THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0029

BETWEEN

HILLARY BOWMAN

of Richland Park

CLAIMANT

and

EUDENIA ARRINDELL

also known as

SHIRLEY EUDENIA ARRINDELL

of Arnos Vale

DEFENDANT

Appearances:

Ms. Mandela Campbell for the claimant.

Ms. Paula David for the defendant.

2018: May 2

May 15

DECISION

BACKGROUND

[1] **Henry, J.:** The claimant Mr. Hillary Bowman and the defendant Ms. Eudenia Arrindell (a.k.a.Shirley Eudenia Arrindell) own adjoining plots of land at Arnos Vale. They are embroiled in a dispute over ownership of land registered in Ms. Arrindell's name. Mr. Bowman claimed that Ms. Arrindell has

reneged on an agreement whereby she allegedly agreed to transfer her property to him in exchange for one he acquired for her. She has denied this.

[2] Ms. Arrindell has made an application[1] for an order that paragraph 7 of the witness statement of her proposed witness Joseph Verol Soleyn be amended 'for the purpose of identifying and attaching the medical certificate of Dr. Amrie Morris-Patterson MBBS, DM (psych) ...' which speaks to her intellectual capacity. She also sought a related order that paragraph 13 of the witness statement be amended to insert the word 'amended' between the words 'this' and 'witness'. Mr. Bowman resisted the application.

ISSUE

[3] The issue is whether an order should be made to amend Joseph Verol Soleyn's witness statement?

ANALYSIS

Issue – Should an order be made to amend Joseph Verol Soleyn's witness statement?

[4] Mr. Soleyn's witness statement was filed on 21st December 2017. Ms. Arrindell filed her application on 17th May 2018. The proposed amendments relate to two paragraphs. At paragraph 7 he averred:

> '7. Mr. Bayliss Frederick sent Ms. Arrindell to see Dr. Amrie Morris Patterson, a psychiatrist. Dr. Morris-Patterson sent Ms. Arrindell to see Ms Marise Butler. Mr. Bayliss Frederick later sent Ms. Arrindell to see Dr. Wayne Murray. I accompanied Ms. Arrindell on all of these visits.'

He concluded at paragraph 13:

> '13. I believe the facts stated in this witness statement are true.'

[5] Ms. Arrindell included three grounds on which the application is made. Firstly, she contended that she always intended to rely on the referenced medical certificate dated 25th February 2016. She indicated that this is illustrated by the fact that it was identified and attached to her Defence filed on March 9th 2016; and was identified in her list of documents filed on December 9th 2017. She stated

[1] Filed on 17th April 2018.

further that she intended to have Dr. Amrie Morris-Patterson give oral evidence as an expert witness, but that he has declined to provide such testimony.

[6] Secondly, Ms. Arrindell represented that she wished to refer to the medical certificate and to place the limited reliance on it which is permitted under the Evidence Act. Thirdly, she contended that since her intellectual capacity is central to the issues which the Court is being asked to determine, the referenced medical certificate ought to be made available for the Court's consideration.

[7] Mr. Soleyn provided an affidavit in support of the application. In it, he rehearsed the three grounds. He deposed that he accompanied Ms. Arrindell when she visited Dr. Morris-Patterson and is familiar with the referenced medical certificate which the doctor prepared after assessing Ms. Arrindell. He added that he has been advised by legal practitioner Ms. Paula David and believes that Dr. Morris-Patterson's medical certificate may be of assistance to the Court in deciding this case. He exhibited a copy of the proposed amended witness statement. He did not say whether he witnessed the preparation of the report by Dr. Morris-Patterson or describe the circumstances under which it was prepared and from whose custody he secured it.

[8] Both parties filed[2] written submissions pursuant to order of court. Ms. Arrindell pointed out that the medical certificate was included as an item in Mr. Bowman's and her list of documents and her Defence. She noted that Dr. Morris-Patterson had declined to testify. She observed further that her son Kendall Arrindell had declared in his witness statement[3] that he had read the referenced report and that it did not state that 'she is mentally incompetent to manage her own affairs.'

[9] Ms. Arrindell submitted that rule 28.18 of the Civil Procedure Rules 2000 ('CPR') provides that a party shall be deemed to admit the authenticity of any document disclosed to him/her, unless he/she serves notice that the documents must be proved at trial. She submitted further that such notice must be served not less than 42 days before the trial. She argued that Mr. Bowman has not served her with any notice to prove the medical certificate. Mr. Bowman did not rebut those submissions. The court's record reflects that no such notice was filed in this matter.

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[2] On 7th May 2018.

[3] Filed on 22nd December 2017, at paragraph 12.

[10] Rule 28.18 of the CPR does indeed address the subject of the authenticity of documents which have been disclosed and not challenged by an opposing party. Mr. Bowman has made no claims impugning the authenticity of the referenced medical report. This is not in issue at this stage of the proceedings. I hasten to add that the failure by a party to question the authenticity of documents which have been disclosed, do not without more translate to an acknowledgment or acquiescence that such documents are either admissible or can be incorporated into a witness statement by way of amendment. The relevant rules mandate that certain pre-conditions be satisfied if such records contain hearsay. I will return to this later.

[11] Ms. Arrindell contended that rule 29.1 of the CPR supplies the Court with wide ambit to control evidence, by giving directions at a case management conference or otherwise. She argued further that rule 29.9 of the CPR permits a witness (at the trial) to amplify the evidence set out in his witness statement. Mr. Bowman acknowledged this and submitted that the CPR provides only for the amplification of filed and exchanged witness statements on the day of trial. By those submissions, both parties have accurately captured the essence of rule 29.9 of the CPR.

[12] Mr. Bowman submitted further that there is nothing curious about the fact that new information may come to light between the dates of filing of a witness statement and trial or that a witness may need to provide further information regarding the issues. He posited that this is contemplated by rule 29.9 of the CPR.

[13] Ms. Arrindell argued that statements in a witness statement do not constitute evidence until the contents are admitted into evidence at trial. She argued that the purpose of a witness statement is to put the opposite party on notice with respect to the evidence he/she intends to lead at trial. She submitted that in all cases, it is eminently preferable for a party to make prior disclosure to the opposing party of the nature of the evidence he intends to lead than to wait until the day of trial to amplify his evidence. I cannot disagree with her on those points.

[14] Ms. Arrindell argued that it simply does not accord with common sense to suppose that 'although the amplification of evidence is permissible at trial, it is impermissible before the trial to give the

opposite party notice of additional evidence which a party intends to lead.' She advanced the case of **Paul Hackshaw v Saint Lucia Air and Sea Ports Authority**[4] as authority for her proposition. I glean from her submissions and by reading the case that she relies on that judgment for the principle that the Court would be 'wrong to strike out a document which has been properly disclosed,' if the opposing party does not give notice of objection with reasons, within the statutory time limit. That is a correct statement of the law. However, the present application is not one regarding admissibility of the medical report.

[15] In the **Paul Hackshaw case**, the question of admissibility was one of four issues before the court. Smith J. identified them as:-

1. whether a document could be admitted not having been referred to in the claimant's pleadings or witness statements;
2. whether a document may be admitted by amplification of the claimant's witness statement;
3. whether a document amounts to breach of the hearsay rules; and
4. whether the admission of a specific document would unduly prejudice the defendant.[5]

None of those issues arise in the present case. Smith J. declined to address the second and fourth issues since the Court of Appeal had ruled on them conclusively.

[16] It should be noted that unlike in the **Paul Hackshaw case**, Ms. Arrindell has raised the issue of mental capacity in her pleadings. She claimed that she was unable to understand the nature of the transaction on which Mr. Bowman relies to support his claim. Without specifying any medical or physiological impairment, she asserted that this incapacity arose from some 'mental condition'.

[17] She pleaded[6]:

> 'VII. The defendant visited Dr. Amrie Morris-Patterson, a psychiatrist, whose report is hereto attached…

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[4] SLUHCVAP2016/0013.

[5] See paragraph [17] et seq.

[6] In her Defence at paragraphs VII, 3 and (a).

3. At all material times, particularly at the several times the claimant spoke or had physical contact with the defendant she was not capable of understanding and did not understand the clamant and the witnesses and exhibits of and on behalf of the claimant by reason of her mental condition and this was known to the claimant.'

PARTICULARS

(a) The claimant by his own confession is … by occupation a "Director of Education for the Caribbean Union Conference of Seventh Day Adventists ... of such education and day to day practice, the Claimant is a repository of knowledge and an intelligent professional who must have evaluated the defendant's mental capabilities and must have discovered her incapacity to understand a transaction, in which the intelligent Claimant handed the Defendant a photocopied cheque which he must know, is of no value whatsoever.'

[18] Ms. Arrindell also attached a copy of the medical certificate to her Defence as mentioned earlier and it was included in the parties' respective list of documents. This scenario is therefore different from the **Paul Hackshaw case** in this regard; and for the more fundamental reason that Smith J. was not there concerned with deciding whether to grant leave to a party to amend a witness statement. That did not arise.

[19] Smith J., the Court of Appeal and the previous judge were considering a straight application for the admission of a document into evidence; a document which was not included or mentioned in the pleadings or any witness statement. Suffice it to say, Smith J. observed that on the question of the admissibility of the documents, the Court of Appeal concluded that the learned trial judge should have considered the effect of CPR 28.18 and s. 54 (1) and (3) of the Evidence Act[7]. Smith J. did not set out those provisions in the decision. He indicated that they had already been litigated and resolved.

[20] However, he quoted from the judgment of Wilkinson J. (in the earlier hearing) where she outlined aspects of section 54 of that Act. She noted:

[7] Of Saint Lucia.

'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 objections'

[21] Smith J. described this portion of Wilkinson J.'s decision as part of an analysis of whether a party objecting to the inclusion of a document in a trial bundle of agreed documents must state his objection and if so in what form. This passage illustrates that section 54(1) imposes a duty on:-

1. a party wishing to rely on a document to serve notice on the opposing party notice of his intention; and
2. the opposing party to signify any objections by counter-notice along with reasons for such objections, within 7 days.

[22] Ms. Arrindell contended that there are no parallel provisions in the Evidence Act of Saint Vincent at the Grenadines ('the Act')[8]. Mr. Bowman had no counter submissions on this point. This court is not concerned at this juncture, with deciding whether the referenced medical report should be included in the trial bundle or if it is admissible. It is therefore not necessary to investigate whether rules made under the Act have included similar provisions as in the Saint Lucia Act. If they exist, they would have been made under the UK Civil Evidence Act of 1968.

[23] In the premises, the instant case is distinguishable from the **Paul Hackshaw case** because the factual matrix and legal considerations are different. Likewise, the issue to be decided differs from the one facing the Court in the earlier case. Although their Lordships' pronouncements on the legal principles governing admissibility of documents in the circumstances of that case are unassailable, that authority does not assist me. However, for completeness, I will address those matters for present purposes.

[8] Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 3009, sections 47 and 55.

[24] Ms. Arrindell argued that the court is empowered by rule 29.1 to grant the requested order and that it would be proper and just for the Court to do so. Mr. Bowman contended that Mr. Soleyn's witness statement could be amplified at the trial pursuant to CPR 29.9 or alternatively an application could have been made for permission to file a supplemental witness statement as mentioned by Edwards JA in **Ross Bowring v Keith Noel**[9].

[25] In the **Ross Bowring v Keith Noel** case, the defendant filed a supplemental list of documents 5 days before the trial. In it, he disclosed a document for the very first time and attempted to introduce it during cross-examination. The trial judge did not permit him to do so or to refer to it in his submissions. On appeal, Edwards J.A. found that the defendant had not complied with the rules which would have permitted him to adduce the referenced document into evidence. She remarked that he had not supplied the requisite prior notice to the claimant and the judge and had not filed a supplemental witness statement with the court's leave. She opined that merely disclosing the document was not sufficient to enable him to rely on it.

[26] Those circumstances are different from those in the instant case. While the Court in the **Ross Bowring case** was concerned with whether a document was properly excluded from the evidence in the absence of due notice to the opposing party, the present case elicits a response to the evidentiary and legal bases on which a Court may make an order for amendment of a witness statement.

[27] Rule 29 of the CPR deals with evidence generally, including the filing, service and use of witness statements. The Court is empowered to control the evidence which is adduced at trial. Specifically, the rules provide that if a witness statement is not served within the time stipulated by court order, that witness may not be called unless the Court gives permission. It provides further that permission may not be granted at the trial unless the person seeking leave at that stage has a good reason for not doing do earlier.[10]

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[9] SLUHCVAP2008/0013 (unreported).

[10] CPR 29.11.

[28] The upshot of these rules is that a party who fails to file and serve a witness statement within the time limited by an order of court, must apply for an extension of time to do so. In the instant case, the deadline for filing and service of witness statements was 22nd December 2017. Ms. Arrindell met the deadline. She has not made any express application for an extension of time to file additional witness statements or for relief from sanctions for late filing

[29] Ms. Arrindell's application to amend Mr. Soleyn's witness statement would (if granted) have the effect of:-

1. extending the time within which to complete the filing of witness statements and by implication incorporate associated relief from sanctions for non-compliance with the deadline for filing of witness statements; or
2. granting leave to adduce Mr. Soleyn's additional testimony, pursuant to rule 29.11 (2).

[30] I therefore examine it as an implied application for relief from sanctions and extension of time to file the proposed amended witness statement. The CPR stipulates that an application for extension of time and relief from sanctions must be made[11] in circumstances of non-compliance with a rule or court order. The case management directions[12] establishing the timelines for filing and service of witness statements contained a sanction for non-compliance, namely wasted costs. Rule 29.11 (2) imposes a further sanction by precluding a party from calling a witness whose witness statement is not filed within the time limited in a court order.

[31] A party applying for extension of time and relief from sanctions is required to make the application promptly. He/she must satisfy the court that the failure was not intentional; that there is a good explanation for it and that he/she has generally complied with all relevant rules, practice directions, orders and directions. Each element must be established.

[32] In considering this application, I remain mindful of the overriding objective to do justice between the parties. Assessing this application on its merits as one for extension of time and relief from

[11] CPR 26.8 and 29.11.

[12] Made on the 18th October, 2017.

sanctions, requires that the Court takes account of (a) the interest of the administration of justice; (b) the effect which granting of the relief or not would have on each party; (c) whether the failure to comply has been or can be remedied within a reasonable time; (d) whether the failure was due to the party or his/her legal practitioner; and (e) whether the trial date can still be met if the relief is granted. The applicant must supply affidavit evidence in respect of those and other related matters.

[33] This application was made some 3 ½ months after the deadline had passed for filing witness statements. Neither Ms. Arrindell nor Mr. Soleyn indicated when they learnt that Dr. Morris-Patterson would be unavailable as a witness or whether the delay in applying was attributable to them or the legal practitioner on record. They did not indicate whether the failure to include the proposed report in the witness statement in an earlier occasion was intentional or the reason for the delay. They have therefore failed to satisfy two critical components of the relief from sanctions barometer.

[34] It appears to me that even if the leave was granted to extend time for the filing and service of the proposed amended witness statement, Ms. Arrindell would still have to surmount the evidentiary hurdle of establishing that the report is admissible into evidence. Mr. Bowman would be entitled to a further opportunity to investigate the assertions in the report and file any witness statements in response. Such eventuality would invariably delay the trial[13]. Ms. Arrindell has provided no good explanation why the application was not made earlier. In all the circumstances, I am satisfied that she has failed to establish on this argument, that it is just to make the order sought.

[35] Moreover, the dictum of Edwards J.A. in the **Ross Bowring v Keith Noel case** suggests that a party must comply with certain rules before he will be permitted to adduce into evidence documentary exhibits, even if they have been disclosed. She did not specify the rules to which she referred.

[36] Ms. Arrindell submitted that the effect of section 47 of the Act is that documentary hearsay is admissible in civil proceedings as evidence of any fact stated in it. It is not denied that the medical

[13] Scheduled for 15th May 2018.

report contains hearsay material. Ms. Arrindell argued that the pursuant to section 47(2) (a), the Court's leave is only required in cases where a party intends to call the maker of the document to give oral evidence. She argued that by attaching the medical report to her Defence; its disclosure in the parties' list of documents and Kendall Arrindell's expression of opinion on it, strongly suggest that Mr. Bowman will suffer no prejudice if the proposed amendment is granted.

[37] Mr. Bowman made no submissions on the import and effect of the Act. He contended that the CPR contains no provision which speaks to the making or filing of amended witness statements. He submitted that the application should therefore be dismissed with costs. This application is not one for admission of the doctor's report into evidence per se. Section 47 (2) of the Act is therefore not applicable for present purposes.

[38] The Act, rules made under it and the CPR govern the procedures in civil proceedings in the Supreme Court. No rules were made by the local rule-making authority pursuant to the Act. However, the rules of the Supreme Court Order 38 Rules 20 to 32 made under the UK Civil Evidence of 1968 have been incorporated into the local legislative framework by virtue of section 55 (12) of the Act.

[39] The rules provide that a person who wishes to adduce hearsay statements must serve notice on all other parties of such desire, within twenty-one (21) days after the date that the matter is set down for trial. If it is documentary hearsay, it must be accompanied by a copy of the document. If the party making the application claims that the author of the document cannot or should not be called because of his unavailability, he must give reasons.

[40] If the statement is a record, the adducer must supply details about 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.

[41] Order 38 Rule 25 lists the reasons for not calling a person. Among them is that the author:

(1) is deceased;

(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.

[42] 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.

[43] In the final analysis, the rules confer a residual discretion on the court to allow a hearsay statement to be given in evidence despite non-compliance with the rules or where refusal might otherwise compel one side to call an opposing party[14]. These sub-issues emerge from the application.

[44] No such notices were issued in the case at bar. While I am satisfied that Ms. Arrindell disclosed the medical report, it does not appear that she served adequate notice on Mr. Bowman that she intended to rely on it at the trial. She has also not complied with the strictures of the applicable rules made pursuant to the Act. I therefore adopt and apply the learning enunciated by Edwards J.A. in the **Ross Bowring case** and find that because of this default, Ms. Arrindell may not adduce the report in the manner proposed, through amendment of Mr. Soleyn's witness statement.

[45] Neither party referred to the rules regarding expert testimony. Part 32 of the CPR addresses such matters. Rule 32.6 provides that a party may not put in the report of an expert witness without the court's permission, which must generally be obtained at a case management conference. It also

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

stipulates that a party wishing to put in such evidence must serve a copy of the report on opposing parties by the date stipulated by the court.

[46] Rule 32.7 provides that such evidence may be given in a written report subject to any enactment restricting the use of hearsay evidence. Rule 32.14 outlines how such a report is to be formulated. Ms. Arrindell does not assert that Mr. Soleyn is a medical doctor or has any medical expertise.

[47] It is left almost purely to conjecture to calculate the intended purpose for which Ms. Arrindell seeks to adduce a medical report by a lay person. I am not satisfied that it can assist the court in deciding the related issues regarding Ms. Arrindell's mental capacity or lack thereof in the absence of a medical practitioner. Permitting her to adduce it would be more prejudicial than probative.

[48] In all the circumstances and for the foregoing reasons Ms. Arrindell's application to amend Mr. Soleyn's witness statement is refused. Ms. Arrindell shall pay to Mr. Bowman costs to be assessed pursuant to CPR 65.11.

ORDER

[49] It is accordingly ordered:

(1) Eudenia Arrindell's application to amend Joseph Verol Soleyn's witness statement is dismissed.

(2) Eudenia Arrindell shall pay to Hillary Bowman costs to be assessed on an application to be filed and served on or before 30th May, 2018.

[50] I am grateful to counsel for their written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar