

COMMONWEALTH OF THE BAHAMAS

CLE/GEN/FP/00060/2020

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN

ANDREW L. GAITOR

(TRADING as A &D GAITOR EQUIPMENT ROCK AND SAND OR ADGERS)

1st Plaintiff

AND

DOUG ROSS INC, 77-0541658 S CORP

2nd Plaintiff

AND

BAHAMAS AGGREGATES INC, 83-1853189 S CORP

3rd Plaintiff

AND

THE BAHAMAS AGRICUTURAL AND INDUSTRIAL CORPORATION

1st Defendant

AND

EQUINOR SOUTH RIDING POINT LLC

2nd Defendant

AND

EQUINOR ASA

3rd Defendant

JOHN W. RUSSELL

(In his capacity as Administrator of the Estate of William Russell)

Applicant /Intervener

Before: Honourable Mr. Justice Andrew Forbes

Hearing Date: December 2, 2022; 20th December 2022, & 16th January 2023

Appearances: Mr. Mark Flowers on behalf of the 1st, 2nd and 3rd plaintiffs

Mr. Dwayne Fernander with Ms. Sydney Rolle & Ms. Lavette Kemp on behalf of 2nd Defendant

Mr. Ashley Williams on behalf of the Intended Intervenor John W. Russell (As Administrator of the Estate of William Russell)

RULING

FORBES, J

1. The Court heard from the parties as it relates to an interlocutory application on behalf of an Intended Intervenor and indicated it would render its decision and does so now.

BACKGROUND

2. This a matter arising out of the tragic Hurricane Dorian which occurred in Abaco and Grand Bahama between the 1st and 2nd of September, 2019.
3. By a Specially Indorsed Writ of Summons filed on the 20th May, 2020, the Plaintiffs allege that substantial petroleum products housed and contained in oil storage facilities occupied and operated by the 2nd Defendant were severely damaged due to Hurricane Dorian's impact and as a result the said products were released and entered onto properties occupied by the Plaintiffs. The Plaintiffs also claim that large portions of the property it had and has used for mining aragonite and other materials were substantially damaged resulting in losses. The Plaintiffs claim significant liquidated and unliquidated damages.
4. The 2nd Defendant by its Defence filed on the 1st July, 2020 denied the allegations of the Plaintiffs claims and put the Plaintiffs to strict proof and also asserted that the Plaintiffs failed to mitigate their losses.

5. Counsel for the Plaintiffs and the 2nd Defendant filed numerous interlocutory applications which were heard and in the interim the Court in utilizing its case management powers sought to have the matter set down for trial. However, by an Ex-Parte Summons and Certificate of Urgency, both filed on the 13th September, 2022 the Intended Intervenor, John W. Russell (in his capacity as Administrator of the Estate of William Russell) seeks to be added and/or joined as a party to the action. Additionally, Mr. Russell also seeks to have this action consolidated with another action. The Intended Intervenor relies on the 3rd Affidavit of John W. Russell filed on the 24th November, 2022 and the Affidavit of Naaman Russell on the 9th December, 2022. The Intended Intervenor also filed a Summons on the 7th November, 2022 and an Amended Summons on the 29th November, 2022 in essence asserting the same claims as found in the Ex-Parte Summons. In support of his application the Intended Intervenor relies on his Supplemental Written Submissions and Skeleton Arguments filed on the 29th November, 2022 and Written Submissions filed on the 8th December, 2022.
6. In reply to the Intended Intervenor's application the Plaintiffs filed a Summons on the 2nd December, 2022 seeking to have the Intended Intervenor's application firstly adjourned pending the determination of a formal boundary plan agreed by the parties and to have the application struck out and costs to be paid on an indemnity basis. The Plaintiffs rely on the 4th Affidavit of Andrew Gaitor filed on the 21st July, 2022 and the 1st Affidavit of Renio Ferguson filed on the 2nd December 2022. The Plaintiff also filed Skeleton Arguments in Support of its Summons on the 2nd December, 2022.

THE INTENDED INTERVENOR'S APPLICATION

7. By his Ex-Parte Summons, Summons and Amended Summons, the Intended Intervenor seeks an Order pursuant to Order 15 Rule (6)(2)(b)(i)(ii)(3) of the Rules of the Supreme Court ("RSC"); Order 4 Rule 1 (a)(b) &(c) of the RSC; Order 31A Rule 18(1)(2)(a)(s) of the RSC and the Court's inherent jurisdiction that he be joined as a party to the action.

8. The Intended Intervenor sets out his grounds as to why he should be joined as a party and the Court summarizes them below:-

- a. That there exists a question or issue as to whether he or the 1st Plaintiff is the legal owner of the aggregates the subject matter of the dispute, the said aggregates which were dredged and removed from the 180.0 acre William Russell Grant No. B-121 (“the subject property”) to create an inner harbor either by The Bahamas Agricultural and Industrial Corporation (“BAIC”) (also the 1st Defendant in this action) or the 2nd Defendant and/or their employees, servants or agents;
- b. That there exists a question or issue between the parties as to who has the better documentary title to the subject property;
- c. That there exists a question or issue as to whether the Intended Intervenor or the 1st Plaintiff is entitled to the sum of \$11,225,655.00 in respect of the damages caused to the aggregates by the oil spill from the oil storage tanks owned or operated by the 2nd Defendant who trespassed on to the subject property;
- d. That the Intended Intervenor will be affected by any Order of the Court in this action such as the 1st Plaintiff who is not the legal owner and who has no legal or equitable right of property in the aggregates may be paid the sum of \$11,225,655.00 by virtue of the oil spill from the oil storage terminal operated by the 2nd Defendant who is a trespasser, who has no right title nor interest in any portion of the subject property in reliance of an alleged Indenture of Lease dated the 21st October, 2009 made between the 1st Defendant and Statoil Point LLC;
- e. That the Intended Intervenor is the true and legal owner of the said aggregates which was dredged and removed from the inner harbor constructed on the subject property either by the 1st or 2nd Defendant and/or their employees, servants or agents and without the knowledge or consent of the Intended Intervenor and the said

aggregates were transported and stored on the Sarah Russell Grant No. B-120 which a five acre portion was allegedly licensed to the 1st Plaintiff for the purpose of processing the aggregates in reliance on and in violation of a Crown Lease to Bahamian Fruttee Delite Company, Limited dated the 10th December, 1999;

- f. That the 1st Plaintiff at paragraph 7 of an Affidavit filed the 16th July, 2021 in action no. 81 of 2021 makes a statement that amounts to an admission that the said aggregates was dredged from the subject property which at all material times is owned by the Intended Intervenor;
 - g. That at all material times the 1st and 2nd Defendants had constructive or actual notice that the subject property was not Crown Land on the ground that the copy of Plan No. 182 GB or Plan No. 185 GB attached to the alleged Indenture of Lease identifies the said subject property and the 1st and 2nd Defendants being concerned together and in furtherance of an unlawful means conspiracy to injure the Intended Intervenor and created the alleged Indenture of Lease for their financial benefit and has caused the Intended Intervenor to suffer loss and damages in the amount of up to \$15,000,000.00 (being the alleged lease payments from the 2nd Defendant on the 1st Defendant) and the 2nd Defendant has caused the Intended Intervenor to suffer loss and damages in the amount of \$11,225,655.00 in respect of the continuing wrongful interference with the Intended Intervenor's quiet use and enjoyment of his property.
9. The Intended Intervenor also seeks that this action be consolidated with action No. 2022/CLE/gen/FP/00181 on the grounds that (i) common questions of law or fact arises in both matters; (ii) that the rights to relief claimed in both matters are in respect and arise out of damages to the same aggregates caused by the same oil spill from the same oil storage tanks operated by the 2nd Defendant; and (iii) that a consolidation of both actions would eliminate the risk of the Judge presiding over equity action No. 60 of

2020 delivering a Judgment or making a finding that is inconsistent with a determination of the same issues by a different judge presiding over action No. 181 of 2022.

LAW

10. The Intended Intervenor makes his application pursuant to the following provisions.

11. Order 15 Rule 6 (2) (b) (i) (ii) and (3) of the RSC states:-

“ 6. (1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

(a)...

(b) order any of the following persons to be added as a party, namely-

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter, but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be

supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.”

12. Order 4 Rule 1 (a), (b), and (c) of the RSC states:-

“4. (1) Where two or more causes or matters are pending in the Court, then if it appears to the Court —

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule, the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.”

13. Order 31A Rule 18 (1) and (2)(a) and (s) states:

“18. (1) The Court’s powers in this rule are in addition to any powers given to the Court by any other rule, practice direction or enactment.

2. Except where these Rules provide otherwise, the Court may —

(a) consolidate proceedings;

...

(s) take any other step, give any other direction or make any other order for the purpose of managing the case and ensuring the just resolution of the case...”

ISSUE(S)

14. The Court on an application for joinder must determine whether:

- a. the joining of a party is necessary to ensure that all matters in dispute in the cause or action may be effectually and completely determined and adjudicated upon or ;

- b. a question or issue may exist arising out of or relating to or connected with any relief or remedy claimed in the action which in the opinion of the Court it would be just and convenient to determine between him and that party as well as between the parties to the action.

15. The Court need only be satisfied that one of the above conditions are met.

SUBMISSIONS

16. The Court thanks the parties for their full submissions however, the Court summarizes the portions it finds are relevant to the issues beforehand.

17. Counsel for the Intended Intervenor in summary contends that by virtue of his title to the subject property occupied by the 2nd Defendant and 1st Plaintiff, he ought to be permitted to firstly be joined and to be joined as the only Plaintiff to this action.

18. Additionally, the Intended Intervenor asserts and/or contends that:

- a. The 1st Defendant is not the freehold or leaseholder of any portion of the subject property and that the subject property was not vested in the Treasurer and/or that the subject property was not compulsorily acquired under the Acquisition of Land Act;
- b. The Intended Intervenor is the legal and beneficial owner of the subject property and is seized and possessed in fee simple of the said property by virtue of the 1827 William Russell Crown Grant;
- c. The Plaintiffs and the Defendants are trespassers of the subject property;
- d. No other person claims to be in possession of the said aggregates through the Estate of William Russell including the Treasurer or the Crown or the 1st and 2nd Defendants;
- e. The 1st Plaintiff is squatting on Crown Land or on a Northern portion of Crown Grant No. B-120 also known as "the Sarah Russell Tract";
- f. The 1st Plaintiff made several admissions in action No. 81 of 2021 as to the site where he operates as the same as the Sarah Russell Tract;

- g. The 2nd Defendant in paragraph 3 of its Defence in action No. 121 of 2020 Bahamian Frutee Delite Company, Limited v Equinor South Riding Point, LLC made numerous admissions relating to the oil spill and the resulting spillage to the adjacent land;
- h. The 1st Defendant and/or Mr. Cyril Minnis have no legal claim to the said land.

19. In summary the evidence in support of the Intended Intervenor is found in the Affidavits of Naaman Russell and the 3rd Affidavit of John W. Russell. They both allege that William Russell is a decedent of Sarah Russell and was given a Crown Grant which was recorded at the Registry of Records in Book L.1 at page 255 and is known as the Sarah Russell Tract. They further state that Letters of Administration was given to the respective Administrator to the Estate of William Russell and as such they are the legal and beneficial owners of the said land.

20. Counsel for the Plaintiffs contend that there is no common question of ownership rights or proprietary rights between the parties and the Estate of William and Sarah Russell as the Government of The Bahamas duly vested the William Russell Tract under designated Order SI 37 of 1974 and there is no overlap of rights with the Plaintiffs on the Sarah Russell Tract B-120. He further contends that the actions are substantially different in nature as one relates to a title ownership dispute and the other relates to a claim of nuisance, negligence and trespass by servants or agents of the 2nd Defendant.

ANALYSIS & DISCUSSION

21. It was brought to the Court's attention that the Intended Intervenor has several actions filed before the Court arising out of the same claim and allegations as to ownership of the subject property. The Intended Intervenor has made a claim in action No. 2019/CLE/gen/FP/00093 John W. Russell (In His Capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural Industrial Corporation the 1st Defendant in this action; another claim in action No. 2021/CLE/gen/FP/00140 John W. Russell (In His Capacity as Administrator of the Estate of William Russell) v Equinor South Riding Point, LLC the 2nd Defendant in this action and another claim against

Bahamian Frutee Delite Company Limited, the Plaintiffs and the 2nd Defendant which was commenced on the 31st October, 2022.

22. The actions against the 1st and 2nd Defendants as the Court understands are seized before another Judge who has carriage of the actions. Additionally, the Court in the action no. 2021/CLE/gen/FP/00140 John W. Russell (In His Capacity as Administrator of the Estate of William Russell) v Equinor South Riding Point, LLC stayed the proceedings pending a determination of an interlocutory application in action No. 2019/CLE/gen/FP/00093 John W. Russell (In His Capacity as Administrator of the Estate of William Russell) Bahamas Agricultural Industrial Corporation.

23. It would appear to the Court that the Intended Intervenor is attempting to either “judge shop” in the event the actions before the other Judge does not go in his favor and/or insert himself in these proceedings to avoid having to wait on the outcome of any pending determinations.

24. Even if the Court was to consider the Intended Intervenor’s application as having some merit, the Intended Intervenor presupposes that his claim to having documentary title and/or possessory title of the subject property has already been established. However, in action No. 2020/CLE/gen/FP/00060 the Intended Intervenor seeks to establish what he alleges is his legal and beneficial interest in the subject property. More so, Counsel for the Plaintiffs contend and the Court accepts that the actions are substantially different in nature as one relates to a title ownership dispute and the other relates to a claim of nuisance, negligence and trespass by servants or agents of the 2nd Defendant.

25. Additionally, the Court’s power under Order 15, Rule 6(2)(b)(i) and (ii) of the RSC is discretionary upon consideration of **whether it is necessary** to ensure that all matters in dispute in the cause or action may be effectually and completely determined and adjudicated upon or where there may exist a question **or** issue arising out of or relating to or connected with any relief or

remedy claimed in the action which in the opinion of the Court it would be **just and convenient** to determine between him and that party as well as between the parties to the action (**emphasis the Court's**). However, the Court is not of the view that matters alleged to be in dispute by the Intended Intervenor are matters that should be determined and adjudicated upon in this action. Further, it would not be just nor convenient to determine the matters alleged to be in dispute as the Intended Intervenor's allegations are grounded in ownership of the subject property which has yet to be established. Until that is determined, this Court is unable to see the necessity of having such an allegation heard parallel to the Plaintiffs claims of nuisance, negligence and trespass.

26. The Intended Intervenor's application for joinder was also made pursuant to Order 31A Rule 18 (1) and (2)(a) and (s) of the RSC. However, while these provisions permit the Court to exercise a wide discretion relating to its case management powers, the provision itself is contingent on there not being any other provision made for the relief sought i.e. *"Except where these Rules provide otherwise, the Court may — ."* In the instant case, Order 15 of the RSC is available and has been invoked by the Intended Intervenor and as such there is no need for the Court to exercise its discretion under Order 31A of the RSC."

27. Therefore, the Court will not exercise its discretion to join the Intended Intervenor as a party to these proceedings.

CONSOLIDATION APPLICATION

28. As the Court has determined that the Intended Intervenor is not to be joined as a party to the action, the Intended Intervenor's application for consolidation of this action with Action 2022/CLE/gen/FP/00181 falls away.

PLAINTIFFS' APPLICATION TO STRIKE OUT

29. Counsel for the Plaintiffs in response to the Intended Intervenor's application filed a Summons to strikeout pursuant to Order 18 Rule 19(d) of the RSC.

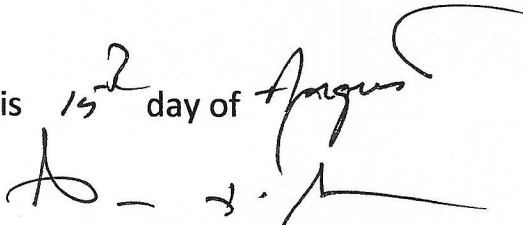
While Counsel is at liberty to conduct his or her case in the manner he or she sees fit, the Court has indicated in recent Judgments/Rulings of the filing of Summonses by Counsel to strike out Summonses as opposed to simply responding to the opposing party's application. The Court finds this to be an unnecessary practice.

30. In the circumstances, the Court will dismiss the Plaintiffs application to strike out but makes no order as to costs.

DISPOSITION

31. Therefore, given the resolution between the Plaintiffs and 2nd Defendant and noting that the 1st and 3rd Defendants were never a party to these proceedings as they were never served the Intended Intervenor's application for joinder pursuant to Order 15 Rule 6 (2)(b)(i) and (ii) and 3 of the RSC and Order 4 Rule 1 (a)(b) and (c) of the RSC and Order 31A Rule 18(1) and (2)(a) and (s) is hereby dismissed.

32. As it relates to the issue of costs, the Court sees no reason to depart from the usual cost order and orders that Plaintiffs and the 2nd Defendants costs to be paid by the Intended Intervenor to be taxed if not agreed.

This 15th day of August 2023


Andrew Forbes
Justice of the Supreme Court