THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2008/0827

BETWEEN:

PAUL HACKSHAW

Claimant

and

ST. LUCIA AIR AND SEA PORTS AUTHORITY

Defendant

APPEARANCES:

Mr. Leslie Prospere and Vilan Edward for the Claimant
Mr. Mark Maragh for the Defendant

2017: March 14th;
2017: April 6th.

DECISION

[1] SMITH J. This is the second round of interlocutory skirmishing about the admissibility of a disputed document ("the document") while the substantive issue remains to be determined in proceedings that have been on foot since 2008.

[2] Mr. Hackshaw alleges that, due to the negligence of the Saint Lucia Air and Sea Ports Authority ("SLASPA"), a vessel, the "Lilian Grace", which was under the care, custody and control of SLASPA, broke from its moorings in Ganthers Bay in the Castries Harbour during the passage of

Hurricane Tomas on 16th August 2007 and collided with his vessel, the *Miss T2*, causing it extensive damage. SLASPA denies that it had care, custody and control of the "Lilian Grace". The document is apparently crucial to proving that it did.

[3] The first round of skirmishing began at the commencement of the trial before Wilkinson J on 13th October 2014 when Mr. Maragh, Counsel for SLASPA, objected to the admissibility of the document which purported to be issued by the Marine Unit of the Royal Saint Lucia Police Force. It was included in a further supplemental list of documents filed by Mr. Hackshaw on 9th April 2014.

[4] In brief, the grounds of the objection taken before Wilkinson J were that the document: (a) was not referred to in any of the Claimant's pleadings in violation of Part 8.7 of the CPR; (b) was not referred to in any of the Claimant's witness statements in violation of Part 29.5 (1) (g) of the CPR; (c) was purportedly extracted from an original record which was not before the Court and failed to indicate who at SLASPA purportedly accepted care and custody of the "Lilian Grace" and had no signature proving acceptance by the SLASPA; and (d) ought to have been in a separate bundle from that containing the agreed documents. It was also argued that the Claimant ought to have filed an application at the pre-trial review stage to rely on the document or to file a further witness statement and that it was too late and prejudicial to the Defendant for the Claimant to be allowed to rely on the document.

[5] In response, Mr. Prospere, Counsel for Mr. Hackshaw, argued that: (a) SLASPA never provided any grounds of its objection until the morning of trial; (b) no objection was taken at the pre-trial review even though SPASPA had the document three months prior to the pre-trial review; (c) that the Defendant had care, custody and control of the "Lilian Grace" is in fact pleaded at paragraph 6 of the Claimant's Preliminary Act; (d) the document came into the Claimant's possession after the Claimant's witness statement had been filed on 26th March 2014 and, in any event, was produced in compliance with the duty of continuous disclosure under Part 28.12 of the CPR; (e) the rules contain no provision for the filing of supplementary witness statements; and (f) the Claimant could amplify his witness statement on the matter of the document and be cross-examined on it.

[6] Wilkinson J directed that written submissions be filed, particularly on the question of whether a party objecting to the inclusion of a document in the trial bundle of agreed documents must state his objection, and what form the objection should take. On 14th June 2016, Wilkinson J. delivered her oral decision on the matter. The findings of the Learned Judge are to be found at page 25 of the transcript of the oral decision under the rubric "Findings and Analysis". For ease of analysis, I have distilled the Learned Judge's conclusions into three findings, as follows.

[7] Wilkinson J found that firstly: "*As to rule 28.18 (2) it is without doubt that the Authority failed to comply with the requirement and giving notice to prove the document within a stipulated time of 42 days*."[1] I will refer to this as the first finding.

[8] Secondly, "*As to the Evidence Act, section 54, Mr. Hackshaw did disclose the document in sufficient time and his intention to rely on the document at trial and it is also without doubt that the Authority failed to (a) serve notice of the objection within seven days, the objection was served 162 days after the document was served on the Authority; and (b) there was not compliance with section 54 (1) which requires the Authority to set out the grounds of its objection*."[2] I will refer to this as the second finding.

[9] Thirdly: "*It therefore appears to the Court that notwithstanding that it could allow the amplification on the grounds described above, that on a further consideration of the prejudice to the Authority, to allow the amplification and the lack of compliance with the Evidence Act, section 51 (2), the lack of identification of the receiver as being the Authority. In the final analysis the Court must deny Mr. Hackshaw amplification by way of putting in a document by oral evidence… The document disclosed by Mr. Hackshaw on 9th April 2014 is struck out."*[3] I will refer to this as the third finding.

[10] Mr. Hackshaw appealed that decision to the Court of Appeal. In its decision, the Court of Appeal set out the first and second findings of the trial judge in full[4] and then stated:

> "We note that there has been no appeal against that finding of the learned judge"

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[1] Transcript of Oral Decision dated 14th June 2016 at page 25.
[2] Transcript of Oral Decision dated 14th June 2016 at page 25.
[3] Transcript of Oral Decision dated 14th June 2016 at page 29.
[4] Paragraph 7 of the Oral Judgment.

[11] The effect of that observation by the Court of Appeal is that the Defendant cannot, in this second round of skirmishing about the admissibility of the same document, re-litigate matters ruled upon by Wilkinson J in her first and second findings and against which the Defendant did not appeal.

[12] The Court of Appeal also found that:

> "In our view, the respondent could not properly complain of prejudice, having regard to the fact that the document was disclosed on 14th April 2014 which was approximately 6 months prior to the trial and the respondent gave no intimation to object to it until 3 weeks prior to the trial and in doing so it gave no basis for the objection."[5]

[13] The effect of that finding of the Court of Appeal is that the Defendant cannot now re-litigate the issue of prejudice.

[14] Thirdly, the Court of Appeal found that "…*the learned trial judge erred in principle in failing to consider the effect of CPR 28.18 and the effect of s. 54 (1) and (3) of the Evidence Act on the question of the admissibility of the documents. We are also of the view that it was not open to the learned judge to consider and make a determination on a hypothetical application for amplification*." The Court of Appeal emphasized that it was not ruling that the document is admissible.

[15] The effect of this third finding of the Court of Appeal is that it is open to this Court to consider the effect of CPR 28.18 and S. 54 (1) and (3) of the Evidence Act on the question of admissibility of the document. Matters already litigated in the first round of arguments and ruled upon by the Court of Appeal cannot be re-litigated.

[16] At the continuation of this trial before me on 14th March 2017, Mr. Prospere made an oral application to the Court to exercise its discretion under sections 143 and 144 of the Evidence Act to admit the document into evidence. If the court was not minded to so apply its discretion, then he applied to the Court to grant the Claimant leave to call the maker of the document to adduce evidence of the circumstance under which she produced the same. Mr. Maragh vigorously resisted

[5] Paragraph 7 of the Oral Judgment.

the application and the arguments were regurgitated. I directed the parties to file written submissions on or before 24th March 2017. Rather than once again adjourning these long outstanding proceedings pending decision on the admissibility of the document, I directed that the Claimant open his case. All of the Claimant's witnesses, save for the Claimant himself, were called; their witness statements were admitted as their examination in chief and they were cross-examined. The matter was then adjourned to 3rd May 2017.

[17] The parties duly filed their written submissions on the admissibility of the document and it is now for the Court to make its decision before continuing the trial. At the outset, it is best to state what issues the court will not be examining in light of the Court of Appeal's decision. The Defendant's arguments were predicated on four issues, namely: (i) whether the document could be admitted not having been referred to in the Claimant's pleadings or witness statements; (ii) whether the document may be admitted by amplification of the Claimant's witness statement; (iii) Whether the document amounts to breach of the hearsay rules; (iv) whether the admission of the document would unduly prejudice the Defendant.

[18] Plainly, the Defendant's issue (iv) – the undue prejudice point – cannot be re-litigated in light of the Court of Appeal's unequivocal finding that: "*the respondent could not properly complain of prejudice, having regard to the fact that the document was disclosed on 14th April 2014 which was approximately 6 months prior to the trial and the respondent gave no intimation to object to it until 3 weeks prior to the trial and in doing so it gave no basis for the objection*."

[19] As regards, the Defendant's issue (ii) – the amplification point – I do not understand the Claimant to be applying to introduce the document through amplification of the Claimant's witness statement. The Claimant's application now is based squarely on sections 143 and 144 of the Evidence Act. There is therefore no need to address this point.

[20] The Defendant's first issue – the pleadings point – can arguably be subsumed under the undue prejudice point which the Court of Appeal has already pronounced upon. Nevertheless, since it does not appear to have been explicitly addressed either by Wilkinson J or the Court of Appeal, I will examine this issue.

[21] The Defendant contends that the document should not be admitted since it was not referred to in the Claimant's pleadings or witness statements. I do not think this point requires any penetrating analysis. It is true that the document was not referred to in either the pleadings or the witness statements. But what is required in the Claimant's pleadings is that the Defendant knows what the case is that it has to meet. That is the fundamental, inalienable requirement. It is plain from the Claimant's pleading (Preliminary Act filed on 30th August 2011) that the allegation is that "*the Defendant had, at all material times, the care, control and custody of a sailing yacht called 'Linian Grace'..."* which broke from its moorings owing to the negligence of the Defendant and collided with the Claimant's vessel causing it damage. The Defendant cannot complain that the Claimant's pleadings do not fully disclose the case that it is required to answer.

[22] The Defendant further contends that the Claimant has not complied with Rules 8.7 (1), (3) and 8.7A of the CPR 2000. These will be examined in turn. Rule 8.7 (1) requires that: "*The Claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies*." The Defendant highlights and puts emphasis on "all the facts". I interpret rule 8.7 (1) to mean that those essential facts sufficient to establish the cause of action and to enable the Defendant to know the case it has to meet and to properly prepare to answer it is what must be pleaded in the statement of claim. Other relevant facts are to be set out in the witness statement.

[23] Rule 8.7 (3) requires that the statement of claim must identify any document which the claimant considers to be necessary to his case. It is true that the disputed document was not identified in the claim form or the statement of case. But the fact that rule 28.12 provides that the duty of disclosure continues until the proceedings are concluded contemplates situations where important documents relevant to the just disposal of the claim come to the attention of a party after witness statement have been filed. The CPR lays down rules for how notice of such documents is to be given and how disclosure of such documents is to be made.

[24] Rule 8.7A states that: "*The Claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.*" Since I have already concluded that the Claimant adequately pleaded the

allegation that the Defendant had care, control and custody of the "Lilian Grace", this point cannot avail the Defendant.

[25] The Defendant relied on St. Lucia Motor & General Insurance Co. Ltd v Peterson[6] to illustrate how the Court deals with allegations not properly pleaded. But that was a case dealing with allegations of collusion and fraud, which must be specifically pleaded. The Court stated that a bare assertion of collusion without setting out the factual background on which a conclusion of fraud could be drawn served no useful purpose. These proceedings, however, do not involve allegations of fraud; they involve allegations of negligence the particulars of which have been adequately pleaded.

[26] Reliance was also placed on Boyea v Eastern Caribbean Flour Mills Ltd;[7] Eastern Caribbean Flour Mills v Boyea;[8] Jacqui Quinn-Leandro v Dean Jonas et al;[9] First Caribbean International Bank (Barbados) Ltd. v Thomas Egan.[10] I read these cases to be saying that where a party has not pleaded an allegation in his pleadings, he cannot adduce documents to prove such allegations for the first time at the trial. Firstly, the Claimant in fact pleaded the allegation that the Defendant had care, custody and control of the vessel and now seeks to adduce at trial a document to prove that allegation. Secondly, the Court of Appeal has affirmed that the Claimant properly gave notice of its intention to rely on the document at trial. Thirdly, the Court of Appeal affirmed that the Defendant cannot now complain of prejudice.

[27] We now arrive at ground zero of this dispute over the admissibility of the document: the hearsay rule and its exceptions. It is on this point that the Claimant based his application. It is upon the outcome of this argument that the fate of the document is hinged.

[28] It is not in dispute that the document contains hearsay evidence and can only be admitted if it can be brought within one of the hearsay exceptions, or the rule is otherwise suspended under

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[6] Court of Appeal Saint Lucia, HCVAP 2009/008
[7] High Court St. Vincent and the Grenadines, Claim Nos 211 and 212 of 1998
[8] Court of Appeal St. Vincent and the Grenadines, Civil Appeal No. 12 of 2006.
[9] Court of Appeal Antigua and Barbuda, HCVAP 2010/018, 2010/019, 2010/020
[10] High Court Antigua and Barbuda Claim No. ANUHCV2005/0497

statutory authority. Mr. Maragh set out the various sections of the Evidence Act relating to the exceptions to the hearsay rule, highlighting why none of those sections could avail the Claimant.

[29] The exception provided by section 50 of the Act cannot assist the Claimant since that section creates as exception where the maker of a previous statement is not available in civil proceedings. The Claimant has positively stated that the maker of the document is available.

[30] Section 51 (1) and (2) suspend the hearsay rule in civil proceedings where the maker is available but "*it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person … to give evidence …*". Mr. Prospere admits that it would "*not be unduly expense, produce undue delay or be impractical to cause the document's maker to attend court to give viva voce evidence*."

[31] Neither is the exception created by section 55 open to the Claimant. That section makes a statement in a document admissible in any proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible, in particular circumstances and based on certain conditions. The conditions are listed in section 55 (2); they all involve the lack of availability or identity of the supplier of the information in the statement. The Claimant has not sought to introduce the document under section 55 nor has any information been put forward regarding the lack of availability of the supplier of the information. Sections 56, 57 and 58 deal with the application of section 55 and how the document is to be identified and proved – once a party can come within section 55. Since the Claimant has not asserted that it can come under section 55 nor is there anything before the Court to suggest that he can, it is not necessary to consider sections 56, 57 and 58.

[32] It therefore does not appear that the Claimant can satisfy the requirements to come within the exceptions to the hearsay rule created by sections 50, 51 or 56 of the Act.

[33] Mr. Prospere did not seek to bring himself under any of those exceptions to the hearsay rule. Instead, he invoked the Court's discretion under section 143 read along with section 144 of the Evidence Act. His argument is that: (a) those sections confer upon the Court a residual discretion

to waive the onerous requirements of certain portions of the Act; and (b) this residual discretion enables the Court to achieve the ends of justice in circumstances where a party is incapable of meeting the onerous requirements of the Act.

[34] Section 143 provides as follows:

> 143. WAIVER OF RULES OF EVIDENCE
> (1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of—
> (a) Division 3 of Part 11;
> (b) Divisions 1 to 6, inclusive, of Part 4; or
> (c) Division 2 of Part 5,
> in relation to particular evidence or generally.
> (2) In criminal proceedings, the consent of a defendant is not effective for the purposes of subsection (1) unless—
> (a) the defendant is represented by an attorney-at-law; or
> (b) the court is satisfied that the defendant understands the consequences of giving the consent.
> (3) In civil proceedings, the court may order that anyone or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if—
> (a) the matter to which the evidence relates is not genuinely in dispute; or
> (b) the application of those provisions would cause or involve unnecessary expense or delay.
> (4) In determining whether to exercise the power conferred by subsection (3), the matters that the court shall take into account include—
> (a) the importance of the evidence in the proceeding;
> (b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding;
> (c) the probative value of the evidence; and
> (d) the powers of the court, if any, to adjourn the hearing, to make some other order or to give a direction in relation to the evidence.

[35] Plainly, section 143 can be invoked since the hearsay rule and its exceptions fall within Division 6, Part 4 of the Act. The critical – pivotal – question is however: when and how is the discretion to be exercised?

[36] Section 143 (3) does indeed give the court discretion to order that certain provisions of the Act do not apply. But it is not an open-ended discretion. The discretion to dis-apply the strict rules of evidence can only be exercised if:

> (a) the matter to which the evidence relates is not genuinely in dispute; or
>
> (b) the application of the provision would cause or involve unnecessary expense or delay.

The question of when the discretion is to be exercised is therefore answered by section 143 (3) (a) and (b). If an applicant can satisfy either (a) or (b) of section 143 (3) of the Act, the discretion may be exercised. Are either (a) or (b) satisfied by the Claimant in the circumstances of this case?

[37] Clearly the Claimant cannot come within section 143 (3) (a) since the matter to which the disputed document relates is genuinely in dispute. The matter to which the dispute relates is whether or not the SLASPA had care, custody and control of the *Lilian Grace.* That matter is genuinely in dispute.

[38] It does not appear that the Claimant can come within section 143 (3) (b) either since the Claimant has stated that matter of unnecessary expense or delay does not arise.

[39] Section 143 (4) deals with how the discretion is to be exercised once an applicant satisfies the requirements of section 143 (3) (a) and (b). Section 143 (4) lists a number of factors which the court should consider in deciding whether to exercise its discretion. Since neither the requirements of section 143 (3) (a) nor (b) appear to have been satisfied, it is not necessary to go on to consider the factors that the court should take into account in determining whether to exercise its discretion to suspend the rules.

[40] Section 144 provides that:

> 144. LEAVE, ETC., MAY BE GIVEN ON TERMS
> (1) Where, by virtue of a provision of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
> (2) In determining whether to give the leave, permission or direction, the matters that the court shall take into account include—
> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing;
> (b) the extent to which to do so would be unfair to a party or to a witness;
> (c) the importance of the evidence in relation to which the leave or permission is sought;
> (d) the nature of the proceeding; and
> (e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence.

[41] Section 144 cannot assist the Claimant, whether read together with section 143 or alone, since the requirements for the giving of leave or permission to dis-apply the rules of evidence to adduce the document have not been satisfied. As with section 143 (4), it is not necessary to go to consider the factors set out at 144 (2) since the prerequisites for the giving of leave or permission have not

been satisfied. After a careful analysis of the relevant provisions of Evidence Act, I do not see how the document can be admitted into evidence in conformity with the Act.

[42] The Claimant alternatively seeks this Court's leave to call the maker of the document to adduce *viva voce* evidence of the circumstances under which she prepared the same and for leave of the Court for the maker of the document to file and serve a witness statement. How am I to treat this application coming as it did on the morning of the continuation of the trial?

[43] It may well be that such a witness statement, together with the *viva voce* testimony of its maker, could shed important light on the question of who had custody, care or control of the "Lilian Grace" at the time of the collision. Indeed this is the outcome that the court would have preferred, in keeping with the overriding objectives of the CPR 2000. But the overriding objective does not in or of itself empower the Court to do anything or grant to the court any discretion. It is a statement of 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 to be exercised by the Court must be found not in the overriding objective but in the specific provision itself.

[44] In considering how I am to treat this application, made on the morning of trial, for leave to file a new witness statement, I draw some guidance from Part 29.11 (1) of the CPR 2000 which provides that: "*If a witness statement …is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits*." Part 29.11 (2) states that: "*The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8*".

[45] As I understand it, among the philosophical considerations underpinning the introduction of witness statements under the CPR 2000 was the elimination of surprise and the reduction of pre-trial applications in our adversarial system of litigation. Part 29 therefore imposes the sanction of a party not being able to call a witness if his statement is not served within the time specified by the court – unless the court is satisfied that there is a good reason for not previously seeking relief from sanction. This is a fixed sanction. It eliminates wide discretion previously given to the Court. It

limits the Court's ability to grant relief from sanction. The Court can only consider granting relief at the trial if the defaulting party gives good reason for not having previously applied for relief.

[46] The Claimant's situation here is not one where there has been default in the filing of a witness statement. But I would think that if the sanction is so serious where there has been a default in filing witness statements ordered by the Court to be filed in advance of trial then, *a fortiori*, a similar sanction should obtain where a party waits until the day of trial to apply to file a brand new witness statement and have that witness called. Were it not so, the tight structure established to deal with the filing of witness statements and the sanction for non-compliance would be undermined.

[47] Even assuming that I have the discretion to order the filing of a new witness statement not previously ordered at case management or any previous stage of the proceedings, is there any good reason to allow it at this stage? Surely, the Claimant must have known of the existence of the maker of the document from at least the date when the document was included in the further supplementary list of documents. It is regrettable that an application was not then made or leave of the Court sought at pre-trial review to file a witness statement from the maker of the document or to have that person subpoenaed.

[48] In these circumstances, I am therefore constrained to refuse the Claimant's application. There shall be no order as to costs.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE