

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCV2021/0025

BETWEEN:

[1] HON. ATTORNEY-GENERAL

Claimant

and

**[1] BERTRAND BURKE and
[2] JENNIFER BURKE
[3] Trading as JENNY TOURS**

Defendants

Appearances:

Ms. Renee Morgan for the Claimant
Mr. David Dorsett for the Defendants (via zoom)

2023: December 8;
2024: February 1.

JUDGMENT

FITZPATRICK [AG.]:

The Court considered the following.

- [1] The parties are engaged in an ongoing trial arising out of a contract between the parties for the collection and remittance of overseas ferry revenues.

- [2] During this trial, counsel for the Claimant was examining her third witness. This witness had signed a witness statement that had been filed pursuant to the East Caribbean Supreme Court Civil Procedure Rules ("CPR") in effect since July 31, 2023 but that had not yet been put to the witness to adopt. Counsel for the Defendants objected to the examination at large. Defendants' counsel argued that

the witness statement had to be put before the witness to adopt as her evidence in chief with any other examination limited to amplification of the evidence disclosed by the witness statement or in relation to new matters arisen since the date of the statement pursuant to CPR 29.9. Counsel for the Claimant argued that the more general provisions of Rule 29.2 permitted examination at large beyond what is provided for by CPR 29.9. In other words, counsel for the Claimant's position was that she was entitled to questioning at large in advance of placing the statement before her witness to adopt that evidence. The trial was adjourned to permit counsel to file written submissions and case law for a determination of this issue.

[3] The question to be answered is, of course, relative to the circumstances of this case.

[4] Here, Justice Morley by Order dated July 1, 2022 directed that "the parties shall file and serve witness statements by November 17, 2022". So, the starting point for this analysis is an order made by the court for the parties to file witness statements, which they did. The only question to be answered is whether the CPR limits the evidence in chief of a witness who has filed a statement to the contents of that statement subject only to amplification and/or addition by permission of the court as provided by Rule 29.9?

[5] To begin this analysis, we need to review the applicable sections of the CPR-

Rule 1 addresses the primary objective that the court must promote:

1.1.1 (1) The overriding objective of these rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to the –

(i) amount of money involved;

(ii) importance of the case;

(iii) complexity of the issues; and (iv) financial position of each party;

- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application of overriding objective by the court

- 1.2 The court must seek to give effect to the overriding objective when it – (a) exercises any discretion given to it by the rules; or (b) interprets any rule.

Rule 29.2 addresses the general rule for trial evidence:

- 29.2 (1) The general rule is that any fact which needs to be proved by evidence of witnesses is to be proved at –
 - (a) trial, by their oral evidence given in public; and
 - (b) any other hearing, by affidavit.
- (2) The general rule is subject to any –
 - (a) order of the court; and
 - (b) provision to the contrary contained in these rules or elsewhere.

Rule 29.4 addresses the “requirement” to serve witness statements:

- 29.4 (1) The court may order a party to serve on any other party a statement of the evidence of any witness upon which the first party intends to rely in relation to any issue of fact to be decided at the trial.

Rule 29.8 directs that a witness who has filed a statement must attend trial to give evidence:

- 29.8 (1) If a party –
 - (a) has served a witness statement or summary; and
 - (b) wishes to rely on the evidence of that witness,that party must call the witness to give evidence unless the court orders otherwise.

Rule 29.9 directs that a court may give a witness at trial permission to amplify and/or add to the evidence set out in their statements:

- 29.9 A witness giving oral evidence may with the permission of the court –
 - (a) amplify the evidence as set out in his or her witness statement if that statement has disclosed the substance of the evidence which the witness is asked to amplify;
 - (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties;

(c) comment on evidence given by other witnesses.

- [6] The fundamental argument advanced by counsel is that Rule 29.9 does not specifically limit the evidence in chief of a witness to her filed statement and, therefore, counsel may question at large on the basis of the general language of Rule 29.2(1)(a). For the brief reasons that follow, I disagree.
- [7] It is no great revelation to state that the Rules need to be interpreted in a logical, common sense manner that allows for the harmonious interaction of its provisions wherever possible and not otherwise indicated.
- [8] The general provision set forth in Rule 29.2(1)(a) simply states that a witness must attend trial in person to provide *viva voce* evidence under oath or affirmation unless the court makes an order otherwise such as where a witness is permitted to give evidence remotely by video link pursuant to Rule 29.3. Every trial is “in public” given the open policy of the court. The court is open to the public to attend and bear witness to the evidence there given in any trial except where there is an order by the court to the contrary, which is rare. This is compared to Rule 29.2(1)(b) that directs the evidence for all non-trial hearings to be provided in the absence of the witness by written affidavit, which itself is taken under oath or affirmation before an appropriately empowered out of court agent.
- [9] Rule 29.2(1)(a) does not empower questioning at large of a witness at trial. I reject that interpretation. This Rule does not address how the oral evidence of the in person witness can be elicited or otherwise address the parameters for that process. The Rule simply and only provides the mandate that a witness must provide evidence at trial in person, orally and in open court. The process for how that oral in person evidence is received is a matter of engagement with other Rules such as 29.9 (witness statements) and 33.7 (evidence by deposition before an examiner before trial) along with the case management powers available to the Court.

- [10] It is also trite to state that specifics tend to control over more general provisions dealing with the same subject matter. Rules 29.4, 29.8 and 29.9 are more specific than Rule 29.2. Rule 29.4(1) requires a witness who has been ordered by the court to provide a statement to set out the evidence of that witness intended to be relied upon at trial. This is unambiguous. The witness is required to set out her trial evidence in the witness statement. Rule 29.8(1) requires a witness who has filed a statement to attend at the trial to give evidence. Clearly, the witness will be attending in person to provide oral evidence in the public forum of the court thereby satisfying the Rule 29.2 mandate.
- [11] The procedure to be followed for the above is self-evident. The in person witness in open court is asked to adopt the contents of the evidence set out in the witness statement. If the witness in open court on the record orally adopts the contents of the statement then that forms the evidence in chief for that witness. The court can give permission for questioning directed to the amplification of that adopted evidence pursuant to Rule 29.9(a) but only to the extent that “the statement has disclosed the substance of the evidence which the witness is asked to amplify”. The court may also grant permission to question beyond the evidence found in a witness statement but only respecting matters that have arisen after the date of the statement as set out in Rule 29.9(b).
- [12] The above represents a very specific and clear process for the receipt of evidence at trial from a witness who has been ordered to provide a written statement. The generality of Rule 29.2 cannot and does not expand those specifics. If otherwise then Rule 29.9 would be superfluous as there would be no need for permission from the court to question beyond what was provided in the statement and there would be no express limits on such additional questioning.
- [13] The rationale here is obvious. All of the above speaks to the need for fairness, consistency and efficiency in the litigation process towards ensuring cases are dealt

with justly as mandated by Rule 1. The Rules are in place to achieve these worthy objectives. Parties need to have a clear understanding of what rights they have and what obligations they must meet. Parties need to know what the issues and expected evidence will be at trial so that they can properly prepare their own case to address these. How could a party know what the issues and evidence they need to meet at trial are where opposing counsel can question at large outside of any witness statement? Obviously, they could not know and prepare, which is completely contrary to the intent of the Rules. Adopting such a process would amount to the reintroduction of the long ago rejected tactic of trial by ambush.

- [14] In conclusion, the evidence in chief of a witness who has been ordered to file a statement is limited to the contents of that statement subject only to amplification and/or addition by permission of the court as provided by Rule 29.9 or as otherwise specifically set out in a case management order by the court. Upon the resumption of this trial, the Claimant's current witness shall be asked to adopt the evidence contained in her statement, which shall stand as her evidence in chief subject to any amplification and/or addition permitted by the court pursuant to Rule 29.9.

It is hereby ordered that:

- (1) Upon the resumption of the trial of this matter, the Claimant's current witness shall be asked to adopt the evidence contained in her statement, which shall stand as her evidence in chief subject to any amplification and/or addition permitted by the court pursuant to Rule 29.9.

The Hon. Dale Fitzpatrick
High Court Judge

By the Court

Registrar

