THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2015/0191

BETWEEN

YOLANDER JARDINE

CLAIMANT

and

ELLIOT LABORDE

DEFENDANT

Appearances:
Mr. Duane Daniel for the claimant.
Mr. Joseph Delves for the defendant.

2018: Jan. 25

ORAL DECISION

BACKGROUND

[1] **Henry, J.:** The Law of Evidence in Saint Vincent and the Grenadines is largely founded on the common law except to the extent that the Evidence Act[1] codifies the present position with respect to hearsay. It is important to note that the Parliament of Saint Vincent and the Grenadines retains (pursuant to the Evidence Act) certain aspects of the law relating to hearsay, which obtained in the United Kingdom. I refer to section 3. The relevant part reads:

> 'Whenever any question shall arise in any … civil proceedings whatsoever in or before any court …, touching the admissibility or sufficiency of any evidence …, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with

[1]Cap 220 Revised Laws of St Vincent and the Grenadines 2009

such modifications as may be applicable and necessary in Saint Vincent and the Grenadines.'

[2] Section 46 of the Evidence Act contains supplementary provisions which require a court to take into consideration certain statutory provisions enacted by the UK Parliament. Section 46 to the extent that it is relevant reads:

> '(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings, shall be admissible as evidence of any fact stated therein to the extent that it is admissible by virtue of any provision of this Act or by virtue of any statutory provision or by agreement of the parties, but not otherwise.
>
> (2) In this section, **"statutory provision"** means any provisions contained in or in an instrument made under, this or any other written law including any written law passed after this Act.'

[3] That provision is almost identical to section 1 (1) of the UK Civil Evidence Act, Chapter 64. That is the 1995 Act. I refer to the UK Evidence Civil Act of 1995 because the decisions made the Court of the United Kingdom in relation to section 1(1) would be applicable here because the provision in Saint Vincent and the Grenadines was mirrored on the UK Legislation.

[4] Whereas the UK Civil Evidence Act of 1995 embodied the recommendations of the Law Commission that the hearsay rule should abolished, that was not effected by the Evidence Act of Saint Vincent and the Grenadines. It means therefore that certain aspects of the common law as it relates to hearsay are still applicable within the jurisdiction of Saint Vincent and the Grenadines. There is limited application.

[5] What is hearsay? Learned Counsel Ms. Richardson correctly refers to the leading authority on what is hearsay. **Subramanian**[2] is captured essentially in the UK Civil Evidence Act 1995, section 1 of which provides:

> 'Hearsay means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matter stated and refers to hearsay of whatever degree.'

[6] So the extent that the court considers whether or not the impugned provisions are hearsay, the court must be guided by the determination in the **Subramanian** case. I turn now to consider those portions of the

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[2] [1956] 1W.L.R. 956

witness statement of the defendant Doradeen LaBorde and Mashica Thomas which have been objected to by learned counsel on behalf of the claimant, firstly on the ground of hearsay and secondly as it relates to opinion evidence.

[7] Paragraph 6 of the witness statement of the defendant Elliot LaBorde as executor of the Estate of Ray LaBorde reads: (I am going to be reading the portion, which has been objected to by the claimant):

> 'The deceased strenuously resisted this maintaining that he has another daughter Mashica Thomas as well as other relatives and that he could not give all his life earnings, sweat and tears to Tonika alone'. I believe that it is for these reasons that the deceased crafted his will in the manner that he did. The premises were part owned by the two of them. He reasonably anticipated that the selling of the premises whether to one of the joint tenant owners or to a stranger was inevitable'.

[8] In deciding whether to admit this part of the defendant's evidence, the court must have regard to section 51 of the Evidence Act, which establishes certain parameters, certain considerations, certain practices which the court must take into consideration when determining admissibility of evidence.

[9] Section 51 (1) reads:

> 'Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 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.'

[10] I pause here to state that this aspect of Section 51, will become relevant when I go on to consider another portion of the witness statement of the defendant, since it relates to the production of a document. Subsection (2) reads:

> 'For the purpose of deciding whether or not a statement is admissible in evidence, by virtue of section 47, 49 or 50, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including in the case of a statement contained in a document, the form and content of that document.'

[11] This subsection empowers the court to draw inferences from the circumstances in which the statement was made. Subsection (3) addresses the weight which the court may attach to any evidence which is admissible although it contains hearsay. Subsection (3) reads:

'In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 47, 48, 49 or 50 regard shall be had to all the circumstances from which any inference can reasonably be drawn as to accuracy or otherwise of the statement and in, particular -

> (a) In the case of a statement falling within Section 47 or 48 (1) or (2) to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;'

[12] This subparagraph (a) is similar to section 6 (3) of the 1968 UK Evidence Act under which rules were made, which are applicable in the jurisdiction of Saint Vincent and the Grenadines; since the relevant authority in Saint Vincent and the Grenadines has not made rules under the Evidence Act as it is empowered to do by several provisions of the Act. No rules have been made under the Saint Vincent and the Grenadines Act under section 55. So, the jurisdiction of Saint Vincent and the Grenadines must apply those rules which are made under the UK Civil Evidence Act 1968.

[13] Before I look at the rules made under the UK Civil Evidence Act of 1968, it is important to look very briefly at section 47 of the Saint Vincent and that Grenadines Act which permits hearsay to be admissible, and it is under that provision, which the court must determine whether or not this 'hearsay' is admissible. Section 47 (1) reads:

> 'In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person whether called as witness in those proceedings or not, shall, subject to this section and to rules court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.'

[14] What do the applicable rules of court say? Rules of the Supreme Court Order 38 Rules 20 to 32 made under the UK Civil Evidence of 1968 provide that if a person wishes to adduce hearsay statements he must serve notice on all other parties of his desire to do so, within twenty-one (21) days after the date that the matter is set down for trial. If it is not documentary hearsay, the adducer must give particulars of the maker of the statement and the substance of the statement or words used and the time when it was made. If it is documentary, it must be accompanied by a copy of the document. If the adducer claims that the maker cannot or should not because of his unavailability be called, he must give reasons.

[15] Where the statement is a record, the adducer must supply particulars of the compiler, the original supplier, the chain through which the information passed and the time, place and circumstances of the compiling of

the record. Where the record is a computer record a copy of the document and particulars of the person responsible for managing the computer operations, for supply of the information to the computer, and for the operation of the computer must be provided. It must be stated that the computer was operating properly at the time in question and reasons must be given for any claim that a person referred to cannot be called. Order 38 Rule 25 lists the reasons for not calling a person. These include:

(1) that the person is question is dead;
(2) beyond the seas;
(3) physically or mentally unfit to attend as a witness;
(4) cannot with reasonable diligence be identified or found;
(5) cannot reasonably be expected to have any recollection of matters relevant to the accuracy of the statement.

If the opposing party requires the maker of the hearsay statement to be called, he must serve a counter-notice within seven (7) days after receipt of the notice that the adducer proposes to adduce hearsay evidence.

[16] However, the rules give the court a residual discretion to allow a hearsay statement which is admissible under the 1968 Act, to be given in evidence despite non-compliance with the rules or where refusal might otherwise compel one side to call an opposing party[3].

[17] The court must decide whether the portion of the defendant's witness statement which I have just read, which is objected to by the claimant is hearsay first of all, and if it is hearsay whether the relevant notice was served on the claimant and whether the reasons for the failure by the defendant to call the person who made the statement is sufficiently known to the claimant; whether it is one of the reasons which is contemplated by the rules and therefore whether the statement is admissible. I hope I have captured essentially the nature of the exercise which must be conducted not only in respect in this part of the witness statement of the defendant, but in respect of all those to which the claimant has objected on the ground of hearsay.

[18] The defendant at paragraph 6 of his witness statement, which has just been read, is referring to statements allegedly made by the deceased Ray LaBorde. There is no contention between the parties that he is deceased. The witness statement before me was filed on the 5th July, 2017. I have no record before me of when it was served, but I infer from all these circumstances, including the fact that this trial commenced in

[3] The UK Law Commission Consultation Paper No.117

November of 2017, that the claimant would have had notice of this witness statement, adequate time to launch a counter notice objecting to the defendant adducing this. I have had sight of no such counter notice, and in the circumstances, it appears from all of the relevant circumstances that the claimant appreciated that the defendant intended to rely on this statement and had no objections until this morning.

[19] I have no difficulty in finding that, that statement 'the deceased strenuously … tears to Tonika alone' constitutes hearsay. It is a statement which on the face of it was made in the absence of the claimant. It is an out-of-court statement and for those purposes it is hearsay. To the extent that the defendant decided to rely on it to establish the truth of what is said in it, it would offend against the hearsay rule. Having said all of that am I satisfied that, notwithstanding that fact that it is hearsay that it would be prejudicial and unjust to allow the defendant to rely on that statement?

[20] I take into account the fact that the claimant would have been aware of the statement since about July, August 2017 and by the very latest on the 26th October, 2017 when this trial started. In those circumstances, the claimant would have been alive to the very real intention of the defendant to rely on this statement. They had every opportunity to object. They did not take that opportunity. I take into account too, that the statement is made by the deceased whose estate comprises the subject matter of this very contentious dispute. If the court were to prevent the defendant from relying on this statement it would unfairly prejudice the defendants and not only the defendants but the beneficiaries of the estate of the first defendant. If it permitted the defendant to rely on this out-of-court statement by the deceased, the claimant would have an opportunity to cross-examine to discredit the defendant in respect of that statement. And if they so desire they will have an opportunity to seek an adjournment to conduct any inquiries that they have failed to do up until this point. On balance it seems to me that the justice of the case demands that notwithstanding that that statement is inadmissible hearsay that it should be admitted into evidence.

[21] Accordingly, the first part of the 'offending' portion of paragraph 6, the statement which starts 'the deceased strenuously … tears to Tonika alone' is admitted into evidence as part of the defendants' evidence. The defendant has conceded that the statement: "I believe that it is for these reasons the deceased crafted his will in manner that he did" is an opinion. My understanding of the law is that where a party can reasonably by their reasoning capacity observe certain uncontested facts and render an opinion on it which is reasonable in all the circumstances then it is not objectionable. The court will have to have regard to the content of the will which the defendant has referred to in this part of his proposed statement to determine whether or not it is a reasonable deduction. It seems to me that the defendant could realistically infer from

all the circumstances that may be this compelled the deceased to craft his will in the manner in which it appears.

[22] The court will have to determine (if this is admitted into evidence) what weight to attach to it. The court may not attach any weight to it. The court may ignore it totally. The court may give little weight to it. The court may give much weight to it. It is entirely a matter for the court taking into consideration all the circumstances, all of the evidence which is adduced. For those reasons, I will not strike out that statement. The claimant objects to the sentence: 'the promises were part owned by the two of them.' That does not appear to contain any opinion or hearsay. It is therefore not objectionable and it remains. The sentence 'he reasonably anticipated that the selling of the premises whether to one of the joint owner or to stranger was inevitable.' That is quite a stretch. It is not in my opinion hearsay and it is not a belief which reasonably flowed from the circumstances. So it is accordingly struck out as being an inadmissible opinion.

[23] In respect of paragraph 7 of the witness statement of the defendant Elliot LaBorde, the claimant objects to it on the ground that it contains inadmissible hearsay. It reads:

> 'I am in contact with Mashica and she has instructed me to protect her interest in the subject property.'

[24] The defendant claims that in his capacity as executor, the first defendant is entitled to give evidence on behalf of the beneficiary. I have no difficulty in light of the law enunciated previously that the last part of paragraph 7 starting with the words 'she has instructed me' constitutes hearsay. The defendants have provided no reason either directly in the document or otherwise to indicate why Mashica (who I believe is Mashica Thomas) could not give that evidence herself. The defendant has not indicated when this conversation took place between Mashica and Elliot LaBorde the executor and in those circumstances, I think it would be unfair and unjust to the claimant to permit that part of paragraph 7 to remain as the defendants' evidence. It is therefore ordered that that part of the paragraph 7 'she has instructed me … subject property,' is likewise struck out as it contains inadmissible hearsay.

[25] Paragraph 12 of the second sentence of paragraph 12 of the defendants' witness statement reads:

> 'The loan was disbursed and like the principle loan was spent in the construction of the house.'

The claimant submits that that statement constitutes opinion or belief. The first part of the sentence to my mind is a statement of fact. 'The loan was disbursed'. That is not disputed by the claimant. The claimant had admitted such. So that is not a statement of opinion or belief. '

[26] 'And like the principle loan was spent in the construction of the house.' Based on my understanding of the claimant's case that is not disputed either. In my opinion, it does not constitute a statement of opinion or behalf. The claimant, (if my recollection is correct) in her testimony, indicated that after the deceased's death she made certain enquiries from the bank from which they obtained the loan. She did not dispute that there was a balance and she gave certain evidence in respect of the balance. In all the circumstances, I consider that statement to be one of the factual contentions as between the parties. And it is accordingly not struck out. I should not say factual contention because there appears to be no divergence between the parties' as it relates to that part of the case'.

[27] Paragraph 16 of the defendant's witness statement reads:

> 'Also there was a long period when the claimant made no payments towards the mortgage loan, but the deceased never stop making payments. An analysis including the print out of the loan payment supplied by the Credit Union and referred to in paragraph 2 of the letter of response shows the following:
>
> i. During the year 2008 no payments were made by the claimant during the months of March, June and December.
> ii. During the year 2009 no payments were made by the claimant during the months of April and November.
> iii During the year 2010 no payments was made by the claimant during the month March.
> iii. During the year 2011 no payments were made by the claimant during months of January, July and December.
> v. During the year 2012 no payments were made by the claimant in the month of January.
> vi. During the year 2013 no payments were made by the claimant during the months of July, September, October and December.
> vii. During the year 2014 no payments were made by the claimant during the months of January, February, April, May, June, July, September, October, November and December.
> viii During the year 2015 no payments were made by the claimant during the months of January, March, April, June, July, August, September, October and November.'

[28] The court must have regard to the contents of paragraph 14 and 15 of this witness statement (which preceded the one that I have just read) in order to put paragraph 16 into context. Paragraph 14 reads:

'The monthly mortgage repayments were made by the deceased and the claimant in the sum of four hundred ($400.00) and eleven hundred dollars ($1100.00) respectively. But the claimant ended her payment just after the divorce.

15. The Credit Union's letters also show that the claimant made one hundred and four (104) payments towards the mortgage loans which amounted to one hundred and twenty thousand, seven hundred and twenty-three dollars and sixty-one cents ($120,723.61). Of these payment seventy-eight (78) were monthly payments of one thousand one hundred dollars ($1100.00) each. The deceased made one hundred and thirty-three (133) payments towards the mortgage loans which amounted to one hundred and ninety-one thousand five hundred and eighty-seven dollars and twenty-five cents ($191,587.25). Of these payments one hundred and eighteen (118) were monthly payments of fourteen hundred dollars ($1400.00) each.'

[29] I have to refer to the testimony of the claimant in order to bring some more context. I recalled that she was cross-examined in respect of that aspect of the defendants' case. In cross-examination the claimant said:

'We were equally responsible for the mortgage payments but it was not in equal amount.'

She was referred to page 203 of the trial bundle, which is a letter the claimant admitted writing to the bank. In her statement she said 'I called Ray the principal borrower in that letter.' It was written in 2015 after Ray's death. She said: 'later we were both responsible to pay the loan.'

[30] So on one aspect of the claimant's testimony she seems to support the defendants' case that the parties did contribute to the mortgage payments in unequal amounts, which appears to be what the defendant is saying. Paragraphs 14, 15 and 15 of his witness statement and paragraph 16 seem to be referring to printed information from the bank. As the executor of the Estate of Ray LaBorde, he is mandated to request financial information with respect to the deceased's estate; to understand it; and to apply his understanding in administering the estate. In giving his evidence to the court in the capacity of executor of Ray LaBorde's Estate, he has a duty as the executor of the estate to bring that information to the court's attention.

[31] To the extent that the claimant is not objecting to this information contained in paragraph 16 on any other ground except that it appears to be the testimony of an expert, it is not objectionable because an executor whether or not he is a financial guru, must by one means or another become intimately knowledgeable about the estate. He or she is charged by the court with administering and to that extent, that evidence in paragraph 16 is not objectionable as containing expert testimony. It is not going to be struck out.

[32] I turn now to look at the testimony of Doradeen LaBorde at page 47, paragraph 10 the second line. That part of the testimony reads:

> 'My brother resisted this, maintaining that he has another daughter and other relatives and that he could not give all his life earnings, sweat and tears to Tonika alone'.

[33] This mirrors the proposed testimony of the defendant which I have already dealt with. For the reasons given earlier, on which the court relied to admit the proposed testimony of the defendant, (those reasons with any other reserved reasons which I will not get into at this point); that portion of the witness statement for Doradeen LaBorde, is not excised.

[34] Paragraph 12 of Doradeen LaBorde's witness statement reads:

> 'The high level of inconsistency and lack of the required commitment on the part of the claimant towards her monthly obligation towards the mortgage loan agreements over the years resulted in the substantial build-up of arrears resulting in the deceased having to transfer substantial amounts from his shares in the Credit Union in February 2012, amounting to ten thousand, five hundred and fifty-three dollars and eighty-one cents ($10,553.81) to reduce the arrears.
>
> I have been told by my solicitors, and I duly believe, that data obtained from the Credit Union substantiates what I have stated in this paragraph and paragraph 11 above'.

The claimant objects to it on the ground that it consists of opinion. No objection was taken on the basis that it constituted hearsay.

[35] It appears to me that the entire paragraph comprises hearsay and not opinion. To the extent that it mirrors the testimony of the defendant in his paragraph 16, which I have just dealt with, and to the extent the defendant has given the claimant notice that they intended to rely on this hearsay material, it afforded the claimant advance notice and an opportunity to object to it. To the extent that it relates to factual contentions between the parties, and to the extent that the proposed witness Doradeen LaBorde set out in her preceding paragraph the nature of the relationship she had with her deceased brother; and in light of the fact that he is not present, it seems to me that the justice of the case requires that most of paragraph 12 be retained. Although the claimant did not reject the final sentence on the ground of the hearsay, the court cannot disregard it. It amounts to the defendants seeking to give evidence from their solicitors and that cannot be countenanced. Accordingly, the final sentence of paragraph 12 is excised.

[36] Finally, I turn to look at page 52. The witness statement of Mashica Thomas at paragraph 4, (at page 63). The claimant objects to the entire paragraph. It reads:

'Following their divorce the claimant continually pressured my father to transfer his share in the subject property to their daughter Tonika. My father strenuously resisted this, maintaining that he has another daughter and other relatives and that he could not give all of his life earnings, sweat and tears to Tonika alone'.

[37] Mashica Thomas here proposes to give evidence which is similar to the testimony foreshadowed in the defendants' and Doradeen LaBorde's witness statements. She has not in the preceding paragraph of the witness statement or in any part of that witness statement outlined the circumstances under which that information was related to her by her deceased father. The court cannot ignore that. She also has not indicated (as the defendant in his witness statement, and Doradeen LaBorde in her witness statement) spoken of the nature of her ongoing relationship - the closeness or otherwise of the relationship between her father. For those reasons paragraph 4 of the witness summary of Mashica Thomas is excised.

ORDER

[38] For the sake of completeness and good order this is the order:

1. Paragraph 4 of the witness summary of Mashica Thomas filed on 5th July 2017, is excised as it constitutes hearsay.
2. Paragraph 12 of the witness statement of Doradeen LaBorde-Campbell filed on the 5th July 2017, is amended by excising the final sentence in that paragraph.
3. The final sentence in paragraph 6 of the witness statement of Elliot LaBorde filed on 5th July, 2017 is excised.
4. The final clause in paragraph 7 of the witness statement of Elliot LaBorde is excised as it consists of hearsay. The clause reads:

   'She has instructed me to protect her interest in the said subject property'.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar