

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 1200 of 2011 (No. 1)

BETWEEN

MICHAEL STALLARD

CLAIMANT

AND

**MARK BISHOP
GILLIAN BISHOP
MB & GB HOLDINGS LTD**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2019: February 13

**Mr. Ivan A. Alert, Attorney-at-Law for the Claimant.
Mr. Alvin D. Bryan, Attorney-at-Law for the Defendants.**

DECISION

Introduction

[1] The sole issue for determination is whether the Court should permit the recall of the Claimant for further cross-examination by counsel for the

Defendant. Paragraph 1 of the Notice of Application, filed on 02 November 2018, asks that the Claimant be recalled “to be re-examined”. The Court understands this to mean further cross-examination of the Claimant.

Background

[2] The trial of this case commenced on 24 February 2014. The Defendants were represented then by other counsel. The Claimant’s case was closed on 11 December 2014, after nine days of trial. Nine witnesses, including the Claimant, gave evidence on his behalf. Thereafter, the Defendants parted company with their counsel, and multiple adjournments ensued. The Defendants attempted self representation, however, further adjournments were granted to allow the Defendants to retain other counsel.

[3] New counsel entered an appearance on 14 June 2016. This was followed by a number of unsuccessful applications on behalf of the Defendants, including a call for the recusal of the presiding Judge. Trial of the matter eventually recommenced on 15 October 2018, nearly four years after the Claimant closed his case.

[4] While the First Defendant was giving oral evidence, his counsel sought the admission of his two witness statements. Counsel for the Claimant objected to these documents, and painstakingly set out all of his objections. The gravamen of the objections was that the witness statements raised issues that

were never put to the Claimant when he was cross-examined by previous counsel for the Defendants.

[5] Counsel for the Defendants conceded that the objections to the First Defendant's witness statements were sound. He was granted leave to file an application seeking the recall of the Claimant for further cross-examination.

[6] Understandably, the Claimant objects to being recalled. His counsel submitted that the Defendants had many years over which to prepare their case. The failure of their previous counsel to cross-examine the Claimant was a deliberate strategy and not an oversight on their part. And any further delays to the proceedings would be prejudicial to the Claimant.

[7] In an affidavit filed on 02 November 2018, the First Defendant deposed as follows:

“3. In order for my case to proceed justly, it is very important that the Claimant be recalled as a Witness so that the specific issues regarding Mr. Alert's objections can be put to him in order for my Attorney to resume questioning of myself. Failure to do so would result in jeopardizing the entire defence of the case.

4. It is because of this material omission and or error of my former Attorneys-at-Law not putting my case to the Claimant that I make this Affidavit so as to seek the Court's permission to recall the Claimant as a Witness.

5. It would be....unjust and [an] injustice for my case to proceed without having the Claimant be recalled as a Witness in order to properly address Mr. Alert's objections vis-à-vis having the case put to the Claimant".

[8] The Notice of Application, filed on 02 November 2018, prayed in aid Part 29 of the Supreme Court (Civil Procedure) Rules 2008, and the Overriding Objective in these Rules. Counsel for the Defendants predicts a miscarriage of justice if the Claimant is not recalled for further cross examination, as it would place the Defendants in legal jeopardy and on an unequal footing with the Claimant. Counsel for the Defendant also relied on section 43 of the Evidence Act, Cap.121.

Analysis

The Evidence Act, Section 43.

[9] Section 43 of Cap.121 provides that:

“Where a party adduces evidence

(a) that contradicts evidence already given in examination-in-chief by a witness called by some other party; or

(b) about a matter as to which a witness who has already been called by some other party was able to give evidence in examination-in-chief,

and the evidence adduced has been admitted, the court may, if the first mentioned party did not

cross-examine the witness about the matter to which the evidence relates, give leave to the party who called the witness to re-call the witness to be questioned about the matter”.

[10] Section 43 is similar to section 46 of the Australian Northern Territories Evidence Act 2008. Odgers informs that this Australian provision:

“.....permits a witness to be recalled where there has been a failure to cross-examine the witness in specific circumstances. It does not preclude the recall of a witness on some other basis. It overlaps with the common law rule of fairness usually referred to as the rule in **Browne v. Dunn (1893) 6 R 67**. It has been held that “the rule in **Browne v. Dunn** remains alive and well under the regime of evidence law introduced by the Evidence Act 1995.” (See Stephen Odgers, “Uniform Evidence Act”, 12th ed. at para. EA 46.60).

[11] In the Australian case of **Reid v. Kerr (1974) 9 SASR 367**, at 374-375,

Wells J. observed that:

“Speaking generally, it is essential to the fair conduct of a trial that a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witness.

...As a corollary to this, it must also be borne in mind that where it is intended to suggest that a witness is not speaking the truth on a particular matter, his attention should be drawn to what is going to be suggested about it, so he may have an opportunity of explanation”.

The learned Judge also stated that the common law rule required a cross-examiner to put to the witness so much of his own case as concerns that witness or on what the witness will give evidence.

[12] The rule in **Browne v Dunn** has been applied in both criminal and civil cases in commonwealth jurisdictions. (See **Franklyn Yarde v. R, B'dos Crim. Ap. No.22 of 2000, decision dated 16 October 2002**, at paras. [29] to [32]; **Boyce v. The Queen, B'dos Crim. Ap. No.35 of 2001, decision dated 25 March 2003**, at paras. [10] and [11]; and J.D. Heydon, "Cross on Evidence", 10th Australian ed. at p.606, para.17435).

[13] This Court is of the opinion that section 43 of Cap.121 would have been relevant to this case if the First Defendant's witness statements were admitted into evidence without objection. Had this occurred, it would have been open to counsel for the Claimant to request the recall of the Claimant to explain any areas of potential conflict, arising from the witness statements, that were not put to the Claimant during cross-examination. Section 43 does not come into play here as the witness statements are not yet in evidence, and counsel for the Defendants conceded that certain paragraphs in the statements were inadmissible at this time.

[14] Part 29 of the CPR is not relevant to the application before the Court.

[15] J.D. Heydon addresses the power to recall witnesses in his seminal text on the law of evidence. (Supra at para.[12]). He states that:

“The recall of a witness whose evidence is concluded is a matter requiring the leave of the trial judge. The overriding principle applying to that discretionary decision is whether the interests of justice require leave to be granted or refused...Ordinarily the interests of justice favour the grant of leave where the evidence sought to be adduced has been overlooked and the other party would not be prejudiced by the fact that the additional evidence is to be given after cross-examination and re-examination of the witness has been completed. On the other hand, sound reasons for rejecting the application might be found in the circumstances that counsel had deliberately refrained from leading evidence when the witness was being examined in chief in the hope of gaining some tactical advantage, or it appeared that the opposing party would suffer prejudice if leave were granted”. (Page 525 at para. 17075; see also “Phipson on Evidence”, 18th ed. at para.11-61).

[16] The decision to allow the recall of a witness is discretionary. It cannot be disputed seriously that the Defendants are largely responsible for many of the delays encountered since the trial commenced. This was due in part to the change of counsel at the close of the Claimant’s case. Even if previous counsel declined to put the Defendants’ case to the Claimant during his cross-examination, as a matter of deliberate strategy, new counsel may for good reason choose to disavow that strategy.

[17] If current counsel for the Defendants rejected the strategy of previous counsel, it was incumbent upon him to make the application to recall the Claimant at the earliest possible opportunity. The transcripts of the proceedings were available to new counsel. He had time to evaluate the Defendants' case, and to determine whether further cross-examination of the Claimant was crucial. Having conceded the several objections to the First Defendant's witness statements, counsel was also conceding that there was a lack of vigilance in the representation of the Defendants. It is for this reason that the Defence is now in jeopardy.

[18] This Court is called upon to balance the request to further prolong this case in order to afford the Defendants the opportunity to get their full case before the Court, against the Claimant's right to have his case heard in a reasonable time. This Court is on a slippery slope fast approaching a grave injustice to the Claimant. On the other hand, the Defence will be compromised if the Defendants are not permitted to further cross-examine the Claimant, and so lay a proper foundation for the admission of the First Defendant's witness statements.

[19] Counsel for the Claimant challenged several paragraphs of the first witness statement filed by the First Defendant on 19 October 2012. Counsel

submitted that the allegations contained in ten paragraphs of this lengthy document, were never put to the Claimant during his cross-examination. Only one paragraph in the supplemental witness statement, filed on 22 October 2013, was objected to on this basis. The other challenges to the two witness statements argued either hearsay, irrelevance, privileged information, or that the information was more prejudicial than probative. The Court may make a ruling on these additional objections, after the disposal of this application.

[20] The Claimant has been in possession of the witness statements, and is aware of the allegations made therein. Therefore, if the Court permitted his recall for further cross-examination, he would not be taken by surprise. With knowledge of the allegations made in the eleven challenged paragraphs of the two witness statements, counsel for the Claimant did not argue the necessity to recall other witnesses for the Claimant to comment on these allegations. Therefore, the recall of the Claimant can be managed within strict guidelines and timelines.

Disposal

[21] The Court is prepared to permit the recall of the Claimant for further cross-examination on the following conditions:-

1. Cross-examination will be restricted to the matters identified in the eleven paragraphs, by counsel for the Claimant, as not having been put to the Claimant. This will include any questions reasonably arising therefrom.
2. Counsel for the Defendants will be allowed no more than ninety (90) minutes of cross-examination. A similar time frame is granted to counsel for the Claimant for re-examination.
3. Cross-examination of the Claimant will be conducted on the next date scheduled for the continuation of this matter. When the cross-examination and re-examination are completed, the Court will return to the Defence and the application to strike out other paragraphs in the witness statements.
4. The Defendants will bear the Claimant's costs for this application. The Court will also consider whether the cost order should be made against counsel for the Defendants.

[22] The Court is committed to giving this case some priority, and to concluding the trial within the shortest time possible.

Sonia L Richards
Judge of the High Court