

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2008/0138

BETWEEN:

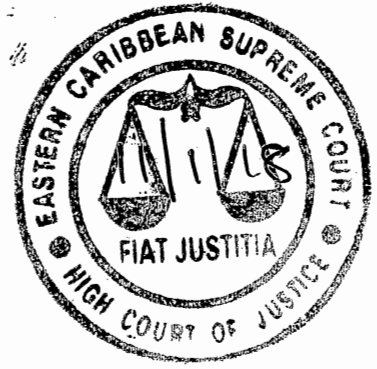
CARL DEFREITAS

CLAIMANT

and

R & R INVESTMENTS

DEFENDANT



Appearances:

Mr. Emery Robertson Snr. for the claimant, with him,
Ms. Samantha Robertson and Ms. Maia Eustace;
Ms. Patina Knights for the Defendant.

2018: Jan. 11

ORAL DECISION

[1] **Henry, J.:** This is an application by the claimant Carl DeFreitas, made orally on the 11th day of January, 2018. Mr. DeFreitas has applied to the court for an order permitting him to recall a witness (Errol Sutherland) who filed a witness statement in this matter on the 26th of April 2010. Subsequently on the 7th of May 2010, on application made by the claimant it was ordered among other things that:

'The witness Errol Sutherland shall testify in this matter as an expert witness.'

[2] It is not clear from the court's record how that order arose. I am unable to locate any notice of application made by the claimant in respect of the order which was made on the 7th of May 2010. I note that the order does not have the name of the judicial officer who made it but it was filed on the

29th of June 2010 and signed off by someone who appears to be the Registrar. As I indicated previously, I am unable to verify the date that a Notice of Application for the appointment of Mr. Errol Sutherland as an expert witness was filed.

- [3] In any event, on the 26th of September 2017 Mr. Errol Sutherland was presented by the claimant as one of his witnesses and the court having reviewed the content of his witness statement observed and remarked that it did not comply with the stipulation set out in the Civil Procedure Rules part 32 relating to the format and content of expert witness reports; and in the circumstances refused to permit Mr. Errol Sutherland to give testimony as an expert. He departed the court and the claimant proceeded with his case and closed his case. The defendant presented its case and this morning closed its case.
- [4] The application which is presently before the court was made at the end of the case for the defendant. In fairness to the claimant, I must say that the claimant on the morning of January 11th 2018 indicated that there was a house-keeping matter which he wished to bring to the court's attention, namely that he proposed to make an oral application for the witness Errol Sutherland to be recalled. The court indicated that it would entertain the application later in the day having enquired of learned counsel Mr. Emery Robertson Snr. whether or not he had indicated to counsel for the defendant that the claimant proposed to take that course.
- [5] At the close of the case for the defendant, the court rose to enable the parties to have their morning ergonomic break and also to give them an opportunity to discuss how they intended to proceed in relation to this issue. When court resumed sitting, learned counsel Mr. Emery Robertson for the claimant proceeded to make an oral application for an order permitting the claimant to recall Errol Sutherland not as an expert witness but as an ordinary witness. In his oral application, learned counsel Mr. Robertson submitted that the court should have regard to CPR 29.8 (1) which stipulates that a party must call a witness who has given a witness statement.
- [6] CPR 29.8 (1) reads if a party:
- (a) Has served a witness statement or summary; and

(b) wishes to rely on the evidence of that witness;
that party must call the witness to give evidence unless the court orders otherwise.

[7] I hasten to add that this rule has been already complied with in the case of Mr. Errol Sutherland because he was called by the claimant on the 26th day of September 2017. Learned counsel Mr. Emery Robertson submitted further that it is possible to recall the witness to give rebutting evidence. The court acknowledges that this is so.

[8] Mr. Robertson contended that the claimant is asking the court to make an order in the terms indicated. He argued that it would not be prejudicial to the defendant who had notice and it would be in the interest of the administration of justice for the testimony of Mr. Sutherland to be adduced specifically in respect of how many sheet metals were on the land and their value. He submitted that assuming that the court finds in favor of the claimant, hearing Mr. Errol Sutherland at this juncture would obviate the need for further assessment of damages.

[9] Learned Counsel Mr. Robertson relied on Blackstone's Civil Practice 2009 Edition which I think is repeated and captured in the 2013 Edition of Blackstone's Civil Practice which I have. I will proceed to read from the top of that paragraph and not from where the claimant took their excerpt. It reads:

'As a general rule of practice rather than law, a party should adduce all the evidence on which he intends to rely before the close of his case. The authorities [which are almost all criminal cases] indicate that there are two common law exceptions to the general rule and a wider discretion to be exercised outside the two exceptions only very rarely. Under the first exception evidence is allowed in the rebuttal of matters arising ex improviso.'¹

[10] This is not the exception on which the claimant relies. The exception on which the claimant relies is referred to immediately after and I shall quote the learned authors of Blackstone's Civil Practice where they state:¹

¹ para. 47.54, Blackstone's Civil Practice, 13th ed.

'Under the second exception, the judge has a discretion to admit evidence which has not been adduced by reason of inadvertence or oversight.'¹

[11] This is the exception on which the claimant in this case relies. So the claimant is saying that Errol Sutherland was not called to testify as a witness due to inadvertence or oversight; that is what the court must focus on in deciding whether or not to permit the claimant to recall Errol Sutherland to give evidence, not as an expert but as an ordinary witness.

[12] I continue to quote the learned authors who have some very significant observations to make:

'The evidence is usually of a formal and uncontentious nature. (see *R v Waller* [1910] 1 KB 364; *Price v Humphries* [1958] 2 QB 353...) It had been held that judge's discretion to admit evidence after the close of a party's case is not confined to the two well-established exceptions, but the wider discretion should be exercised only on the rarest occasions. (*R v Francis* [1991] 1 WLR 1264 as when an important witness arrives late for reasons beyond his/her control (see e.g. *James v South Glamorgan County Council* (1994) 99 Cr. App R 321).'

'Although the exceptions to the general rule of practice are well-established, more recent authorities permit the court to take a generalised discretionary approach to admissibility having regard to whether the defendant will be unfairly prejudiced (as when the defence would have been conducted differently had the evidence in question been adduced at an earlier stage).

In *Jolly v the Director of Public Prosecutions* [2000] Crim LR 471 applied in *Cook v Director of Public Prosecutions* [2001] Crim LR 321 it was said to be 'beyond argument' that there is a general discretion to permit the prosecution to call evidence after closing its case. Before exercising the discretion, the court would look carefully at the interests of justice overall and, in particular, the risk of any prejudice whatsoever to the defence. The result is that the discretion would be sparingly exercised but it is doubtful whether it assists a court to speak in terms of 'exceptional circumstances'.

Each case must be considered on its own facts. In civil cases, where obviously regard must be had to the overriding objective, a broadly similar approach has been adopted. In

Stocznia SA v Latvian Shipping (2000) LTL 12/2/2001 the claimants, after the close of the trial but before judgment had been handed down, sought to adduce further relevant evidence, namely, a document which ought to have been disclosed by one of the defendants and which the claimants could not have obtained by other means. It was held that the claimants could rely on the document and that, in accordance with the overriding objective, it would not be just to ignore it.¹

- [13] So in that latter case, the court made its decision relying on the measure of relevance. As I indicated before, this court has to determine whether or not the claimant has made out its claim that the witness Errol Sutherland was not called before he closed his case, due to inadvertence or oversight. As is generally the case when an oral application is made the claimant was unable to adduce any evidence in support of his oral application and so he was unable to establish that Errol Sutherland was not called, or alternatively, that the application was not made before the close of his case due to inadvertence or oversight. I noted earlier that Errol Sutherland had in fact been called.
- [14] It does not escape the court's attention that the claimant is represented by three lawyers one of very senior years in the person of learned counsel Mr. Emery Robertson Snr., Ms. Samantha Robertson - not of that many years call, but who has been practising in the courts in Saint Vincent and the Grenadines for upwards of ten years - and Ms. Maia Eustace - somewhat junior but who has her own years of experience, before the court. I say that to illustrate or to make the point that the claimant having been informed and given notice of the trial date would have through his lawyers prepared his case, reviewed the relevant Civil Procedure Rules which apply to any witness statements which he intended to rely on, familiarized himself no-doubt that the witness statement of Errol Sutherland did not comply with Civil Procedure Rules Part 32; and having done so would have come up with one or more options as to how to deal with the potential of an order by the court to exclude Errol Sutherland's testimony as an expert witness.
- [15] Having taken those options under consideration, the claimant would have been poised, in those circumstances, by the very latest on September 26th 2017 to make an application of the nature

which is now presented. It failed to do so without any explanation. I am unable to find on the material which is before the court that there is any basis on which the court can conclude that the failure to make this application to have Errol Sutherland called as an ordinary witness before the close of the defendant's case was an oversight. I take into account also that an order granting the claimant leave to recall Errol Sutherland at this stage could prejudice the defendant unfairly, and if not, would open the court to be faced with an application by the defendant to call other evidence, this application having been made at this juncture.

[16] The court noted earlier *en passant*, and it bears repeating, that this matter was scheduled for the 26th of September 2017 on which date the trial proceeded, it was adjourned to October 3rd 2017 and that trial date had to be vacated due to the unavailability of the Director for the defendant who had to leave the State to attend to a medical emergency. Finally, it was set down to today's date. It is just after 12:00 in the State of Saint Vincent and the Grenadines. The parties have had adequate time between the 3rd of October 2017 and today to make any application in writing supported by evidence. This was not done.

[17] The defendant has submitted that the evidence of Errol Sutherland is neither formal nor uncontentious. The testimony which Errol Sutherland is projected to give is very short and I think that it is important for me to read it; it consists of just five paragraphs. It reads:

1. I, Errol Sutherland, of Prospect in Saint Vincent and the Grenadines, am the Managing Director of Sea Operations (SVG) Limited. Except where I indicate otherwise, I make this Witness Statement from my own personal knowledge.
2. As Managing Director of this company I am involved in building wharfs and deal in steel sheet piles in the area of my work.
3. Sometime in 2006 I inspected 22 steel sheet piles 20 feet in length at the area where Mr. Carl DeFreitas was doing some reclamation of land from the sea in the vicinity of Ratho Mill.
4. The steel sheet piles had minor corrosion with some brush blasting and I estimate the value in this condition to be 15% less than the market value at that time.

5. The current market value at the time stood at \$325.00 USD per foot making the value USD \$276.25 per foot, making a total value \$121,550.00 USD.'

- [18] I observe in respect of paragraph 4 of the witness statement of Errol Sutherland filed on 26th April 2010, that the witness is seeking to ascribe an estimated value of steel sheet piles without giving a basis on which he is arriving at that estimation. He is also seeking to set out in (paragraph 5) the current market value. I have not seen any exhibits attached to the witness statement in relation to paragraphs 4 and 5. In those circumstances, it is very doubtful that this witness would have been permitted in any event, to give evidence as set out in paragraphs 4 and 5 of his witness statement. Paragraphs 1, 2, 3 as they stand do not advance the claimant's case beyond where it stands presently.
- [19] In all of the circumstances, I take under consideration the statements which I read previously from Blackstone's Civil Practice where the learned authors stressed that while the court has a wide discretion to allow a party to recall a witness after the close of their case, and even just before judgment, that the court does so primarily in two exceptional cases and that beyond that it is very rare to permit this. The court in exceptional circumstances - I use that word guardedly and advisably having regard to what I read previously - the court would consider the relevance of the material which the proposed witness is seeking to adduce.
- [20] The court also takes into account the prejudice to the other party. As I indicated, the vast majority or the most substantial part of the evidence foreshadowed in Mr. Sutherland's affidavit is open to objection by the defendant and if the defendant does not object to it, open to being struck out under the court's discretion for the reasons I have signaled before.
- [21] Moreover, the court takes into account that the witness Errol Sutherland was called before and this is not a case where there appears to be or where the court can infer reasonably that there was oversight or inadvertence.
- [22] The claimant demonstrated from day one that he wanted to call this witness; he had proceeded with this matter relying on the witness' testimony as an expert. I can find no evidence, no shadow

of evidence; I can draw no inference from all the circumstances which would lead me to conclude that there was some oversight or inadvertence, in all the circumstance of this case. I find that it would be unjust to permit the claimant to recall Errol Sutherland.

ORDER:

[23] It is accordingly ordered:

1. The claimant's application for leave to recall Errol Sutherland as a witness is dismissed.
2. The court has carriage of this order.



Esco L. Henry
HIGH COURT JUDGE

By the Court

REGISTRAR'S OFFICE
ST. VINCENT AND THE GRENADINES
Chelene L. Dargles
Deputy Registrar