

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0175

BETWEEN

(KEN) ORMISTON ARNOLD BOYEA

of Prospect

CLAIMANT

AND

LUKE BOYEA

of Prospect

DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mrs. Kay Bacchus- Baptiste for the claimant.

Mrs. Zhing Horne-Edwards for the defendant.

2020: Dec. 2

Dec. 16

Dec. 21

REASONS FOR DECISION

BACKGROUND

[1] **Henry, J.:** Mr. (Ken) Ormiston Boyeais Mr. Luke Boyea's father. The father claimed that his son is trespassing on his property at Prospect, Saint Vincent and the Grenadines. He filed a claim in the High Court against his son for an eviction order, an injunction to restrain further trespass, damages, and costs.

[2] Mr. Luke Boyeahas denied being a trespasser. He alleged that his father allowed him to live at

the premises and promised him that he would transfer title of the property to him. He pleaded that he caused a draft transfer document to be prepared by a lawyer and that he delivered it to his father for execution, but never received the signed document from his father. He contended that he relied on the promises made to him by his father and spent a considerable amount of money to refurbish the property. He counterclaimed for a declaration that he is entitled to possession of the disputed property.

[3] The parties were ordered¹ to file list of documents on or before 12th March 2020. The son and father filed their respective list of documents on March 12th 2020 and March 17th 2020. Mr. Luke Boyea filed supplemental list of documents and amended list of documents on 29th May 2020 and June 2nd 2020. He filed a third supplemental list of documents on July 14th 2020, in which he disclosed the referenced draft transfer document. Mr. Ken Boyea objects to the last of those supplemental filings and the references to the draft deed in his son's defence. He has applied for those references and the third supplemental list of documents to be struck out. Mr. Luke Boyea resisted the application. The application to strike out was dismissed for the reasons outlined in this decision.

[4] The order was issued orally on December 17th 2020. The court promised to provide the written reasons for the decision. It explained to the parties that the written decision with reasons had been destroyed by a computer virus. The order made on December 17th is set out at the end of the reasons.

ISSUES

[5] The issues are whether the impugned:

- 1) supplemental list of documents; or
 - 2) portions of the defence and counterclaim;
- should be struck out.

LAW AND ANALYSIS

Issue 1 – Should the impugned supplemental list of documents be struck out?

¹ By order made on 12th February 2020.

- [6] Mr. Ken Boyea's application was supported by affidavit testimony of Lynette Jameson². He also filed³ an affidavit of his own. He pleaded that the list of documents should be struck out because contrary to CPR⁴ 27. it was filed outside of the time stipulated in the order. He contended further that no application had been made for extension of time to do so or for relief from sanctions for the failure. He asserted that it would be unfair and against his interest and against the administration of justice to admit the draft deed of gift. He argued that he had previously specifically objected to references to it in Luke Boyea's witness statement and applied⁵ for those portions to be struck out. It is a matter of record that the court made no order excising those statements.
- [7] Ms. Jameson averred that she is an office clerk at the law chambers of Mrs. Bacchus-Baptiste. She repeated the foregoing averments as grounds for striking out the supplemental list of documents. She added that Mr. Ken Boyea objects to the filing by Mr. Luke Boyea of 3 list of documents, contrary to the case management deadline.
- [8] Mr. Ken Boyea asserted that he is advised and believes that if the impugned deed existed, Mr. Luke Boyea 'would have and should have' exhibited it to his Defence and Counterclaim. He did not place any reliance on that proposition in his submissions. Mr. Luke Boyea submitted that he identified the deed by subject matter, parties and time in paragraph 16 of his defence. CPR 10.5(6) stipulates that a defendant 'must identify in or annex to the defence any document which is considered to be necessary to the defence.' There is therefore no requirement that he exhibits it to the Defence and counterclaim if he identifies it with specificity.
- [9] It is common ground between the parties, and the record reveals that Mr. Luke Boyea mentioned and described the draft deed at paragraph 16 (xix) (xx) and (xxi) of his Defence and Counterclaim. He pleaded there:

'(xix) As a consequence, the Defendant told the Claimant that he needed to transfer the subject property into the Defendant's name. The Claimant assured the Defendant that he would do so and told the Defendant to arrange for the preparation of the deed to facilitate the transfer.'

² Filed on 16th July 2020.

³ On 15th October 2020.

⁴ Civil Procedure Rules 2000.

⁵ By Notice of application filed on 5th May 2020.

(xx) In reliance on the Claimant's statement, the Defendant engaged a lawyer to prepare the deed for the purpose of transferring the subject property into his name.

(xxi) In or about January 2011, the Defendant presented the Claimant with the said deed

for execution by him. The Claimant told the Defendant to leave the deed with him and he would sign it.

However, several weeks later, the Claimant's explanation to the Defendant for still not having signed the deed was that the subject property was security for a loan.

He, nonetheless, again reassured the Defendant that the subject property was the Defendant's, thus continuing to encourage the Defendant in the belief that he would become the owner of the subject property.'

Those paragraphs reflect that Mr. Luke Boyea provided identifying particulars of the draft deed in accordance with CPR 10.5(6). He did not have to attach it to the Defence.

[10] Mr. Ken Boyea deponed that Mr. Luke Boyea did not avail himself of the opportunity to exhibit the deed to his list of documents on March 12th 2020, May 29th 2020 or 2nd June 2020. He testified that Mr. Luke Boyea only did so on July 14th 2020 after an application had been made to strike out the impugned portions of his defence and counterclaim.

[11] Mr. Luke Boyea provided affidavit⁶ testimony. He averred that he was not in the State when the case management order was made for filing of standard disclosure. He explained that he had traveled abroad to undergo surgery on his hip and was not as 'vigorous in his efforts to locate the documents' needed for trial as he might have been had he been in his usual physical health. He claimed that he did his best to obtain the necessary documents to support his case.

[12] He averred that when he was searching for his documents to support his case, he knew that he did not have the impugned draft deed of conveyance because he had presented it to his father to sign and it was never returned to him. He stated that it was therefore not disclosed in the list of documents filed in March or May. He asserted that his lawyer Mrs. Horne-Edwards made enquiries of Ms. Paula David on his behalf in or about July 2020 and obtained a certified copy of the referenced deed. He said that his lawyer explained to him that he had an ongoing duty of disclosure throughout the pre-trial and trial period and as a consequence the document was disclosed in the supplemental list of documents filed on 14th July 2020.

⁶ File don 21st September 2020.

[13] He stated that his lawyer has advised him that no injustice would be occasioned by admitting the deed. He pointed out that his defence and counterclaim (at paragraph 16 (xix), (xx) and (xxi)) had outlined that he had a lawyer prepare the deed of conveyance in or about 2011 and further that he mentioned this in his witness statement⁷. He asserted that his father was therefore aware of those assertions regarding the preparation and presentation to him of the deed. He reasoned that he cannot claim to have been surprised by the disclosure of the certified copy of the deed. He added that it was disclosed shortly after it was received.

[14] Mr. Luke Boyea expressed the belief that it was in the interest of justice to admit the deed into evidence. He opined that the court may give to it what weight it deems appropriate in the circumstances or none at all. He asserted that it is best for the evidence to be admitted and a decision made as to the weight to be attached to it, after cross-examination is completed. It is important to state at this point that this decision does not concern admission or exclusion of the draft Deed as evidence. It must be noted also that the mere disclosure of a document does not convert it into evidence.

[15] Mr. Ken Boyea submitted that CPR 28.5(1)(b) mandates that the respondent 'carry out a search for documents' and disclose any documents located as a result of such search. He argued that Mr. Luke Boyea referred to the draft deed of gift at paragraph 16: xix, xx and xxi of his defence and at paragraph 21 of his witness statement. Mr. Ken Boyea submitted that Mr. Luke Boyea did not avail himself of the opportunity to disclose the deed in his defence or witness statement or on the third opportunity when he complied with the disclosure order.

[16] Mr. Luke Boyea countered that the directive in CPR 28.5(1)(b) relates to specific disclosure, has no application to standard disclosure and is therefore not relevant to these proceedings. CPR 28.5(1)(b) states:

'28.5 (1) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) ...;

(b) carry out a search for documents to the extent stated in the order;'

No order for specific disclosure was made in this case, only for standard disclosure. The cited CPR provision is not applicable to the issue under consideration.

⁷At paragraphs 21 and 28.

- [17] Mr. Ken Boyea argued that it was only after he objected to the impugned statements in Luke Boyea's witness statement that his son disclosed the deed. He contended that the draft deed 'miraculously appeared' only then. He submitted that pursuant to CPR 28.8 a party's legal practitioner has a duty to explain to a litigant 'the necessity of making full disclosure in accordance with the terms of the order. He reasoned that Mr. Luke Boyea must have been aware of the consequences of failing to disclose the deed by 12th March 2020 at the latest. He argued that no new documents were found and it would therefore be unjust to allow him to rely on CPR 28.12.
- [18] Mr. Ken Boyea submitted that CPR 28.13 is applicable. He argued that in the premises, Mr. Luke Boyea may not produce the draft deed at the trial or rely on the impugned portions of his defence. He contended that he has made no application for relief from sanctions and that having regard to CPR 26.8 and 27.8(4)(a) (b), no such application can be made at this juncture because it is now too late. He submitted that there can be no good explanation for the failure and it must have been intentional.
- [19] Mr. Ken Boyea submitted that the deed seeks to introduce evidence from Paula David who has provided no witness statement. He argued further that no explanation has been given 'for the copy of the original document'. Presumably, he means that no explanation has been provided as to why there is no original or certified copy of the draft deed. He submitted that the decision in **RBTT Bank Caribbean Limited v Dean Nichols**⁸ is instructive. He directed the court's attention to paragraphs 8 – 14 of the case.
- [20] At paragraphs 10 and 11 of that decision, the learned Master observed that the claimant had applied for extension of time to file standard disclosure but had not made an application for relief from sanctions. She noted that it was the usual practice for an application for extension of time to be made before the time has expired for compliance. She concluded that in the case before her, the deadline had passed for compliance and further since CPR 28.13 specifies a sanction for such default, an application for relief from sanctions would have been the appropriate application. She dismissed the application for extension of time. The learned Master took a number of factors into

⁸ SLUHCv2004/0957.

consideration including the length of time that proceedings had been stalled – almost 9 years; and the claimant's failure to apply for relief from sanctions.

[21] Mr. Ken Boyea argued that a party who fails to comply with an order for disclosure may be visited with sanctions pursuant to CPR 28.13. He submitted that the available sanctions are orders preventing him from relying on the document; striking out of the statement of case or an unless order. He relied on the decision in **RBTT Bank v Olson Robertson**. He highlighted paragraph 10 where the learned trial judge stated:

'In its decision, the Court of Appeal set out the first and second findings of the trial judge in full and then stated:

'We note that there has been no appeal against that finding of the learned judge'⁹.

That statement does not assist this court to resolve the present issue.

[22] Mr. Ken Boyea submitted further that CPR 28.12 was considered in the case of **Paul Hackshaw v Saint Lucia Air and Sea Ports Authority**¹⁰. He argued that the rule underscores the point that the duty of disclosure continues until the proceedings are concluded. He submitted that the learned judge remarked that that rule contemplates situations where important documents relevant to the just disposal of a claim come to the attention of a party after witness statements are filed and that the CPR sets out rules regarding how notice of such late discovery is to be made. Mr. Boyea argued that the rule is not to be abused by willfully failing to disclose documents which are or should be in a party's possession 'well after standard disclosure has been ordered.'

[23] He contended that Mr. Luke Boyea asserted that a lawyer was engaged to prepare the deed and that the deed was presented to him to sign. He submitted that Paula David was not mentioned in the pleadings nor was it pleaded that the deed was unavailable for disclosure. He argued that the 'late appearance of the deed after the several missed opportunities for disclosure begs the question.' He reasoned that it is not just for the court in those circumstances to admit the deed without more. It must be noted that the law does not require a party to include in his pleadings that a particular document is unavailable for disclosure. That is the purpose of discovery.

⁹No citation provided.

¹⁰ SLUHCV2008/827.

[24] Mr. Luke Boyea countered that he is not required to call as a witness at the trial the author or creator of the deed of conveyance. He submitted that there is no CPR provision and no principle of law that requires him to apply for an extension of time to file an additional witness statement of Paula David and relief from sanctions on the basis of the disclosure of the impugned deed on July 14th. This is so. He quite correctly pointed out that the absence of the author is a factor that the court is entitled to take into account in determining the weight to be attached to any documentary evidence.

[25] Mr. Luke Boyeasubmitted that the purpose of disclosure is summarized in **Halsbury's Laws of England** where the learned authors explained:

‘The function of discovery of documents is to provide parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their respective cases and ... provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to use before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of litigation.’¹¹

[26] Mr. Luke Boyea submitted further that CPR Part 28 governs disclosure and inspection of documents. This is so indeed. He pointed out that pursuant to CPR 28.12 disclosure continues throughout and until the proceedings are concluded. He argued that while he did not include the impugned deed in his earlier list of documents, he referred to it in his defence and witness statement. He contended that there was no need for him to apply for extension of time to file a supplemental list of documents or relief from sanctions, because a party has an ongoing duty of disclosure.

[27] He submitted that the impugned supplemental list was filed within 14 days of June 30th 2020 when the deed was certified to be a true copy. He argued that this complies with the timeline in CPR 28.12(3). He advanced as authority, the case of **Dwight Cozier v Mark Brantley et al** in which the learned judgereasoned:

‘The claimant filed the supplemental list of documents on 4th May 2012 which contains the said documents.

The Defendant would have been made aware of the existence of these documents from

¹¹ 4th Edition, Volume 13, para. 1.

that date onwards and it cannot be said that he was taken by surprise. The fact that the documents were not included on the list of Documents filed on 5th February 2016 by the Claimant does not mean that he cannot rely on them as notice had already been given to the Defendant of the Claimant's intention to rely on these documents from the time

the supplemental list of documents was filed in May 2012.¹²

[28] The learned judge dismissed the application to exclude the referenced documents from the trial bundle. She took into account that, pursuant to CPR 28.12 disclosure continues conclusion of the matter. She observed that the impugned documents were included in the trial bundle which was filed about 3 days before the trial date. She ruled that this was effective disclosure and she dismissed the application to exclude them from the trial bundle.

[29] Mr. Luke Boyea argued that in the instant case the impugned deed was listed in the second supplemental list of documents; was available for inspection at a designated place at a designated time; was appended to the second supplemental list of documents and was therefore in Mr. Ken Boyea's possession and available for examination by him at his leisure and convenience. He submitted that this was adequate. He argued further that a failure to disclose a document or permit inspection by the date ordered does not automatically carry the sanction of prohibiting reliance on the document. He submitted that the sanction is discretionary and that the court in making a determination must have regard to all of the circumstances.

[30] He cited the case of **RBTT Bank Caribbean Ltd. (formerly known as Caribbean Banking Corporation Limited) v. Robertson et al**¹³. In that case, the learned trial judge ruled that the sanction was not mandatory. She refused an application at trial to permit the defendant to rely on the document at trial, even though he had not complied with the order for standard disclosure. The learned trial judge took into consideration that the defendant had referred to the document in his defence (filed 9 months before); alleged that the claimant had a copy in his possession and was aware of them; that the claimant had not filed a reply to the defence. She ruled that the claimant would not be prejudiced if the defendant was allowed to rely on the document.

¹² NEVHCV2009/0180, decision delivered on October 8th 2018, per Charles-Clarke J. at para. 17.

¹³ SVGHCV2003/0017, per Thom J, at paras. 9 and 10.

[31] Mr. Luke Boyea also referred to **Ferrari v Central Water and Sewerage Authority**¹⁴ in which the defendant was permitted to rely on a document that he had disclosed after the deadline for standard disclosure had passed. He argued that Mr. Ken Boyea cannot claim to be prejudiced or taken by surprise by the July 14th disclosure, having had notice since the defence was filed on 13th January 2020 and the filing of his witness statement on 7th April 2020. He contended that it is important that no trial date has been set because the disclosure provided ample notice to his father and nullifies any claim of trial by ambush. He submitted that it would not be unfair or unjust, contrary to Mr. Ken Boyea's interest or against the administration of justice to permit him to rely on the deed.

[32] Mr. Luke Boyea submitted that his filing of the supplemental list of documents on July 14th was proactive and a perfectly acceptable course of action in light of CPR 28.13(4). He contended that the CPR permits continuous disclosure, which furthers the overriding objective to deal with cases justly while striking a balance to prevent trial by ambush and ensuring that parties can fully present their respective cases. He concluded that the July 14th list of documents was filed in accordance with CPR 28.12(2) & (3). He submitted that the application to strike it out should be dismissed with costs.

[33] CPR 28.12 provides:

'Duty of disclosure continuous during proceedings

28.12 (1) The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded.

(2) If documents to which that duty extends come to a party's notice at any time during the proceedings, that party must immediately notify every other party and serve a supplemental list of those documents.

(3) The supplemental list must be served not more than 14 days after the documents to which that duty extends have come to the notice of the party required to serve it. Consequence of failure to disclose documents under order for disclosure.' (Underlining added)

[34] This rule makes clear that parties are under a continuing duty of disclosure until a final judgment is rendered in a matter. Sub-rules (2) and (3) elaborates on how the duty is to be operationalized.

¹⁴SVGHCV2004/0302.

Firstly, the person who discovers a document must immediately notify the opposing party; and secondly he must within 14 days serve that other party with a supplemental list of documents.

[35] Rule 28.13 provides that a party who fails to disclose a document within the specified timelines may not rely on it at trial. To put this rule into context the specified timelines may refer to the date given in a case management order or an order for specific disclosure or the timelines for standard disclosure in rule 28.12. Where the timeline in an order has passed, a party is not bound by that timeline if he subsequently obtains a document which was not in his possession at or since the date of the order, but has since then come into his possession. The sanction is activated if he fails to comply with the relevant timeline after the document comes into his possession. This is the only logical explanation for and reconciliation of rules 28.12(1) (2) and (3).

[36] In considering any application under the CPR, the court must seek to give effect to the overriding objective to act justly as between the parties. It must also consider any prejudice which may be caused to, or any advantage which may accrue to any party as a result of any order it may make. Having considered the affidavit testimony, I am satisfied that Mr. Luke Boyea did not have the impugned deed in his possession when he filed his defence and counterclaim, his witness statement and the first four list of documents. I accept his account that the certified copy of the deed was recovered by his lawyer around the beginning of July 2020 and was filed within 14 days. This satisfies his duty of ongoing standard disclosure and the timelines prescribed by CPR 28.12(3).

[37] I remind myself that Mr. Luke Boyea described the impugned deed in his defence and counterclaim at paragraph 16 (xix), (xx) and (xxi) and that Mr. Ken Boyea had notice of this when it was served on him. I am of the considered opinion that any prejudice occasioned to Mr. Ken Boyea by the delayed disclosure can be offset by an order allowing him additional time to file and serve a further witness statement. Denying Mr. Luke Boyea the opportunity to include the document in his list of documents would affect his ability to prosecute the case he has pleaded. This would also happen if an order is made striking out paragraph 16(xix), (xx) and (xxi) of his Defence and Counterclaim. I do not think that this would be just.

[38] The justice of this case can be served by permitting Mr. Luke Boyea to include the draft deed in his list of documents filed on July 14th 2020 and denying Mr. Ken Boyea's application to strike it out. Likewise, Mr. Ken Boyea should be permitted to respond in such manner he considers necessary by way of filing and service of one or more witness statements. This two-pronged solution will have the effect of balancing the parties respective rights to present their best case and eliminate prejudice on both sides. In the premises, I make no order striking out the supplemental list of documents filed on July 14th 2020.

Issue2 – Should the impugned portions of the defence and counterclaim be struck out?

[39] Mr. Ken Boyea linked his application to strike out paragraph 16 (xix), (xx) and (xxi) to the contents of the impugned draft deed. His rationale suggested that if the list of documents and the deed fall away, so too must the questioned sub-paragraphs of the defence and counterclaim. It follows that if the supplemental list of documents survives so too must the impugned sub-paragraphs. It cannot be gainsaid that Mr. Ken Boyea had adequate notice of Mr. Luke Boyea's defence. For the reasons outlined in consideration of the application to strike the list of documents, it would be illogical and indefensible to strike out the impugned portions of the defence and counterclaim while permitting the list of documents to stand. There is no legal basis for making an order to strike out the referenced paragraphs. I therefore make no order striking them out.

Costs

[40] The successful party is usually entitled to costs¹⁵. Mr. Luke Boyea is that party. Mr. Ken Boyea shall pay to him costs to be assessed if not agreed. Mr. Luke Boyea is required to file and serve his application for costs to be assessed on or before January 29th, 2021.

ORDER

[41] The order made on December 16th 2020 was:

1. Ken Boyea's application to strike out Luke Boyea's Supplemental List of Documents filed on July 14th 2020 is dismissed.
2. Ken Boyea's application to strike out paragraph 16 (xix) (xx) and (xxi) of Luke Boyea's Defence and Counterclaim is dismissed.

¹⁵CPR 64.6.

3. Ken Boyea is at liberty to file and serve on or before January 22nd 2021, a further witness statement limited to responding to the contents of the referenced draft deed of conveyance.
4. Mr. Ken Boyea shall pay to Mr. Luke Boyea costs pursuant to CPR 65.11, to be assessed if not agreed. Mr. Luke Boyea shall file and serve his application on or before January 29th 2021.

[42] I am grateful to counsel for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar