 379.
[5] [1998] 3 FC 400.
[6] Revised Statutes Canada 1985, c C-5.
[7] [1956] 1 WLR 965 – a Privy Council decision from the courts of Malaysia.
[8] [1965] AC 1001.
[9] 13th edn., Sweet & Maxwell 1982; Murphy on Evidence (11th edn., Oxford University Press 2009) 223; and Cross on Evidence were also referred to.

> "Now the transcripts themselves have not been exhibited in regard to these proceedings so far… So the court cannot be certain either way whether or not any of the things reported to have been said in these transcripts fell within any of those exceptions. In particular, whether they amount to an admission or a confession such as -- was allowed as an exception under the English Common Law. Where this leaves us, therefore, is that I will allow the transcripts into evidence as evidence and proof of the words that were spoken in the US criminal proceedings and who spoke them, in other words, as evidence of the record in those proceedings, but not as evidence for the truth of what was stated."

The arguments on appeal

[10] The arguments on appeal were substantially a re-run of the arguments made to the learned judge below. Counsel for the appellant again relied heavily on the Canadian case of **Merck** as being highly persuasive as to the interpretation which should be placed on section 29 of the Act. Section 23 of the **Canada Evidence Act** states in part as follows:

> "Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, … or of any other foreign country … may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court… without any proof of the authenticity of the seal … or other proof whatever."

[11] In **Merck**, the plaintiffs in the proceedings in the Federal Court sought to show why the defendant and its CEO should not be found in contempt of court and sought to introduce documents from a judicial review application in the Ontario Court. They relied upon the **Canada Evidence Act** sections 23, 24 and 30. They intended to use such evidence, particularly the evidence of the CEO among other witnesses, as evidence of the assertions then made. Among the issues for determination was the question whether section 23 of the **Canada Evidence Act** provided a gateway for the admission of hearsay evidence. It was held that the evidence that the plaintiffs sought to introduce was precluded from admission by the hearsay rule unless admissible by some exception thereto. That the provisions of the Act relied upon merely facilitate admission of documentary evidence which meets the requirements for admission under some exception to the hearsay rule but do not themselves provide the exceptions except to the extent that they permit admission

without formal proof that would otherwise be required at common law of the authenticity of the documents in question.

[12] My understanding of the decision in **Merck** is that section 23 of the **Canada Evidence Act** does not thereby make hearsay evidence which would be inadmissible as a general rule, admissible. In essence, where the evidence would be hearsay then it remains hearsay and inadmissible unless it comes within one or more of the exceptions to the hearsay rule. Put another way, the section does not in and of itself create an exception to the hearsay rule. It merely obviates the need for formal proof so that the hearsay rule remains intact.

[13] Similarly, I do not consider that section 29 of the Act makes hearsay evidence admissible in circumstances where it would otherwise be inadmissible. Like the Canadian provision it merely obviates the need for formal proof of its authenticity which was otherwise required by common law. The test as to whether the evidence falls within an exception to the hearsay rule so as to be admissible without formal proof under section 29 of the Act must still be applied. If the evidence is hearsay evidence not falling within any exception to the rule then such evidence will be inadmissible whether or not section 29 of the Act exists. In short, the test for admissibility of evidence is a wholly different consideration to the question as to the formalities required for admission once the evidence has passed the test of admissibility.

Did the trial judge admit hearsay evidence under section 29 of the Act?

[14] Having concluded as to the scope of section 29 of the Act, I return to the question as to whether the learned trial judge's decision in admitting the US Transcript in evidence in the proceedings 'as evidence and proof of the words… spoken… and by whom… but not as evidence of the truth of what was stated' is, in essence, an admission into evidence of hearsay evidence under section 29 of the Act. This requires a return to a consideration of the principles relating to the rule against the admission of hearsay evidence discussed in the cases and treatises on the subject referred to earlier.

[15] Learned Queen's Counsel for the appellant sought to distinguish the position as it relates to the case at bar from the circumstances considered by the Privy Council in **Subramamiam v Public Prosecutor** relied on by the respondent. In **Subramamiam**, the appellant had been charged and found guilty of possession of ammunition without lawful excuse. At trial he had put forward the defence that he had been captured by terrorists and that at all material times he had been acting under duress. He sought to give evidence, in describing his capture, of what the terrorists said to him but the trial judge ruled the evidence of the conversation with the terrorists was not admissible unless they were called. In the end, the trial judge said he could find no evidence of duress with the result that the appellant was convicted and sentenced to death. On appeal, the Privy Council held that the trial judge was in error in ruling out peremptorily the evidence of conversation between the terrorists and the appellant. They ruled that evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay evidence and was admissible when it was proposed to establish by the evidence not the truth of the statement but the fact that it was made. Statements could have been made to the appellant by the terrorists which, whether true or not, if they had been believed by the appellant might reasonably have induced in him an apprehension of instant death if he failed to confirm to their wishes. Such evidence, their Lordships considered, might have afforded cogent evidence of duress. In their Lordships' judgment the following passage appears:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."[10]

[10] At p. 970.

[16] This statement of principle was recently endorsed by the CCJ in **Ganga Charran Singh v Ram Singh et al**,[11] an appeal from a decision of the Court of Appeal of Guyana. I have not been able to discern any reason for distinguishing the general principle enunciated in **Subramanian** from its application in the present case. I am more persuaded by the submissions of the respondent on this issue.

[17] Given the learned judge's observations to which I have referred at paragraph 9 above, it is clear that the learned judge was meticulous in his ruling and made clear that the admission of the US Transcript was admitted into evidence not as evidence of the truth of any statements contained in the record but merely as evidence and proof of the words spoken and by whom. He was, as he stated, in no position to determine its admissibility for any other purpose at this stage. This will no doubt be an exercise to be carried out at the actual trial when he will be best placed to do so. His clear ruling makes it pellucid that he did not admit the US Transcript as hearsay evidence under section 29 of the Act, but rather as direct evidence for the purpose stated. As such there has been no trampling of the rule against hearsay as explained in **Subramaniam** by his decision. Neither can it be said in any event that he disregarded the construction placed on section 29 of the Act by reference to **Merck**. Indeed the proposition of law contained in **Merck** in construing section 23 of the Canadian Act, is not at odds with the proposition of law for which **Subramaniam** stands. In my view, they complement each other.

[18] Given that the US Transcript has not at this stage been admitted as evidence of the truth of what is stated therein, but rather as evidence in proof of the fact of what was stated and by whom, there has been no offending of the hearsay rule. The learned judge was quite alive to this having regard to his conclusion reached as set out in paragraph 9 above. This leads me to conclude that the appellant's complaint in respect of prejudice may at this stage be premature and may well be an argument for another day before the trial judge when the substantive matter comes on for trial.

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[11] [2014] CCJ 12 (AJ).

Conclusion

[19] For the foregoing reasons, I would dismiss this appeal and order that the appellant bears the respondent's costs on this appeal to be assessed unless agreed within 30 days.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise E. Blenman
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal