RULING

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMERCIAL DIVISION
CLAIM NO. 2011 CD 00076

BETWEEN	JAMAICA MONEY MARKET BROKERS LIMITED	1ST CLAIMANT
AND	JMMB INTERNATIONAL LIMITED	2ND CLAIMANT
AND	PRADEEP VASWANI	1ST DEFENDANT
AND	SANTOSHI LIMITED	2ND DEFENDANT

Mr. Michael Hylton Q.C., Mrs. Symone Mayhew and Ms. Shauna Kaye Carter instructed by Harrison & Harrison for the Claimants.
Mr. Gordon Robinson, Mr. Peter Asher and Ms. Janene Laing, instructed by Phillipson Partners for the 1st Defendant.

IN OPEN COURT

Heard: 14 and 15 May 2012.

Evidence - Admissibility of documents - Rule 28.19 of the CPR - Meaning of authenticity - Whether documents admissible without more when recipient of disclosed document does not serve notice to prove document - Whether objection on grounds of hearsay can still be taken

Mangatal J:

RULING ON DOCUMENTS-RULE 28.19 OF THE C.P.R.

[1] This ruling concerns admissibility of documents as exhibits and the meaning and purport of Rule 28.19 of the Civil Procedure Rules "the CPR".

Standard Disclosure and Inspection under Part 28 of the CPR as ordered at a case management conference have taken place, and the Claimants have applied to have certain documents entered *en bloc* as exhibits in this case. They rely upon Rule 28.19 of the CPR.

[2] Rule 28.19 of the CPR reads as follows:

> ***Notice to prove document***
>
> *28.19 (1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this part unless that party serves notice that the document must be proved at trial.*
>
> *(2) A notice to prove a document must be served not less than 42 days before the trial.*

[3] The Attorneys-at-Law for the 1st Defendant on the 2nd of April 2012 filed a Notice Objecting, pursuant to Rule 28.19, to certain of the documents disclosed by the Claimants in their List of Documents, and expressly requiring the Claimants "to prove their authenticity at the trial".

[4] Learned Queen's Counsel Mr. Hylton, who appeared on behalf of the Claimants, submits that those documents in relation to which no objection has been filed should be admitted into evidence without more. Counsel for the 1st Defendant, Mr. Robinson on the other hand, has submitted that Rule 28.19 has not relieved the party who has made disclosure of a document from having to prove that document's admissibility. Mr. Robinson has further submitted that the time to take objections on grounds other than proof of authenticity, for example on the basis of relevancy or the rule against hearsay, is at the time when it is sought to tender the document into evidence as an exhibit.

[5] Though there are a number of differing definitions of "Hearsay" revealed in the authorities, in my view, "Hearsay" means a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence of the matters stated-see **Phipson on Evidence, 15th Edition paragraph 25-02**.

[6] It is important to note that the rule against hearsay applies equally to former oral statements of a party as well as to documents. As regards documents, "... it is relevant both to the authenticity of the document (that, for example, it was signed by the person whose signature purports to be on it) and to its contents "–**Phipson paragraph 25-16** (My emphasis).

[7] Under Rule 28.19 of the CPR, which is similar to Part 32 Rule 19(1) of the English Civil Procedure Rules, a party to civil litigation shall be deemed to admit the authenticity of a document disclosed to that party under Part 28(the Disclosure and Inspection Part of the CPR), unless that party serves notice that the document must be proved at trial. This is described by Phipson, in relation to the English Rule as being a "presumption of authenticity" – paragraph **40-01.**

[8] The effect therefore is to render such documents prima facie admissible or presumed admissible, so far as their genuineness and validity (as distinct from their truth), go.

[9] In the **2007 White Book Service, Civil Procedure, Vol. 1, paragraph 32.19.1**, it is stated that this rule differs from its predecessors in that now a party will be deemed to admit the authenticity of documents disclosed to him unless he serves the requisite notice. It is also stated that "(it is not incumbent on the disclosing party to seek an admission of authenticity)". Mr. Hylton Q.C. is accordingly correct that the CPR places an obligation on the recipient of the disclosed documents to give notice of objection, but that is as to authenticity. (My emphasis)

[10] As stated at paragraph 14 of the "Claimants' Submissions on Documents", the documents which are the subject of the Notice of Objection filed on behalf of the 1st Defendant on April 2nd 2012, i.e. the documents so helpfully highlighted in yellow on the Indices to the Bundle of Documents, will have to be proved individually .

[11] I agree with the Claimants that the effect of Rule 28.19 and the authorities of **Rall v. Hume** [2001] EWCA Civ 146, **Douglas v. O' Neill** [2011] EWHC 601, and **Linel Bent v. Eleanor Evans** , C.L. 1993/B115, delivered February 27 2009 by McDonald-Bishop J. is that the Claimants are prima facie entitled to have these documents (those not highlighted in yellow), admitted into evidence as authentic and genuine.

[12] However, other objections as to admissibility nevertheless remain open to the 1st Defendant, just as they would have been prior to the advent of the CPR. I therefore disagree with the submission at paragraph 25 advanced on behalf of the Claimants that the documents to which no objection has been filed should be admitted in evidence without more.

[13] It is still open to the 1st defendant to object to the admissibility of each document, not only on the grounds of, for example, relevance, privilege or public interest immunity, but objection can also be mounted on that aspect of the rule against hearsay that deals with, not the document's authenticity, but as to the truth of its contents.

[14] I have taken note in particular of the decision of McDonald-Bishop J. in **Bent v. Evans**. Prior to dealing with the issue of whether the documents were admissible by virtue of Rule 28.19, (see paragraphs 56-61 of the judgment), my learned sister dealt with the issue of whether the documents were inadmissible on the grounds of hearsay (see paragraphs 53-55). She also dealt with the issue of relevance. It was found that the defendant was the alleged maker of the documents in question, as they were allegedly submitted by the defendant as part of her application for registered title. The documents therefore, being allegedly documents of the defendant, could not be excluded on the grounds of being inadmissible hearsay, since the defendant would be in a position to deny or admit them. Further, McDonald–Bishop J. held that the documents were relevant before she looked at the issue of whether there was admitted authenticity pursuant to Rule 28.19.

[15] Mr. Hylton may be correct that the 1st Defendant has not given notice of objections on the grounds of relevance, or hearsay, in the sense of the truth of the document. However, in my judgment, in the circumstances of this case there was no obligation so to do prior to the time when the Claimants seek to tender the documents. The Claimants have candidly admitted that no Notice was served under the Evidence Act, for example on one of the grounds for admitting hearsay under section 31 E, i.e. that the maker of the document is dead, or that the maker of the document is outside of the jurisdiction and that it is not reasonably practicable to secure his attendance at court, or such other reasons. So there has been in turn no notification by the Claimants themselves as to any intention to, for example, tender any document consisting of hearsay into evidence for the purpose of proving the truth of its contents. It follows that there has been no opportunity or occasion for the 1st Defendant to file a Counter-Notice of objection in relation to, or under the Evidence Act. The Notice of Objection under Rule 28.19, as stated before, only deals with objections as to authenticity.

[16] I agree with Mr. Robinson that the time for taking such objection, in these circumstances, will be at the time when it is sought to tender the document into evidence. Rule 28.19 does not in my judgment, where there has been no agreement as to the documents being admitted into evidence, remove the obligation on the party to prove that a document is otherwise admissible and to be admitted, separate and apart from its authenticity.

[17] This brings us back to one of the cardinal rules of evidence, especially as it concerns the rule against hearsay. That is, as stated at **paragraph 25-09 of Phipson**, "It is the purpose for which the document is tendered which is the key to its admissibility". (My emphasis) This has driven the learned author to comment, **paragraph 25-02**, that one of the reasons for the widespread misunderstanding of what evidence does and does not fall within the hearsay rule, is a "failure to appreciate that the hallmark of a hearsay statement is not only the nature and source of the statement, but also the purpose for which it is tendered".

[18] In my judgment, the documents cannot, and ought not, to be admitted *en bloc*. I have to presume them admissible as authentic documents, but I will have to examine the purpose for which they are tendered as well as to deal with any objections made by the 1st Defendant in the course of the tendering process.

[19] As a practical matter, however, and bearing in mind, the duty of the parties set out at Rule 1.3 of the CPR to help the court to further the overriding objective of dealing with cases justly, the Attorneys for the 1st Defendant ought now, in order to save time and expense, if this course would not be detrimental to his case, to group together and notify the Claimants' Attorneys as to the nature of their objections and as to the documents to which these objections respectively apply. This will hopefully enable me to deal with the issues as to the documents more effectively and efficiently.