

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2018/0009

BETWEEN:

CLIVE CRICK

Appellant

and

[1] NORRIS LEWIS
[2] JOAN LEWIS

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams and Ms. Dannielle France for the Appellant
Dr. Linton A. Lewis for the Respondents

2021: January 12;
February 25.

Civil appeal – Cross examination - No accepted documentary evidence in court below – No independent witnesses - Whether learned trial judge erred in that, having established that the outcome of the case hinged on credibility, failed or refused to permit counsel for the appellant to pursue a line of cross-examination of the respondents intended to put in doubt their credibility – Rule 29.10 of the Civil Procedure Rules 2000 - Latitude to be given to counsel during cross-examination – Evidence elicited in cross-examination may be relevant to the witness' credit despite not being directly relevant to issue before court – Latitude to be given to counsel during cross-examination where there is no independent witnesses or admissible evidence – Rule 29.1 of the Civil Procedure Rules 2000

The second respondent, Joan Lewis and her husband, Norris Lewis, the first respondent, instituted proceedings against the appellant, Clive Crick (who is the second respondent's brother) for \$57,500.00. The respondents claimed in the court below that they had sent the said sum over a number of years from England to the appellant in Saint Vincent and the Grenadines ("Saint Vincent"), to conclude the purchase of land on their behalf in Saint Vincent. However, the land was never purchased and the money was never returned. The appellant denied the claim and averred that only some of the money which the respondents claimed to have sent to him was in fact sent and for a purpose unrelated to any land purchase.

The case was tried in the High Court and there being no documentary evidence accepted by the trial court or no independent witnesses, the outcome of the case was determined by the court based on whose evidence the trial judge believed. The trial judge preferred the evidence of the respondents over that of the appellant and gave judgment in favour of the respondents. The appellant, being dissatisfied with the decision of the learned trial judge appealed on four grounds of appeal, later only relying on his first ground of appeal. The main issue which arises for determination before this Court is whether the learned trial judge erred in that, having established that the outcome of the case hinged on credibility, failed or refused to permit counsel for the appellant to pursue a line of cross-examination of the respondents intended to put in doubt their credibility.

Held: allowing the appeal; setting aside the orders of the learned trial judge; ordering a retrial in the High Court before a different judge; and ordering that each party bear its own costs on the appeal and in the court below, that:

1. Rule 29.10 of the **Civil Procedure Rules 2000** ("CPR") gives latitude to counsel cross-examining an opposing witness to question him or her on statements made in his or her witness statement even though not even a part of the statements was referred to in the witness' evidence in chief. Further, this rule does not restrict counsel to asking only questions arising from statements made in the witness' witness statement. The trial judge in the court below adopted a very narrow view of the scope of cross-examination, consistently ruling that counsel could only ask a witness a question under cross-examination if the question was on an issue which was addressed in his client's statement of case or witness statement. This approach is contrary to CPR 29.10 which in fact enlarged, and not narrowed, the scope of cross-examination. The trial judge accordingly erred.

Rule 29.10 of the **Civil Procedure Rules 2000** applied.

2. Evidence given in court, whether elicited in examination-in-chief, cross-examination or re-examination, should be relevant to the issue or issues before the court. Evidence elicited in cross-examination, however, may be relevant to the witness' credit, even though not directly relevant to the issue or issues before the court. The trial judge restricted cross-examination of the witnesses to questions which she determined were relevant only to the matters in issue between the parties and/or matters which were addressed in the opposing party's statements of

case or witness statements. This prevented counsel for the appellant from testing the credibility of the second respondent and from seeking to establish that her motive for filing the case against the appellant was not to recover money that he owed to her and her husband, but in furtherance of the animus which she had developed towards him on account of a dispute over family lands. It follows that the trial judge did err in her approach.

Phipson On Evidence 14th Edition applied; **Hobbs v Tinling (C.T.) and Company, Limited** and **Hobbs v Nottingham Journal, Limited** [1929] 2 K.B. 1. applied.

3. In cases where there were no independent witnesses or admissible documentary evidence, and which therefore turned entirely on the credibility of the parties, it is of the utmost importance for counsel to have the latitude to cross examine opposing witnesses on issues of credibility, even though not directly relevant to the issue or issues being tried by the court, and even though not addressed in the party's statements of case or witness statements. Insofar as the trial judge did not give this latitude to counsel, and in fact directed witnesses not to answer questions posed by opposing counsel or disallowed the questions from counsel even when the questions were relevant to the credibility of the witnesses, she fatally erred in the exercise of her powers under rule 29.1 of the CPR to control the evidence given at trial.

Rule 29.1 of the **Civil Procedure Rules, 2000** applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against a judgment of a trial judge dated 30th July 2018 ordering the defendant (who is the appellant in this appeal) to pay to the claimants (who are the respondents in this appeal) the sum of \$57,500.00, together with judgment interest and prescribed costs.

Background

- [2] The setting is a not untypical one in the Caribbean, particularly in the latter half of the last century. A locally-based Caribbean family with a British-based family member who sends his or her 'highly-valuable English money' to a local relative to undertake some task for him or her. All seems well until a not-unusual family land dispute breaks out, dividing members of the family. The appellant and the second respondent in this case, a brother and a sister, end up on different sides of the

land dispute and litigation ensues, including this case in which the second respondent and her husband, the first respondent, instituted proceedings against the appellant for \$57,500.00 which they (the respondents) say they had sent from England to the appellant in Saint Vincent and the Grenadines (or “Saint Vincent”) to purchase a portion of land for them, but the land was never purchased and the money was never returned. The appellant denied the claim and averred that only some of the money which the respondents claim to have sent to him was in fact sent and for a purpose unrelated to any land purchase. The case was tried in the High Court and, there being no documentary evidence accepted by the trial court or no independent witnesses, the outcome of the case was determined by the court based on whose evidence the trial judge believed - the evidence of the respondents (as the claimants in the court below) or the evidence of the appellant (as the defendant in the court below). The trial judge preferred the evidence of the respondents over that of the appellant and gave judgment in favour of the respondents. The appellant appealed.

The appeal

[3] The appellant’s notice of appeal, filed on 11th September 2018, contained four grounds of appeal, as follows:

- (1) The learned trial judge having appreciated that the matter was one which hinged on the question of credibility erred in failing and or refusing to permit the parties to answer in cross-examination questions to establish that the sole purpose of the claimants bringing the action was because of a property dispute they are engaged in.
- (2) The learned trial judge erred in finding that the motive behind the respondents filing the claim against the appellant was irrelevant.
- (3) The learned trial judge erred in finding that the respondents transferred the sum of £6,000.00 to the appellant on just the mere say so of the [respondents] and without having a single shred of supporting evidence to support such a transfer.

(4) The learned trial judge erred in finding that the appellant held the sum of £11,500.00 on a resulting trust for the respondents and as such the claim was not capable of being statute barred under the provisions of the Limitation Act.

[4] On 21st August 2020, the appellant filed written submissions in support of his appeal. In the submissions, the appellant stated that his first three grounds of appeal could be conveniently rephrased into a single ground, as follows:

“The Learned Trial Judge erred in not appreciating that credibility was an important and central issue at the trial and unfairly restrained the Appellant from giving conflicting evidence to the Respondents which would have impugned their credibility.”

He also stated that he was withdrawing his fourth ground of appeal.

[5] On 25th September 2020, the respondents filed written submissions in response to the appellant's submissions. In their submissions, the respondents opposed the appellant's reliance on the rephrased ground of appeal, which ground they alleged fundamentally contradicted the appellant's first ground of appeal, and they responded to the first three grounds of appeal contained in the notice of appeal. The respondents did not respond to the fourth ground of appeal which the appellant stated in his submissions that he was withdrawing.

[6] On 2nd November 2020, the appellant filed a notice of application, with affidavit in support, seeking the Court's permission to rely on his rephrased ground of appeal, and on 17th December 2020 he filed written submissions in support of his application. At the case management conference on 15th December 2020, the court set down the application to be heard together with the substantive appeal on 11th January 2020. On that date, however, the appellant withdrew his application and stated that he would argue the appeal on the first of the four grounds contained in the notice of appeal.

- [7] I do not consider that anything turns on whether the appellant was proceeding on the basis of his original ground one or on his rephrased ground; his submissions, and indeed the respondents' submissions in response, covered either or both grounds. The respondents' contention in their written submissions that the rephrased ground of appeal "fundamentally contradicted the first ground of appeal in the Notice of Appeal", was advanced on the basis that in the first ground of appeal the appellant said that the judge "appreciated that the matter was one which hinged on the question of credibility", whilst in the rephrased ground the appellant said that the judge "erred in not appreciating that credibility was an important and a central issue at the trial". But these two formulations were merely alternative ways to introduce the real issue that the judge did not allow the parties to answer questions under cross examination which bore on the issue of credibility, even though this was the deciding factor in the case.

Appellant's case

- [8] The appellant's argument, as contained in his written submissions in support of his appeal and his oral submissions at the hearing of the appeal, was essentially that the trial judge erred in that, having established that the outcome of the case hinged on credibility, failed or refused to permit counsel for the appellant to pursue a line of cross-examination of the respondents intended to put in doubt their credibility and, consequently, the reliability of their evidence, so that the court might find that they had not proved their case to the requisite standard.
- [9] Counsel for the appellant substantiated his argument by pointing the Court to several instances when the trial judge stopped the parties (particularly the second respondent) from answering questions posed by counsel (particularly counsel for the appellant).
- [10] The first instance occurred very early in Mr. Williams' cross-examination of the second respondent (who was the first witness in the case) when Mr. Williams was questioning the second respondent about her affection for her father, with a view

to advancing that the money sent by her from England to the appellant in Saint Vincent was sent for the purpose of repair and renovation of the home of her father whom she loved dearly. Although the second respondent had already responded affirmatively before the trial judge's intervention, the trial judge proceeded to say to Mr. Williams that he should get to the relevant issues because there was not a lot of time, clearly evincing thereby that she would pay no regard to the witness' response.

[11] Then when Mr. Williams was cross-examining the second respondent about her wealth, with a view to impugning her credibility arising from her testimony that she needed time "to put together" £11,500.00 to send to Saint Vincent to purchase land, the trial judge directed the witness not to answer the question and directed counsel to ask his next question.

[12] When Mr. Williams was cross-examining the second respondent on issues relating to the money which she said that she and her husband had sent to him to purchase land for them, the trial judge stopped Mr. Williams from proceeding with that line of cross-examination on the basis that it was not relevant to the issues that the court had to decide. Mr. Williams sought to persuade the trial judge to allow him to proceed with that line of questioning because it bore on the credibility of the second respondent, but the judge did not allow him to proceed because she said that the issue was not addressed in the appellant's defence or witness statement and so it does not arise for the court's determination. She then directed Mr. Williams to "get back to the central issues".

[13] When Mr. Williams was trying to cross-examine the second respondent about her residing at the appellant's home when she was in Saint Vincent for years after she claimed she had sent money to him which he did not use for the intended purpose or return to her (with a view to impugning her credibility) the trial judge directed her not to answer the question and directed Mr. Williams to ask the next question. Mr.

Williams tried in vain to persuade the trial judge that this issue bore on the credibility of the witness, but the trial judge remained unyielding.

- [14] When Mr. Williams sought to cross-examine the second respondent about her fall out with the appellant over a family land dispute, with a view to advancing the appellant's submission that the claim which the second respondent brought against him was motivated by ill will arising from the land dispute, the trial judge informed Mr. Williams that the questions he was asking did not form part of his client's case and that he would not be permitted to ask them unless he could direct her to somewhere in the appellant's defence or witness statement that these assertions were made.
- [15] The trial judge also stopped counsel for the respondents, Dr. Lewis, on two occasions when he was cross-examining the appellant on issues relating to credibility, and informed him, on the first occasion, that he could not ask a question in cross-examination if he had not set out the issue in the respondents' pleadings or witness statements. On the second occasion, the trial judge questioned the relevance of the line of cross-examination being pursued by Dr. Lewis, and when Dr. Lewis sought to persuade her of its relevance to the credibility of the witnesses, she informed him that his questions were not relevant to the issue which the court had to decide as to whether or not the respondents had sent money to purchase land, and she directed him to move on to the next question.
- [16] Although the two occasions just mentioned relate to the respondents' counsel cross-examining the appellant, they illustrate the mindset of the trial judge on the issue of cross-examination on credibility and also would have impacted Mr. Williams' ability to further his client's credibility arguments via re-examination.
- [17] Then, as the trial was nearing an end with Mr. Williams re-examining the appellant (who was the only witness for the defence) the trial judge stopped Mr. Williams from questioning the appellant about the issue of the money which the second

respondent said she had sent to him from England to purchase land for her (which was the central issue in the case) and told him that the issue did not arise and asked him whether he had any other question. Mr. Williams then - almost in frustration - concluded his attempts to advance his client's case on a credibility limb by responding to the trial judge with the words: "No My Lady, that's all".

Respondents' case

- [18] Counsel for the respondents, while himself manifesting displeasure with the trial judge when on two separate occasions whilst he was cross-examining the appellant she stopped him from asking questions bearing on credibility, nonetheless defended the trial judge's right to control and curtail the cross-examination of the second respondent by counsel for the appellant. In his submissions on behalf of the respondents, Dr. Lewis contended that the trial judge did not prevent the appellant's counsel from cross-examining the second respondent on matters bearing on her credibility and, in particular, her motive for bringing the claim against the appellant. Dr. Lewis contended too that, Mr. Williams was permitted to ask his questions and that, in any event, the information being elicited by Mr. Williams' questions was not relevant to the issue of whether the respondents had sent £11,500.00 to the appellant to purchase land for them. He also contended that the trial judge was very alive to the importance of witness credibility at the trial and quoted from paragraph 24 of the judgment to substantiate his contention. Of the respondents, the trial judge said: "They presented their evidence in a forthright and frank manner. Their demeanour throughout were at times pained and suggestive of candour. They struck me as credible witnesses." Of the appellant, the trial judge said: "Mr. Crick on the other hand was halting and seemingly evasive and unsure." She then concluded: "I prefer the Lewis' account to Mr. Crick's. I accept Mr. and Mrs. Lewis' oral testimony and find therefore that Mr. and Mrs. Lewis sent Mr. Crick monies as alleged – a total of £11,500.00 for the purpose of paying for a parcel of land at Prospect."

Discussion and analysis

- [19] On the issue of the latitude given to counsel in the cross-examination of opposing witnesses, the trial judge adopted a very narrow view of the scope of cross-examination. She consistently ruled that counsel can only ask a witness a question under cross-examination if the question is on an issue which was addressed in his client's statement of case or witness statement. The trial judge accordingly disallowed several questions asked under cross-examination (especially questions to the second respondent asked by counsel for the appellant) on the basis that the subject matter of the question was not specifically addressed in the pleadings or witness statement of the party whose counsel was asking the questions. And this even when the question had a direct bearing on the credibility of the witness.
- [20] This narrow view of the scope of cross-examination was supported by the respondents in their written submissions. At paragraph 25 of their submissions, the respondents state:
- “On the issue of cross-examination it must be noted that CPR 29.10 provides [that] if a witness is called to give evidence at trial, that witness may be cross-examined on the evidence as set out in his or her witness statement, whether or not the statement or any part of it was referred to during the witness' evidence in chief.”
- [21] Rule 29.10 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (“CPR”) gives latitude to counsel cross-examining an opposing witness to question him or her on statements made in his or her witness statement, even though not even a part of the statements was referred to in the witness' evidence in chief. This rule, however, in no way restricts counsel to asking only questions arising from statements made in the witness' witness statement. Indeed, if the rule was to be taken to mean that, a witness could not even be cross-examined on matters pleaded by him if he did not also set out the matters in his witness statement. CPR 29.10 in fact enlarged, and not narrowed, the scope of cross-examination.

[22] On the issue of relevance, which the trial judge used in disallowing certain questions placed to the witnesses in cross-examination, the legal position is that evidence given in court, whether elicited in examination-in-chief, cross-examination or re-examination, should be relevant to the issue or issues before the court. Evidence elicited in cross-examination, however, may be relevant to the witness' credit, even though not directly relevant to the issue or issues before the court.

[23] According to '**Phipson On Evidence**'¹ at paragraph 12.12:

"All cross-examination must be relevant to the issues or to the witness's credit. The object of cross-examination is twofold – to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witnesses."

The authors of **Phipson** said further in paragraph 12.12 that:

"...the witness may be asked [questions] not only as to facts in issue, or directly relevant thereto, but all questions which, though otherwise irrelevant, tend to impeach his credit in the manner provided."

At paragraph 12.20 the authors say:

"So, all questions may be asked in cross-examination which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the witness's testimony."

[24] In the consolidated cases of **Hobbs v Tinling (C.T.) and Company, Limited** and **Hobbs v Nottingham Journal, Limited**,² Scrutton L.J. in giving judgment in the English Court of Appeal, put it this way:

"When a witness has given evidence material to the issues in the case you can cross-examine him on matters not directly material to the case in order to ask the jury to infer from his answers that he is not worthy of belief, not a credible person, and therefore that they should not accept his answers on questions material to the case as true. This is cross-examination as to his credibility, commonly called cross-examination to credit."

¹ Fourteenth Edition, Page 245.

² [1929] 2 K.B. 1.

[25] The trial judge did err, therefore, when she restricted cross-examination of the witnesses - particularly the second respondent on whose evidence the respondents' case relied- to questions which she determined were relevant only to the matters in issue between the parties and/or matters which were addressed in the opposing party's statements of case or witness statements. This prevented counsel for the appellant from testing the credibility of the second respondent and from seeking to establish that her motive for filing the case against the appellant was not to recover money that he owed to her and her husband, which he said he did not owe, but in furtherance of the animus which she had developed towards him on account of a dispute over family lands on which they found themselves on opposite sides.

[26] In a case in which there were no independent witnesses or admissible documentary evidence, and which therefore turned entirely on the credibility of the parties, it was of the utmost importance for counsel to have the latitude to cross examine opposing witnesses on issues of credibility, even though not directly relevant to the issue or issues being tried by the court, and even though not addressed in the party's statements of case or witness statements. Insofar as the trial judge did not give this latitude to counsel, and in fact directed witnesses not to answer questions posed by opposing counsel or disallowed the questions from counsel even when the questions were relevant to the credibility of the witnesses, she fatally erred in the exercise of her powers under rule 29.1 of the CPR to control the evidence given at trial.

Conclusion

[27] The judgment must accordingly be set aside, but the case will have to return to the High Court for a fresh trial before a different judge.

[28] This is very unfortunate, because it prolongs a dispute between siblings which has its genesis in 1987 or 1988 when money was sent by a sister in England to her brother in Saint Vincent in an amount and for a purpose which are disputed

between the parties. If the parties are still alive and well 33 to 34 years later, then they should try to resolve their dispute amicably and try to pass their senior years in peace and harmony with each other, and without further dissipating their funds for payment of legal costs. The Court can, however, only express a hope and indicate a desire, but it cannot make an order. It is up to the parties to determine whether they will cause this matter to end with hugs at home or with trial in court; although in this COVID-19 environment neither may be immediately possible.

[29] As to costs, the order made by the trial judge for prescribed costs to be paid by the appellant to the respondents must obviously be set aside, but I do not propose to replace it with an order for the respondents to pay prescribed costs to the appellant. Instead, I will make no order as to costs in the High Court on a matter which is to be returned to that court for a retrial. Since the usual order for costs on appeal is that the losing party will pay to the successful party two-thirds of the amount ordered to be paid in the court below, and since no costs are to be paid in the court below, there will also be no order for costs to be paid by either party on the appeal.

[30] My order, therefore, is as follows:

- (1) The appeal against the judgment of the trial judge dated 20th July 2018 is allowed.
- (2) The orders made by the trial judge in the judgment are set aside.
- (3) The case is to be retried in the High Court before a different judge.

(4) The parties shall each bear their own costs, here and in the court below.

I concur.

Louise Esther Blenman

Justice of Appeal

I concur.

Gerard Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]