

**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. Zhinga Horne-Edwards for the defendant.

2020: Sept. 23
Oct. 13

DECISION

BACKGROUND

[1] **Henry, J.:** Mr. (Ken) Ormiston Boyea claimed that his son Mr. Luke Boyea is trespassing on property situated at Prospect Saint Vincent and the Grenadines which belongs to him. He filed a claim for an orders of eviction, damages, injunctive relief and costs.

[2] Mr. Luke Boyea filed a counterclaim. He denied that he is a trespasser. He alleged that his father has acquiesced in his occupation of the property and that he gave him assurances that it would be transferred to him. He claimed that in reliance on those assurances he expended substantial sums

of money on it. He sought a declaration that he is entitled to possession of the disputed property; an order compelling his father to transfer the equity of redemption in the property to him; an injunction restraining him from interfering with his use of the property and costs.

- [3] Witness statements and witness summaries have been filed by the parties. The father filed an application for an order striking out portions of those filed on behalf of his son. He contended that those impugned portions are inadmissible because they contain scandalous, irrelevant, oppressive or otherwise inadmissible material. His son resisted the application. He submitted that the impugned statements are all admissible. Most of the objections raised by the father are without merit. Others are upheld for the reasons outlined in this decision.

ISSUE

- [4] The issue is whether the impugned portions of the referenced witness statements and witness summaries should be struck out.

LAW AND ANALYSIS

Issue – Should the impugned portions of the witness statements and witness summaries be struck out?

- [5] Mr. Ken Boyea's application was made pursuant to Civil Procedure Rules 2000 ('CPR') 29.5 which empowers the court to strike out any inadmissible, scandalous, irrelevant or oppressive material in a witness statement. Mr. Boyea argued that his son's witness statement and the witness summaries of his witnesses Shiva Joseph and Martin Joseph are objectionable as they contain statements that violate the referenced rule. His attack focused primarily on Ms. Joseph's proposed testimony.
- [6] He set out 3 grounds on which the referenced witness statements and witness summaries are attacked. They are:

'1. On 7th April, 2020 Shiva Joseph, Luke Boyea and Martin Joseph filed witness statements herein.

2. Many paragraphs of Shiva Joseph witness statement and a few of the other witness

statements include inadmissible, material, scandalous, irrelevant or otherwise oppressive matter.

3. An affidavit filed herewith details the offensive paragraphs.'

[7] Ms. Lynette Jameson, office clerk at law chambers of Mrs. Kay Bacchus-Baptiste supplied affidavit testimony to support the application. Ms. Jameson stated that she was informed by learned counsel Mrs. Bacchus-Baptiste and believes that paragraphs 6, 7, 8, 9, 10, 11, 12, 19, 21, 28, 29, 30, 32 and 33 of Shiva Joseph's witness statement are offensive, inadmissible and ought to be struck out. She supplied no averments as to why they are labelled as offensive or inadmissible.

[8] Ms. Jameson asserted further:

'4. In relation to Luke Boyea Witness statement paragraphs 21 and 27 and paragraph 10 of Martin Joseph.'

No qualifying statements were set out to give an indication of what evidentiary concerns allegedly affected those paragraphs.

[9] Mr. Ken Boyea submitted that CPR 29.5 is applicable. He argued that Ms. Shiva Joseph included in her witness summary, inadmissible information and belief. He contended that the offending paragraphs were identified in Ms. Jameson's affidavit. Mr. Boyea did not spell out the specific bases on which he contended that paragraphs 6, 7, 8, 9, 10, 11, 12, 21, 28, 30, 32 and 33 are inadmissible. He basically lumped them together and submitted that they offend CPR 29.5(2).

[10] CPR 29.5 (1) (e) and (2) provide respectively:

'Form of witness statements

29.5 (1) A witness statement must –

(a) be dated; ...

(e) not include any matters of information or belief which are not admissible or, where admissible, must state the source of any matters of information or belief; ...

(2) The court may order that any inadmissible, scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.'

[11] Mr. Ken Boyea added: 'We rely on the following cases which currently cannot be downloaded from

the website:

Mable Phillip vs Coorine Claro

Joseph Horsford vs Geoffery Croft

Matthew Harris vs Lindsay Mason

Michelle Jones vs The St. Vincent Port Authority – part 29.5’.

- [12] At the hearing on September 23rd, 2020, learned counsel Mrs. Bacchus-Baptiste indicated that she could not get the cases downloaded. She undertook to do that within a few days. An order was made directing Mr. Ken Boyea to file and serve supplementary written submissions on or before 8th October 2020, in which he must distill the legal principles on which he relies in respect of each decision identified in his skeleton argument and list of authorities. He did not do so.
- [13] In contrast, Mr. Luke Boyea provided comprehensive written submissions accompanied by the full text of all legal authorities relied on. The court is grateful to him and his legal practitioner for complying with the directions issued and for carefully articulating his position in defence of the impugned statements. It bears noting that it is well established that the court must refrain from descending into the arena and acting as litigant by presenting a legal position on behalf of one or other party.
- [14] I hasten to add that the court must perform its duty as a referee to ensure that fairness prevails. This should not be interpreted as an obligation to take over a party’s claim or defence or to advocate a particular position. It cannot be stressed enough that this is the role of legal practitioners which they must strive to do by making clear statements of their legal positions in skeleton arguments and legal submissions. This can be achieved in bullet points but must be substantive, clear, unambiguous and concise.
- [15] Mr. Luke Boyea submitted that it is doubtful whether CPR 29.5 applies to witness summaries in the same manner that it applies to witness statements. He contended that CPR 29.6(6) makes certain rules in Part 29 applicable equally to witness summaries as they do to witness statements. He submitted that curiously rule 29.5 is not one of them. He argued that this begs the question of

whether striking out orders can be applied to witness summaries. He submitted that a witness summary is not the proposed evidence of a witness but merely a summary of what it is anticipated that the proposed witness will say. He submitted further that CPR 29.5 therefore does not apply to witness summaries.

[16] Mr. Ken Boyea made no counter submissions on this point. The court accepts that CPR 29.6(6) expressly provides that rules 29.4, 29.7, 29.8 and 29.9 are applicable to witness summaries, while remaining silent about the applicability of rule 29.5 to witness summaries. Applying the learning in **Attorney General v Keron Matthews**¹ to this glaring omission, at first blush it would be logical to make a pronouncement that the principles set out in rule 29.5(e) and (2) do not ever apply to a witness summary.

[17] However, the court is required to examine the objective of the rule. It is being called on to make a *carte blanche* ruling that assertions in a witness summary are not objectionable or inadmissible on the same grounds as for a witness statement. It must consider the overriding objective to do justice between parties and assess whether such a pronouncement would achieve fairness and justice between litigants. A useful starting point is to remind oneself that in this jurisdiction, witness summaries are usually treated as witness statements at a trial.

[18] At such hearings a witness for whom a witness summary is filed is generally asked whether the contents are true and correct and comprise his or her testimony, much in the same way as a witness statement is treated. If he or she responds in the affirmative an application is made for the witness summary to be admitted as the witness' evidence in chief. There is usually no differentiation in the way in which a witness statement and witness summary are treated.

[19] Unless there are objections to the content of a witness summary, it is invariably admitted as evidence. Mr. Luke Boyea did not submit or represent that he intends to diverge from this approach. As part of its case management function, the court is required to entertain and make determinations on the admissibility of proposed testimony. It seems to me that the furtherance of

¹ [2011] UKPC 38.

administration of justice and fairness is better achieved by considering all objections to proposed evidence (including witness summaries) prior to the trial rather than to await the trial date, unless a party signals that the witness summary is only a guide which will be departed from at trial.

[20] On this point, it is worth noting that the definition of 'witness summary'² in the CPR distinguishes between a summary of the:

1. evidence, so far as is known, which would otherwise be included in a witness statement; and
2. matters about which the party serving the witness summary proposes to question the witness, if the evidence is not known.² (underlining added)

This definition highlights the distinction to which I have alluded.

[21] The witness summaries filed for Shiva Joseph and Martin Joseph contain a paragraph which states: 'The statements made in this witness statement are true and correct'. Further, the reason given for the filing of a witness summary and not a witness statement is that 'the witness was unavailable to sign a witness statement.' This signals that the proposed witnesses will probably adopt the witness summary as their XIC without major or any changes. In the circumstances, delaying consideration of objections related to admissibility until trial would not be in furtherance of the overriding objective to effect justice, because, among other things, it would not be the most efficient and effective way to dispose of the objections.

[22] Accordingly, although the CPR signals that rule 29.5 does not necessarily apply to a witness summary, I am satisfied that issues of admissibility are equally as applicable to a witness summary which sets out the evidence which would be included in a witness statement. In such a case, it is just to consider questions of admissibility in relation to a witness summary of that specie. I find therefore that it is just to consider them at this juncture. I turn now to examine the objections. I shall deal first with Shiva Joseph's witness summary.

Shiva Joseph – Witness summary

[23] A witness summary was filed on Ms. Joseph's behalf on 7th April 2020. At paragraph 6 the following

² CPR 29.6(3).

statement is set out as the second clause of the final sentence:

‘From our first very unconventional meeting which happened the night the defendant was burned with hot oil by his ex-girlfriend.’

Mr. Ken Boyea objects to this on the ground that it is offensive and inadmissible.

[24] Mr. Luke Boyea correctly submitted that the **Evidence Act**³, rules of court and English law and procedure, govern admissibility of evidence. He pointed to section 3 which provides in part:

‘Whenever any question shall arise in any... civil proceedings whatsoever in or before any court ..., touching the admissibility or sufficiency of any evidence ..., the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in Saint Vincent and the Grenadines.’

[25] He argued that the case of **Joseph Horsford v Geoffrey Croft**⁴ is also instructive. In this regard, he quoted from the judgment, where Blenman JA opined:

‘The witness statement should contain the evidence which that person would be allowed to give orally. A witness statement should not contain inadmissible evidence. Leal arguments or opinion evidence (except from someone who is qualified to provide that evidence) or irrelevant evidence (i.e. evidence which has no bearing on the facts in issue) should not be included in the witness statement. In effect the purpose of witness statements is to replace oral testimony. A witness statement must therefore address all the factual issues in the case upon which the witness is in a position to comment. It is unimpressive when a witness mentions something of importance in oral evidence that does not appear in the witness statement.’⁵

[26] Mr. Luke Boyea argued that the impugned part of paragraph 6 of Shiva Joseph’s witness summary

³ Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009 (‘the Act’).

⁴ ANUHCVP2014/0006.

⁵ At paragraph 34 of the Joseph Horsford v Geoffrey Croft case.

merely makes reference to a memorable incident, that is in no way scandalous to his father. He explains that Ms. Joseph seeks by that statement to link the timing of her first introduction to his father, thereby making the testimony relating to the time frame more reliable. He referenced again the judgment in **Joseph Horsford v Geoffrey Croft**, where the learned Justice of Appeal stated:

‘Allegations or evidence are held to be scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party to make any charge of misconduct. However, an allegation which is scandalous, as, for example, by making charges of dishonesty, immorality or outrageous conduct cannot be struck out if it is necessary or relevant to any issue in the action.’⁶

[27] In this part of the witness summary Shiva Joseph ‘indicates’ that she is Luke Boyea’s girlfriend. The impugned statement in paragraph 6, refers to someone who is not a party to the claim. It recalls details of an incident which is unflattering of that former girlfriend and sets it out as a factual statement of assault by that person. It is not germane to a determination of the issues between the parties and is potentially defamatory of the subject. It is for those reasons offensive and must be struck out.

[28] Paragraph 7 of Ms. Joseph’s witness summary is also attacked. The offending sentences are the penultimate and final ones which read respectively:

‘... Notwithstanding, the Claimant kept spending money frivolously without first discussing his planned expenditure with the defendant, or even informing him beforehand. This upset the defendant greatly and put him under immense pressure to keep paying the bills.’

[29] Mr. Luke Boyea defends the inclusion of this statement on the ground that it has been pleaded and is relevant to his defence and counterclaim. He argued that part of his defence is that his growing frustration with his father’s mismanagement of the funds of the businesses made him (the son)

⁶ At paragraph 43 of the Joseph Horsford v Geoffrey Croft case.

threaten to leave the businesses, and that this prompted his father's assurance that the subject property was his (the son's). He submitted that this assertion is relevant to determination of the issue of proprietary estoppel. Mr. Ken Boyea did not respond to this submission.

[30] Mr. Luke Boyea did make such claims at paragraph 16 (xiii) and (xiv) of his counterclaim. The court reminds itself that only relevant and probative averments are admissible as evidence. In the Trinidad and Tobago case of **Kelsick v Kuruvilla, North West Regional Health Authority & AG of Trinidad & Tobago**, Boodoosingh, J. articulated that principle as follows:

'The test for evidence is relevance. ... This test must be applied in the context of other rules. ... The trial judge will sometimes have to sift through the evidence to find the key or relevant evidence and apply such weight as is required.'⁷

[31] I agree with Mr. Luke Boyea that the impugned factual assertions in paragraph 7 of Ms. Joseph's witness summary could support a defence of proprietary estoppel. They are relevant and probative of his statement of case. I make no finding therefore that the impugned statements are offensive and inadmissible. No order is made striking them out.

[32] The second sentence in paragraph 8 of Ms. Shiva Joseph's witness summary states:

'A couple of years later, sometime after the opening of the first Aunt Jobe's Supermarket in Stoney Grounds, the Defendant quit his position out of frustration with his father and his bad sending habits.'

Mr. Ken Boyea included this as one of the averments he considered to be offensive and inadmissible.

[33] His son submitted that like paragraph 7, this was also pleaded in his counterclaim at paragraph 16 (xiii) and (xiv). He argued that it attests to the assurance he received from his father that the subject property was his. He referenced dicta in **Mable Phillips v Corine Clara** where Pereira C.J. opined:

⁷ TT 2012 HC 379.

'Paragraphs of a witness statement are not to be read in isolation and subjected to sterile construction.'⁸

[34] Akin to this learning is the commonsensical notion that some objections are better addressed at trial after cross-examination is ended. His Lordship Justice Boodoosingh expressed it thus:

'... it is not always possible to determine the significance of a particular aspect of the evidence until the end of all the cross-examination in the matter. A judge would also, therefore, be entitled to admit evidence *de bene esse* or conditionally subject to its relevance being shown at the trial. ... at the pre-trial review a judge may not always be able to determine the exact significance to be attached to a particular, aspect of the evidence until all of the cross-examination unfolds and the witnesses are tested on their statements. It is always open to the parties to advance submissions on what weight, if any, is to be attached to a specific bit of evidence.'⁹

[35] The second clause of the impugned statement appears to embody an element of hearsay. This was not addressed by either party. I am mindful that not all hearsay is inadmissible in this jurisdiction. I am satisfied that the impugned statement is relevant and probative as it relates directly to the pleaded case and the defence of proprietary estoppel. The hearsay related issues are in my opinion best left for the trial after cross-examination of this proposed witness. I make no determination that any part of the impugned statement is offensive, inadmissible or order striking it out.

[36] Mr. Ken Boyea objected to paragraphs 9 (second sentence) and 10 (first four sentences and part of the 5th sentence) of Ms. Joseph's witness summary. He claimed likewise that they were offensive or otherwise inadmissible. Those paragraphs state respectively:

'9. The defendant felt like he was doing all the work; which he was, with no reward, a small salary and 'a father spending huge sums of money on frivolous projects like his

⁸ GDAHCVAP2014/0023, at para. 23.

⁹ At para. 13 of the Kelsick v Kuruvilla case.

garden.'

'10. The claimant kept calling the Defendant, trying to get him to return to work. The businesses were a mess without the Defendant. After a two-week hiatus the Defendant went in and listened to what the Claimant had to say. From what the Defendant said to me, I know that after his conversation with his father, the Defendant felt reassured that his hard work in his father's businesses was being recognized and rewarded. To be quite frank, I did not trust the Claimant...'

[37] Mr. Luke Boyea countered that those assertions are part of his pleaded case. He contended that they support his claim that his father assured him that the subject property was his, after he (Luke) threatened to leave the businesses on account of his father's alleged mismanagement. He argued that they are part of the circumstances relevant to the determination of the issue of proprietary estoppel.

[38] Mr. Ken Boyea did not state why he considered the referenced paragraphs to be offensive or otherwise inadmissible. He relied on the bald claim to this effect in his application and the supporting affidavit. He made no submissions on the issue of hearsay which may arise from paragraph 10, depending on the treatment given to it at trial. Neither did Mr. Luke Boyea. Those are matters which can be addressed at trial. As with the objections to paragraphs 7 and 8 of that witness summary, I find that the impugned statements in paragraphs 9 and 10 are not offensive or inadmissible.

[39] The following statements appear as the penultimate and final sentences in paragraph 11 of the witness summary:

'As far as I understood, the Main House was now the Defendant's and to all intents and purposes, ours. There was no doubt in my mind about this and I verily believe that the Defendant felt the same way because he certainly acted like it belonged to him.'

Mr. Ken Boyea submitted that this is also offensive and inadmissible.

[40] Mr. Luke Boyea contended that it contains an expression of Ms. Joseph's belief of his feelings

about the subject property, based on her observations. He submitted that she may give this testimony orally and be cross-examined about it. The referenced paragraphs contain assertions as to the proposed witness' opinion or belief regarding her state of mind with respect to ownership of the house and her suspicions about the defendant's. It is trite that a witness is not permitted to testify about another person's state of mind, unless he or she is expressing an opinion as a medical expert or in other limited circumstances. Moreover, Mr. Luke Boyea can testify about his state of mind if he considers it a relevant part of his case. Ms. Joseph's beliefs regarding such matters are not germane to the issues to be tried. Those statements offend the referenced rule of evidence and must be struck out.

- [41] At paragraphs 12 (4th sentence) and 21 (part of the 5th sentence) of Ms. Joseph's witness summary, an opinion is expressed about the main house on the subject property. She telescopes that it is her intention to testify that:

'everything was so dated, it made my skin crawl.'; and '... hideous pool bar...'.

Mr. Ken Boyea did not explain why this is offensive or inadmissible.

- [42] Mr. Luke Boyea described the statement as 'an expression of the witness' feelings about a certain aspect of the subject property prior to its renovation' and argued that it must be examined in context. He contended that the context is supplied in the rest of that paragraph and succeeding paragraphs. He submitted that they collectively describe the unpalatability of the décor; the reasons for his major investment in the renovation (namely the property's décor and deterioration) and chronicle his father's non-involvement in the renovation. He argued that the proposed testimony is relevant to his claim that his father surrendered control of the property to him and his girlfriend.

- [43] I am satisfied that there is a reasonable nexus between Mr. Luke Boyea's counterclaim and the circumstances in these parts of Ms. Joseph's witness statement, where a description of the subject property is provided. Part of that description involves the impugned expression of opinion as to the décor. Her description has a reasonable *nexus* to the ancillary claim, are relevant and probative of collateral issues. The words are neither offensive nor inadmissible.

[44] Mr. Ken Boyea submitted that all references to bills and works be struck from paragraph 19. He contended that they are offensive or inadmissible for other reasons. Mr. Luke Boyea rejoined that the only such reference appears in the first 3 sentences, which state:

‘Once more, I oversaw most of the renovation as I worked from home. The Defendant mainly oversaw the roof, paid the bills, for example the contactors, workmen, material etc. I dealt directly with the workmen and their execution of the works.’

This is not refuted by his father.

[45] The younger Boyea submitted that paragraph 19 must be read in light of the paragraphs which follow, where the renovation works are detailed. He argued that the reasonable inference must be that the bills relate to such works and that copies of those bills were disclosed. He submitted that this evidence is relevant to the issue of whether he acted to his detriment in reliance on his father’s words and conduct. I agree that this could be so and that they are therefore relevant and probative. I do not find that the references to those bills are offensive or inadmissible.

[46] Paragraphs 28 and 29 of Ms. Joseph’s witness summary are attacked by Mr. Ken Boyea on the same grounds. In relation to paragraph 29 he objects to all references to ‘loan for a large sum of money’ (part of the 7th sentence). Paragraph 28 states (the 2nd and 3rd sentences):

‘28. He overspent behind the Defendant’s back and was untruthful about a number of money related and other matters. Additionally, you must remember the Claimant kept jerking the Defendant around regarding assigning the Defendant his proper shares in the company.’

[47] The son submitted that there is no dispute that his father was heavily indebted. He contended that this has been pleaded and further that he disclosed a deed of further charge #1015 of 2011 which supports the allegation that his father borrowed a large sum of money in 2010. He argued that this supports and is relevant to his assertions that his father was overspending and displayed lack of prudence in his financial dealings. He submitted that they are pleaded at paragraphs 8 and 9 (xii) and (xiii) of his defence.

- [48] Once again, I accept that Mr. Luke Boyea has made this matter a part of his claim. The related assertions are relevant to the case pleaded and the determination of the issue of the alleged proprietary estoppel. I find that the referenced sentences are not offensive or admissible as claimed.
- [49] The last sentence in paragraphs 30 and 32 of Ms. Joseph's witness summary state respectively:
 'The Defendant felt that he was being used by his father, who kept overspending while he had stressful days and sleepless nights trying to figure out how to keep all the bills, salaries etc paid reference to loans and mortgages'.
 'I know that the Defendant warned his father before he quit, that he, the Claimant would lose not only his house but also his businesses because of his frivolous spending and bad management style and it came to pass.'
- [50] In response to his father's objection to those statements, Mr. Luke Boyea argued that based on her personal knowledge, Ms. Joseph is expressing her belief at paragraph 30 about how he felt. He submitted that at paragraph 32 she was merely stating facts of which she was aware.
- [51] The impugned statement at paragraph 30 seeks to speak to Mr. Boyea's state of mind and the reasons for such state. This is not permissible. The offending statements must be struck out. Paragraph 32 contains material which may be inadmissible hearsay. In the present format, the court is unable to make a determination about whether it is admissible. This is an issue which can be more appropriately dealt with after cross-examination. In any event, neither party addressed the court on that issue. I make no order striking it out.
- [52] Paragraph 33 contains the following statements:
 'When the Claimant was comfortable and secure in his Ratho Mill home, he had no desire to take the subject property from the Defendant, presumably because he had no need for it. I do believe that his action in bringing possession proceedings against the Defendant is unfair, especially having regard to the considerable money, time and energy that the Defendant has invested in it, and all with the Claimant's knowledge and without any

objection by him.’

[53] Mr. Luke Boyea defends them as being admissible. Regarding the first sentence, he submitted that his father expressed similar sentiments in paragraph 6 of his statement of claim and therefore has no valid grounds for objecting to Ms. Joseph’s assertion of this. He argued that the second sentence is Ms. Joseph’s personal opinion of his father’s conduct, for which she provides a justification. He contended that she is permitted to give her opinion. He relied on dicta from the **Mable Phillips case** which has already been referenced.

[54] In the court’s estimation, the first sentence is clearly an attempt by the proposed witness to describe Mr. Ken Boyea’s state of mind. She is not permitted to venture into that territory. The court will not entertain such musings and must be struck. The second sentence is indeed an expression of her opinion which she may proffer for the court’s consideration. It is neither offensive nor otherwise inadmissible. No order is made striking it out.

Luke Boyea – Witness statement

[55] Luke Boyea’s witness statement was filed on 7th April 2020. Mr. Ken Boyea objects to paragraphs 21 and 27¹⁰. He submitted that no deed was identified or disclosed in relation to the last two paragraphs (sic). Presumably, he meant the last two sentences. Paragraph 21 states:

‘While the Claimant had, for years before making this statement, routinely referred to the subject property as “Luke’s House” and behaved as if the subject property were already mine, and although I considered it my property, this was the first time that he categorically said that he had given the subject property to me. Notwithstanding, the subject property was still in the Claimant’s name. So I told the Claimant that he needed to transfer the property into my name and the Claimant assured me that he would do so. In fact, he told me to arrange for the preparation of the deed to facilitate the transfer. I subsequently engaged Ms. Paul a David to prepare the deed transferring the subject property into my name.’

[56] Mr. Luke Boyea countered that this paragraph must be read along with paragraph 28, which

¹⁰ See Lynette Jameson’s affidavit, para. 4.

addresses what has become of the deed and in whose possession it may be. In that paragraph he alleged that he left the deed with his father. He argued further that the contents of this paragraph are relevant to the issue of proprietary estoppel. When paragraphs 28 and 21 are read together, further context is provided which is missing if paragraph 21 is read on its own. I accept that together those paragraphs are relevant and are not offensive as alleged or otherwise inadmissible. No order is made striking out paragraph 21.

[57] Paragraph 27 of Mr. Luke Boyea's witness statement states:

'When I left the company at the end of 2010, it was precipitated by the Claimant getting a valuation of his operations and assets by the companies' Auditor, Mr. Peter Alexander. As usual with the Claimant, he read what he wanted into the report. Valuations typically provide a spectrum, and in this case it did. Essentially the report showed that the company was worth, at one end, the minimum value which would anticipate the disposal of assets, paying off loans etc. This value was something in the region of \$5M. At the upper end was the value which was in excess of \$30M. The valuation was important because at this point, I had had enough of the Claimant and his random, ego driven decision-making so I had given him an ultimatum on my continued involvement. The Claimant used the valuation basically to justify his decision making and to deny the share promised since in his eyes he didn't really need me. It turned out that, by 2015, the Claimant had run the businesses so far into the ground that he could not even recover \$5M.'

[58] Mr. Ken Boyea contended that no valuation was identified and further that the entire paragraph constitutes hearsay. His son conceded that the valuation is not in his possession and he is therefore unable to produce it. He did not indicate in whose possession it was. This paragraph is best left for consideration until after cross-examination of Mr. Ken Boyea and his son. At that stage, more details would quite likely have been elicited. The information outlined in it is relevant. I make no order striking it out at this stage.

[59] Mr. Ken Boyea included submissions relative to paragraph 28 of Luke Boyea's witness statement. This is not mentioned in his application. This belated and un-pleaded objection is therefore disregarded.

Martin Joseph – Witness summary

[60] The older Boyea objected to paragraph 10 of Mr. Martin Joseph's witness summary¹¹. There, Mr. Joseph's proposed testimony states as follows:

'I cannot remember the Claimant playing any part in the works that were being done. It was only the Defendant who seemed concerned about what was happening at the subject property. He was the person who did the hiring of the contractors and who the contractors consulted on all matters related to the construction work being done to the subject property. If there were questions that needed answers, changes that needed approval and costs that required sanction, the Defendant was the go-to-person without exception.'

[61] Mr. Ken Boyea submitted that this paragraph offends CPR 29.5(1) (e). His son rejoined that the paragraph cannot be read in isolation but must be considered in light of paragraph 11 which states:

'I was not the Defendant's accountant at the time that the Defendant renovated the subject property, but I was the person in charge of the finances of the Claimant's businesses and, as such, I can say categorically, that the renovations were not paid for by the Claimant's businesses. I verily believe that the renovation works done on the subject property were financed by the Defendant. I say this because it was the Defendant who was ordering the materials, communicating with the contractor and generally directing the nature of the works to be done.'

[62] Mr. Luke Boyea argued that paragraph 11 details Mr. Joseph's source of information and the basis of his belief. He submitted that it can be inferred that he makes the statement from his own personal knowledge. He reasoned that the fact that he (Joseph) worked closely together with him (Boyea) bolsters this contention. He submitted that the statements are admissible. He cited the **Mable Phillips** decision in support and argued that a similar approach was taken in that case.

[63] A court called upon to decide whether a particular bit of information or proposed testimony is admissible court is required to consider whether it is relevant and probative of any of the alleged

¹¹ Filed on 7th April 2020.

facts. A witness can state what he observed and what he believes based on the information available to him. It is for the court to decide what weight to give to each bit of evidence.

[64] In the **Kelsick v Kuruvilla** case, the learned presiding judge remarked:

'An ordinary witness (as opposed to an expert) will also in appropriate cases be able to give evidence of matters which may appear to be an expression of opinion if the matter is one in which they may be experienced in. ... Ultimately, it will be an issue of what weight can be attached to the evidence. ... Evidence will sometimes be allowed as part of the narrative if it helps explain some other aspect of the evidence which is directly relevant.'⁷

[65] Paragraph 10 of Mr. Joseph's witness summary contains relevant statements of his observations and opinion formed in reliance on them. They are neither offensive nor otherwise inadmissible. I make no order striking them out.

Costs

[66] Mr. Luke Boyea has prevailed at this round of the proceedings. He is entitled to recover costs to be assessed if not agreed¹². He must file his application and supporting affidavits on or before December 15th, 2020.

ORDER

[67] It is accordingly ordered:

1. Shiva Joseph's witness summary is amended by excising the:
 - (a) second clause of the final sentence in paragraph 6;
 - (b) penultimate and final sentences in paragraph 11;
 - (c) second sentence in paragraph 12;
 - (d) penultimate sentence in paragraph 19;
 - (e) last sentence in paragraph 30; and
 - (f) first sentence in paragraph 33.
2. No order is made excising from:

¹² Pursuant to CPR 65.11.

- i) Shiva Joseph's witness summary the:
 - (a) penultimate and final sentences in paragraph 7;
 - (b) second sentence in paragraph 8;
 - (c) second sentence in paragraph 9;
 - (d) first four sentences in paragraph 10; or the impugned part of the 5th sentence in paragraph 10;
 - (e) 4th sentence in paragraph 12;
 - (f) first 3 sentences in paragraph 19;
 - (g) impugned part of the 5th sentence in paragraph 21;
 - (h) 2nd and 3rd sentences in paragraph 28;
 - (i) impugned part of the 7th sentence in paragraph 29;
 - (j) last sentence in paragraph 32; and
 - (k) second sentence in paragraph 33;
 - ii) Luke Boyea's witness statement:
 - (a) paragraph 21;
 - (b) paragraph 27;
 - (c) paragraph 28; and
 - iii) Paragraph 10 of Martin Joseph's witness summary.
3. Mr. Ken (Ormiston) 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 December 15th 2020.

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

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar