



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

**CLAIM NOS. 2016CD00069, 2018CD00629, 2019CD00190, 2017HCV02300
(CONSOLIDATED)**

BETWEEN	GLORIA GRACE-ANN PALMER	1ST CLAIMANT
	PAUL ANTHONY THOMAS	2ND CLAIMANT
AND	PAUL SINCLAIR	1ST DEFENDANT
	GREGORY FORBES	2ND DEFENDANT
	HEATHER FORBES-THOMPSON	3RD DEFENDANT

Evidence – Civil Practice – Application to strike out portions of Witness Statements– Hearsay Rules – Whether any relevant exceptions – Relevance-Role of statement of case- Whether condition for service of Notice of Intention to Rely satisfied by service of witness statement.

Charles Piper QC and D'Angelo Foster instructed by Charles E. Piper & Associates for 1st & 2nd Claimants

Esther Reid for 1st Defendant

Caroline Hay QC and Barbara Hines instructed by Barbara L Hines & Associates for 2nd & 3rd Defendants

In Chambers by ZOOM

Heard: 30th June 2021 and 2nd July 2021

COR: BATTIS J

- [1] At the commencement of the matter it was agreed that each counsel would be allotted 20 minutes to speak as full written submissions, with authorities, had already been filed. I am grateful to counsel who all kept within the allotted time. I reserved my decision on the 30th June 2021 and on the 2nd July delivered these reasons, now reduced to writing, orally.
- [2] The 2nd and 3rd Defendants applied, by Notice of Application filed on the 18th June 2021, to strike out portions of witness statements filed. The application is commendable for its detail and clarity. It is also, I should say, consistent with the best practice for such an application to be made at this interlocutory stage rather than on the first morning of trial.
- [3] The application is premised on various grounds being: (1) Facts not pleaded in accordance with CPR 8.9(1) and 8.9A, (2) Inadmissible hearsay, (3) Inadmissible opinion evidence and (4) Relevance. In this judgment I will decide on each point of objection in the order stated in the Notice of Application.

The Witness Statement of the 1st Claimant dated 17th November 2020

- [4] The portions of this witness statement, to which objection is taken, are listed at Paragraph 1A of the Notice of Application filed on the 18th June 2021.
- i. Last line paragraph
"I am a Businesswoman and a Developer."
 - ii. Paragraph 7 lines 3-9 the words,
"We developed lands at West Road ... we kept" and in line 9 the words "also" between the words "We" and "developed"

- iii. Paragraph 17
 - a) line 2 the words “*for the preparation of his last will and testament as well as*”
 - b) lines 7 to 10 the words “*I ... to witness his will.*”
 - c) Paragraph 7 line 3
“*We developed lands at West Road ... we kept* “and,
the word “*also*” in line 9.

[5] The basis of objection to the above-referenced evidence is that it is in relation to facts not pleaded. In her submissions Queens Counsel, for the Defendants/Applicants, relied heavily on the judgment of the Judicial Committee of the Privy Council in ***Charmaine Bernard (legal Representative) of the Estate of Reagan Nicky Bernard v Ramesh Seebalock [2010] 77 WIR 455***. In that case the court stated (Para 16 of the judgment):

“But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed.”

[6] The decision of that court was that a plea of “*general damages*” was insufficient to support a claim for damages in the lost years and for funeral expenses. In other words, these heads of damages must be particularised. The court interestingly had observations about the circumstances in which applications to amend were to be dealt with, the inflexibility of an approach peculiar to Trinidad & Tobago and, the possibility of injustice. The Board in the end recommended that the Trinidad & Tobago rules committee review its rules.

[7] This case is to be distinguished from Bernard. The general principle, as it relates to a short statement of material facts, applies however its application will depend on the facts and circumstances of each case.

- [8] In the matter at bar there are four consolidated claims. I agree with Queens Counsel appearing for the Claimants that, in considering the pleaded facts, all statements of case must be considered including the affidavits filed in support of the Fixed Date Claim. When these are perused it is manifest that the issues concern business dealings of the deceased. It is alleged that the 1st Claimant was romantically involved with the deceased. She also, it is said, was his business partner. So too was the 2nd Defendant. They, it is alleged, operated a real estate business. In that regard they embarked on the development of certain land as a “joint venture.” In this context the 1st Defendant, it is further alleged, agreed to act as trustee and held the legal interest on behalf of others. It is also contended that the deceased had a will. The validity of that will is challenged in these consolidated claims. Issues also arise as to the validity of several transfers of land.
- [9] There is to my mind a distinction between “material facts,” which need to be in ones statement of case, and evidence to support such facts. Counsel is not required to plead evidence. A statement of case which is too prolix is as unhelpful as one bereft of any detail whatsoever. It is not always easy to draw the line of distinction or strike the happy balance between the two. Suffice it to say the statements of case must be such as to alert the other party, and the court, of the case to be met.
- [10] I am satisfied that the statements of case in this matter are sufficient to allow the evidence to be lead. The Claimant, describing herself as a “*businesswoman and developer,*” is in tandem with her pleaded case of partnership (business and personal) with the deceased. The issue surrounds a particular development of land and construction of dwellings and therefore there is consistency in her describing herself as a ‘*developer.*’ Evidence of other developments they embarked upon can be regarded as background information intended to be supportive, I suppose, of the assertion of a partnership. The objections to reference to the last will and testament, and its preparation, are not sustainable when regard is had to the totality of pleadings and not only those in **2018CD00069**.

There is no doubt that the validity of the alleged last will and testament, as well as the circumstances of its execution, are issues in this matter.

[11] The objection at Paragraph 1A (i) to (iii) is therefore refused and the evidence allowed to stand.

[12] Paragraph 1A (iv) and (v) of the Notice of Application takes a hearsay objection to the following:

iv. "Paragraph 21 line 2,

"He asked me not to disclose this to any of his relatives."

v. Paragraph 23

(a) lines 1 – 3,

"In early April 2017 Lawrence indicated to me that he was becoming weak and wished to have the rest of the lots dealt with. He spoke to Mr. Ricketts about it on that day and Mr. Ricketts prepared a Deed of Conveyance for Paul Sinclair to sign."

(b) line 6 the words,

"which Lawrence wished transferred to his children."

[13] Insofar as these were statements by the deceased made directly to the Claimant they fall within the section 31E statutory exception to the hearsay rule. The requirement of a Notice of Intention to Rely is satisfied by the content of the witness statement which has been served so long before trial, see ***Mable Philips v Corrine Clara a decision of the Eastern Caribbean Court of Appeal unreported 27th January 2015*** at para. 14 of the judgment. The court agreed with the trial judge's finding that the condition, for service of notice of intention to

rely on a hearsay statement, had been satisfied by service of the witness statement long before the trial.

[14] Insofar as the witness says the deceased “*spoke to Mr. Ricketts*” it is not a report of anything said. It is a statement of fact as to something done. It is for the cross-examiner to explore whether the witness observed the conversation.

[15] The hearsay objections in paragraphs 1A (iv) and (v) are refused.

[16] Paragraph 1A (vi) of the Notice of Application takes objection to paragraph 24:

(a) lines 7 to 8 the words. “*which were to go to Lawrence’s three children in accordance with his wishes expressed to me.*”

(b) lines 9 to 12 the words: “*Lawrence was concerned that the only persons having control over the remaining (sic) lots other than lots 17 and 20 which belonged to Paul Thomas, was he and I in order to guard against the Trustee claiming those for himself.*”

[17] It is said these are objectionable as being statements of opinion and/or hearsay. I accept that the statement about the deceased’s “*concern*” is an expression of opinion as to his motive or intent. This is inadmissible. The other aspects are not, as the witness attributes the expression as one made to her by the deceased, in that regard see analysis at paragraph 14 above.

[18] The objection is therefore upheld with respect to Para 1A (vi) (b) and those words are to be struck out.

[19] Paragraph 1A (vii) and (ix) (paragraph viii) having been withdrawn.

(vii) Paragraph 27, last line

“he would not accept it when you asked him to sign in one consistent manner.”

(ix) Paragraph 30 lines 4 and 5,

“he told me that Gregory had been there, and that Gregory used the opportunity to curse him.”

[20] The objection is that these constituted hearsay and/or opinion evidence. I disagree. Paragraph 27 when read in its totality, and understood in the way Jamaicans speak, is explaining that the deceased used different signatures and that although cautioned against it the deceased *“would not”* accept such caution. It is evidence of direct knowledge best explained or tested by cross-examination. The statements by the deceased to the witness are not struck out for reasons stated at paragraph 14 above. The objections at Para 1A vii and ix are therefore dismissed.

Witness Statement of Barlow Aristyde Ricketts dated 19 November, 2020.

[21] The objections with respect to this witness statement are at paragraph 1B of the Notice of Application. Objection on the ground of inadmissible hearsay is taken to the following:

i) Paragraph 10 lines 6 to 8

“he said to me that he would like instructions in writing.”

ii) Paragraph 11

a) line 4 to 7

“I then had discussions with Mr. Forbes ... to Miss Palmer’s office”

b) Line 8,

“then left the draft will with her.”

(c) lines 10 and 11

“he expressed his satisfaction were correct”

[22] The hearsay objections fall to be considered and dealt with in accordance with paragraph 13 and 14 above. The objection is further taken that the assertion in line 8, (ii) (b) above, was one not pleaded. As indicated earlier (Para 10 above) the circumstance of the execution of the will is clearly a fact in issue on the pleadings.

[23] Objections in paragraph 1B (i) and (ii) are therefore dismissed

[24] Paragraphs 1B (iii) and (iv) of the Notice of Application allege inadmissible hearsay and facts not pleaded:

(iii) Paragraph 12 the words

“I did not see the will ... I did not know her signature very well.”

(iv) Paragraph 17 lines 8 to 10

“When Mr. Forbes was deteriorating he ... advised that ... from his name.”

[25] These objections are also refused because the circumstances of execution of the will are facts in issue and therefore evidence pertaining thereto is admissible. Secondly, the alleged hearsay falls to be dealt with in accordance with Para 14 above.

[26] Objections at 1B (iii) and (iv) are therefore dismissed.

Witness Statement of Paul Anthony Thomas (the 2nd Claimant)

[27] These objections are on the basis of factors not pleaded, hearsay and irrelevance. They are found in Para 1C (i) to (iv) of the Notice of Application.

[28] Subparagraph (i) objects to paragraph 6 lines 1 to 2,

“Mr. Forbes along with myself and Ms. Palmer conducted various business transactions.”

This statement is supportive evidence to the pleading that the deceased and the 2nd Claimant were business partners engaged in a joint venture and in particular a development.

[29] Subparagraph (ii) objects to paragraph 7 lines 3 – 7

“At the invitation of Jamaica National Building Society the three of us In that Diaspora.”

This is direct evidence and supportive of the alleged business partnership. It is also relevant to the extent it may lend credence to subsequent alleged conduct of the deceased.

[30] Subparagraph (iii) objection is taken to paragraph 16 lines 1 to 5

“but he indicated ... Ms. Palmer.”

This account, of words said to the witness by the deceased, falls to be dealt with in accordance with paragraph 14 of this judgment.

[31] In subparagraph (iv) objection is taken to paragraph 18 in its entirety. The basis of the objection is relevance, facts not pleaded as well as inadmissible hearsay. The evidence in that paragraph reflects the witness stating something allegedly told to him by the deceased about another development. This is not the one in Montpelier with respect to which these actions are concerned. The witness indicated his role in that development.

[32] The evidence is relevant to the extent that it is supportive of the alleged business relationship/partnership between the parties. It is also admissible on the basis that it, on the face of it, is the witness' first-hand knowledge and he indicates his role. No express plea is necessary as it does not concern a fact in issue insofar as the development is concerned. The evidence is intended to be supportive of the

alleged partnership, and I suppose course or type of dealings, alleged to have occurred.

[33] Objections at para 1C (i) to (iv) are therefore refused.

[34] I will not require the filing of a new witness statement given the small area of objection upheld. It will suffice for the Registrar (and the parties) to adjust the witness statement by putting a line through the portion of the statement in respect of which the objection was upheld.

[35] In the result it is hereby ordered:

1. That the words "*Lance was concerned that the only persons having control over the remaining (sic) lots other than lots 17 and 20 which belonged to Paul Thomas, was he and I in order to guard against the Trustee claiming these for himself,*" are to be deleted from Paragraph 24 of the witness statement of Gloria Grace-Ann Palmer dated 17 November 2020.
2. Costs to the Claimants (who were for the most part successful) to be agreed or taxed.

David Batts
Puisne Judge