IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CL 2000/B 089

BETWEEN	**GEORGE BRYAN**	**CLAIMANT**
AND	**GROSSETT HARRIS**	**DEFENDANT**

Mr. Ainsworth Campbell for the claimant

Mr. David Johnson instructed by Althea Wilkins for the defendant

October 18 and 21, 2005

RULING ON ADMISSIBILITY OF WITNESS STATEMENT

RULES 26.7 (2), 29.4 (1), (2) AND 29.11 OF THE CIVIL PROCEDURE RULES

SYKES J

The issue

1. Mr. George Bryan, the claimant, is illiterate. He signed a witness statement. There is no certification of the witness statement as required by rule 29.4(2) of the Civil Procedure Rules (CPR). He was called to give evidence. Mr. Johnson has objected to his evidence. The question is can he be called as a witness?

The facts

2. Mr. George Bryan filed his witness statement in this matter on September 30, 2004, because an order on case management by Sinclair-Haynes J (Ag) on March 15, 2004, obliged him so to do. Up until the commencement of his evidence, there was prima facie compliance with the order. The appearance of compliance began to unravel almost immediately he began his testimony. In examination in chief, Mr. Bryan testified that he read and signed the statement. He also muttered, unclearly, something about an "X". It was not quite clear what he was saying about the "X" but in any event, he concluded his

examination in chief by saying that he read and signed the document. The statement therefore stood as his examination in chief.

3. At the beginning of cross-examination, Mr. David Johnson took up the issue of the "X". The claimant said that he usually signs documents with an "X" because he neither reads nor writes well. This was an understatement. The truth is that he cannot read or write. When asked about the statement he said that he had not read the statement. He added that because he could not read he was not certain of the contents of the statement. This meant that he could not vouch for what purported to be his witness statement.

The objection

4. At this point Mr. Johnson declined to cross-examine Mr. Bryan any further on the grounds that (a) there was no examination in chief and consequently there was no evidence establishing the ingredients of the tort; (b) if he continued with the cross-examination in light of Mr. Bryan's confession it might be said at a later stage that he (Mr. Johnson) had waived his right to object to the statement being used in any appropriate manner. Mr. Johnson submitted that the statement should be struck out with the implied but yet unstated assertion that the claim should be dismissed – a submission he did make eventually when I made my decision on this objection.

5. Mr. Johnson referred to rule 29.4(1) and (2) which addresses the issue of what is a witness statement. Rule 29.4(1) states:

*In this Part a "**witness statement**" means a written statement –*

(a) signed by the person making it; and

(b) containing the evidence which it is intended that that person will give orally.

Rule 29.4 (2) provides

Where the person making the statement is illiterate or blind the statement must be made in the presence of a witness who must certify that

(a) the statement was read to the person making the statement in the presence of the witness; and

(b) the person making the statement –

(i) appeared to understand it; and

(ii) signed the statement or made his or her mark in the presence of the witness

6. Mr. Johnson submitted that rule 29.4 (1) and (2) defines a witness statement. He said that rule 29.4 (2) makes specific provision for illiterate and blind persons and it is mandatory. The witness statement in question does not comply with this requirement and so by definition it is not a witness statement within the meaning of the rule. He next referred to rule 29.11 (1) and (2) which reads:

(1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

7. Mr. Johnson submitted that Mr. Bryan cannot be called to give evidence because the failure to comply with rule 29.4 (2) means that in law there is no witness statement and therefore the claimant cannot give evidence unless the court permits. He added there is no such application before the court and therefore the claim can go no further.

8. Mr. Campbell's response to all this was simply to say that the court must not be fettered in its efforts to adjudicate and arrive at the truth. This appeared to be an appeal to the overriding objective. He then applied, orally, to have the claimant give viva voce and to ignore the witness statement.

The Analysis

9. The CPR has established a new regime for trying cases. One can have either oral evidence or evidence in such manner as the court directs (see Part 29). When one reads the whole rule regarding evidence the following is clear:

(a) the general rule is that evidence is to be given orally subject to any other rule or court order (see rule 29.2);

(b) if the court makes an order for witness statements then there must be compliance with that order unless such an order is varied or set aside. This is an inherent quality of orders of all superior courts of record (see ***Isaacs v Robertson*** [1985] A.C. 97, at 101 – 102);

(c) there is a general restriction on witnesses who have given witness statements or witness summaries from giving oral evidence without the court of trial granting permission (see rule 29.9 (1) and (2));

(d) the witness statements usually stand as examination in chief (see rule 29.8(2));

(e) (a) – (d) above are clear indications of the importance attached to witness statements if an order for them is made;

(f) the significance of witness statements is reinforced by a provision in part 29 that says that where the statement is to be relied on the witness who gave it must be called unless the court orders otherwise (see rule 29.8 (1)).

10. This shows that a court order requiring witness statements by a court is not a mere formality. Witness statements are critical documents. In this context it should not be surprising that part 29 spares no effort in setting out the procedure that seeks to ensure that the statement of the witness is indeed his statement and no one else's. Without this foundation much of the value to be derived from the courts' case management powers would be reduced considerably. The ability of the court to exercise many of the powers conferred on it by rules rests upon the foundation of disclosure of which witness statements are but a part of that process when ordered. In light of the powers now vested in the court and the mandate of the court to manage cases actively, the court has to be assured, when it is exercising or considering exercising these powers, that the statement is what it purports to be, namely, the true and accurate statement of the witness who purports to give it. The certificate of truth is in essence a guarantee of authenticity.

11. In the case of illiterate persons the witness of the statement (the authenticating witness) **must** do the following: he **must** (a) be present when the statement is being made and (b) certify not only that it was read over to the blind or illiterate person (the intended witness) but (i) **must** certify that the intended witness appeared to understand the statement and (ii) **must** certify that the intended witness signed or marked the statement in the presence of the authenticating witness, if that is the case. By doing this, the authenticating witness is certifying to the court and the opposing party that the intended witness knows the contents of the statement and has accepted the statement as his own. I should add that the authenticating witness is also authenticating the

statement to the world at large for there is provision for third parties to inspect the witness statement (see rule 29.14). These third parties may well include but are not limited to other litigants who may have future litigation with one of the parties to the case in which the statement is filed. Third parties may glean admissions from the statement on which they can seek judgment. It is entirely possible that a ***Remmington and others v Scoles*** [1895-1899] All ER Rep 1095 situation may arise. In that case, the court permitted the claimant to adduce evidence of what the defendant had pleaded in a previous trial in order to demonstrate that the defence filed in his case was frivolous and vexatious. All these considerations reinforce my conclusion that there must be compliance with rule 29.4 (2) where the witness is blind or illiterate. There should be no doubt that the statement is what it purports to be. If this is the policy behind witness statements, any interpretation I place on the rules should advance this policy.

12. In my view the provisions of rule 29.4 (2) must be met before the statement can be properly called a witness statement of an illiterate person within the meaning of the rule. I need to set out the provision of one more rule. Rule 26.7(2) states

Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.

13. The failure by the claimant to file a witness statement that is fully compliant with rule 29.4 (2) is indeed a breach of the court order. The document is defective and consequently not a witness statement within rule 29.4 (2). If this is correct it necessarily follows, because of rule 29.11 (1), that the intended witness cannot be called unless the court gives permission. This is the sanction specified by the rule itself. This sanction, according to rule 26.7 (2), takes effect unless the defaulting party applies for and obtains relief. This is an example of an automatic sanction that comes into effect without any further action by either the court or any of the parties. This interpretation is consistent with ***Bansal v Cheema*** [2001] C.P. Rep. 6 which in my view has stated the applicable law correctly. The English Court of Appeal were interpreting similar rules and concluded that the failure to file a witness statement in accordance with a court order was a breach of the relevant rule for which the sanction in the rule took effect unless and until a court said otherwise (see paragraphs 12 and 13 per Brooke LJ).

14. Rule 29.11 (2) implies that the party in breach must apply for relief from sanctions under rule 26.8 before the trial. Unless this is done, then the person seeking to call the witness has to have a good reason for not ***previously applying for relief under rule 26.8***. It appears that if a good reason is given then the defaulting party may apply for relief from the sanction imposed by rule 26.7(2).

15. I therefore agree with Mr. Johnson that Mr. Bryan cannot be called as a witness until a court has granted relief from the sanction imposed by rule 29.11 (1) since it is obvious that Mr. Bryan's witness statement is not a witness statement as contemplated by the court order. The court order must have contemplated a statement that complies with the rules governing witness statements.

16. Upon this ruling being made Mr. Johnson applied to have the claim struck out. I declined to do this and these are my reasons. A textual analysis of rule 29.11 suggests that the door is not closed forever on a claimant who fails to comply with a court order for witness statements. This being so it would be wrong to apply rule 29.11 to produce the effect desired by Mr. Johnson at this point. An appropriate order as to costs, at this stage, is the proportionate response.

17. My orders are

(a) trial adjourned to a date to be fixed by the Registrar pending the outcome of any application made by the claimant for relief from sanctions.

(b) costs of $12,000 to the defendant.