IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2021/CLE/gen/00353

BETWEEN

RENEE FERGUSON
EDCIL FERGUSON

Claimants

AND

BANK OF THE BAHAMAS LIMITED

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Brian Dorsett for the Claimants**
	Mr. Jamal G. Davis for the Defendant
Judgment Date:	**17 May 2024**

Calling of Witness after the Close of Evidence – Real Significance – Real Risk of Injustice not to Reopen Case – Rule 1.1 of the Supreme Court Civil Procedure Rules – Overriding Objective – Parts 26 and 29 of the Supreme Court Civil Procedure Rules, 2022 – Evidence – Relief from Sanctions – Good Reasons – Ladd v Marshall

RULING

1. This is an application brought by Renee and Edcil Ferguson ("**Claimants**"), requesting the Court to allow a new witness to be called to give evidence in the trial of the action. This application was made after trial - at the close of both the Claimants' and the Defendant's, Bank of The Bahamas Limited ("**BOB**"), respective cases.

Background

2. By Specially Indorsed Writ of Summons filed on 08 April 2021, the Claimants brought an action against BOB for, *inter alia*, breach of contract and negligence

for BOB's alleged failure to insure Lot 15, Block 8, Unit 2, Greening Glade Subdivision, Freeport, The Bahamas ("**Home**"), which was purchased by the Claimants with the assistance BOB's financing.

3. Essentially, the Claimants allege that BOB breached the terms of an Indenture of Mortgage dated 20 July 2005 made between BOB of the one part and the Claimants of the other and recorded in Volume 9503 at pages 269 to 280 in the Registry of Records in the city of Nassau, The Bahamas ("**Mortgage**") by failing to insure the Home secured by the Mortgage.

4. The loss allegedly suffered by the Claimants stemmed from extensive damage to the Home caused by Hurricane Dorian in 2019. The Home was not insured, thus the Claimants incurred expenses in repairing it, without the assistance of insurance (as the Claimants were unable to meet the insurance premiums and the insurance, therefore lapsed). They allege that the terms of the Mortgage provide that, where the Claimants were unable to pay the insurance premiums, BOB assumed responsibility for it and would ensure it was paid.

5. BOB then filed a Defence on 19 May 2021. It avers that the terms of the Mortgage state that BOB, in its absolute discretion, may pay the insurance premiums for the Home, in the event of the Claimants' default in paying the same without any requirement to do so. BOB further avers that the responsibility to cause and keep the Home insured always was and remained the Claimants and BOB did not assume responsibility to do so.

6. BOB also alleges that it notified and reminded the Claimants of their obligation to insure the Home and to keep the Home insured.

7. The usual course of the action ensued (i.e. case management, discovery, inspection and exchange of the parties' respective list of documents and evidence, preparation of bundles for trial, filing of witness statements, calling of witnesses to provide testimony and preparation of skeleton arguments). During the trial, the Claimants sought the testimony of Mr. Julian Nixon ("**Mr. Nixon**") who had provided an estimate to the Claimants on the cost of repairs to their damaged Home ("**Estimate**"), but he refused to give evidence. The Claimants' counsel sought leave of the Court to have the Estimate entered into evidence as it was inadvertently omitted from the First Claimant's Witness Statement and mentioned throughout the Claimants' pleadings and evidence. This was allowed (subject to BOB's right to cross-examine) and a Supplemental Witness Statement was filed on 16 October 2023 exhibiting the Estimate.

8. After the close of the respective parties' cases on 17 October 2023, the Court gave directions in relation to closing submissions. The matter was then adjourned.

9. Thereafter, the Claimants made filed an application on 24 October 2023 requesting leave of the Court to reopen their case to subpoena Mr. Nixon. BOB objected to this application.

Issue

10. The Court must determine whether leave should be granted to the Claimants to reopen their case in order to subpoena a witness?

Evidence

11. The Claimants seek to rely on the Affidavit of Renee Ferguson filed 13 November 2023 ("**Ferguson Affidavit**") for relevant evidence relating to this application. The Ferguson Affidavit provides that: (i) after Hurricane Dorian damaged the Home in 2019, Renee Ferguson sought the assistance of Mr. Nixon, whom she believes is a licensed building contractor. He provided the Estimate sometime in February of 2020; (ii) the Estimate is the basis of the Claimants' claim for Special Damages and it is exhibited to the Supplemental Witness Statement of Renee Ferguson filed on 16 October 2023; (iii) BOB objected to the Estimate being tendered into evidence without Mr. Nixon being called as a witness to be cross-examined on the contents of the said documents; and (iv) Renee Ferguson immediately made contact with Mr. Nixon and requested his assistance in the matter, however he declined to make himself available without providing any reason.

12. The Ferguson Affidavit also states that: (i) Renee Ferguson's son, Renio, went to Freeport, Grand Bahama to seek Mr. Nixon's confirmation that he would be appearing at the trial of this matter to give evidence in support of the Claimants' claim, as this was a crucial aspect of their case, but this was to no avail; (ii) Mr. Nixon appeared to have turned off his mobile telephone; (iii) Mr. Nixon's refusal to give evidence was unforeseeable; and (iv) he was paid for his services and had Renee Ferguson been in a position financially to carry out the repairs, she likely would have utilized his services.

13. The Ferguson Affidavit further states that: (i) the request to reopen these proceedings is out of the ordinary, but that the court has discretion to do so; (ii) compelling a witness to give evidence is not good practice as it has the potential for the uncooperative witness to give evidence against one's interests; and (iii) due to the importance of Mr. Nixon's evidence to the case, it is appropriate to seek to compel him to give evidence in these proceedings.

BOBs Evidence

14. BOB provided no evidence in relation to this application.

Discussion and Analysis

Whether leave should be granted to the Claimants to reopen their case in order to subpoena a witness?

15. I have considered both counsel's submissions in the matter and will now apply the law. In relation to the sought leave to reopen the case to subpoena Mr. Nixon, the Claimants' counsel seeks to rely on **Rule 1.1 of the Supreme Court Civil Procedure Rules, 2022** ("**CPR**") which provides:

> *"1.1 The Overriding Objective.*
>
> *(1)* ***The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost****.*
>
> *(2) Dealing justly with a case includes, so far as is practicable:*
>
> *(a)* ***ensuring that the parties are on an equal footing****;*
>
> *(b)* ***saving expense****;*
>
> *(c) dealing with the case in ways which are proportionate to —*
>
> *(i) the amount of money involved;*
>
> *(ii) the importance of the case;*
>
> *(iii) the complexity of the issues; and*
>
> *(iv) the financial position of each party;*
>
> *(d)* ***ensuring that it is dealt with expeditiously and fairly****;*
>
> *(e)* ***allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases****; and*
>
> *(f)* ***enforcing compliance with rules, practice directions and orders*** *(emphasis added)."*

16. BOB's counsel submits that there is an order (dated 02 December 2021 and filed on 02 May 2022) in place by Charles J (as she then was) which required all witness statements to be filed and served by 04 April 2022, failing which the offending party's pleadings would be struck out. Failure to comply, BOB's counsel contends, means that the Claimants must first apply for relief from sanction or provide the Court with a good reason to depart from this procedure. He draws the Court's attention to **Rule 29.11 of the CPR**, which reads:

> *"29.11 Consequence of failure to serve witness statement or summary.*

(1) ***If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the Court, 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*** *(emphasis added)."*

17. In relation to the Court's discretion to permit a litigant to reopen his case to call a witness, the case of **Charlesworth v Relay Roads Ltd (in liquidation) and others [1999] 4 All ER 397** is instructive. For the purposes of this application, only the first below mentioned factor is relevant. There, the Court opined:

> *"As is so often the case where a party applies…to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted…"*

18. It was also noted in the case of **Vernon v Bosley (No 2) [1997] 1 All ER 614** that:

> *"Where, therefore,* ***a document was disclosed to a party after he had closed his case, or the evidence as a whole was concluded, he should apply to the court to reopen the case in the light of the disclosure if the document was of real significance and there was otherwise a risk of injustice*** *(emphasis added)."*

19. I must also mention the seminal case of **Ladd v Marshall [1954] EWCA Civ 1** which provided the test for when the Court would allow parties to adduce fresh evidence:

> *"****In order to justify the reception of fresh evidence…three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible****."*

20. I am also mindful of the wide powers of case management permitted by **Rule 26.1(2)(v) of the CPR**. It expressly provides:

> *"Except where these rules provide otherwise, the Court may –*
>
> *(v) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective…."*

21. In the Jamaican Court of Appeal in **Lilieth Douglas v Errol Francis [2017] JMCA App 8 ("Douglas")**, the Court had to consider whether or not a judge of first instance's refusal to exercise her discretion to allow the appellant to reopen her case and to call further evidence to prove her claim was reasonable. At paragraphs 37, 42 to 46 and 48 of the judgment, the Court made the following pronouncements on the subject:

> *"[37] It is true, as stated by the learned judge, that the general rule is that a party is expected to adduce all the evidence on which he intends to rely before closing his case.*
>
> *[42] In civil cases under the regime of the CPR, regard has to be had to the overriding objective and the court will take a similar approach.*
>
> *[43] The exceptions to the general rule have been extended to cases where judgment has been reserved but not yet delivered or delivered in draft but not yet perfected or delivered but the order has not yet been drawn up. See Stocznia Gdanska SA v Latvian Shipping Co (2000) LTL 12/2/2001 cited in Blackstone's Civil Practice 2005, paragraph 47.52. In that case, 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.*
>
> *[44] **A judge has the jurisdiction to exercise a discretion to alter a judgment before perfection. See Re Barrel Enterprises and Others [1972] 3 All ER 631 (the Barrel jurisdiction). The basis of this jurisdiction is that the judge retains control of his case, even up to judgment and before the orders are perfected. This extends to the right to reconsider the matter of his own motion or on application of either party or to hear further argument on a point on which he had already made a decision and handed down judgment, so long as his orders had not yet been perfected. It also includes the discretion to allow the amendment of pleadings or calling further evidence or further arguments at that stage**. See Charlesworth v Relay Roads Ltd (in Liquidation) [1999] 4 All ER 397. In Fisher v Cadman [2005] EWHC 377 (Ch) it was held that where the application to reopen is made after judgment but prior to it being perfected, the principles in Ladd v Marshall*

are to be applied with more flexibility than they are applied in an appeal court but that the threshold before new evidence is allowed is a high one.

[45] ***It has also been held that reopening contentious matters or permitting one party or the other to add to their case or make a new case after the close of evidence should only exceptionally be allowed.*** *See Gravgaard v Aldridge and Brownlee (a firm) [2004] EWCA Civ 1529, cited in The Caribbean Civil Court Practice 2011, page 379 note 30.4.*

[46] ***It is clear on the authorities, therefore, that it is in the discretion of the high court to reopen civil proceedings to receive further evidence, at any stage, even after judgment but before the order is perfected. However, the basis of the exercise of this discretion between these extremes is different. Where the discretion is being considered before judgment, the principles on which the court will act surrounds questions of relevance, fairness, prejudice, delay and under the CPR regime – on a consideration of the overriding objective****. At this end of the spectrum, what the applicant to reopen the case is trying to do, is to persuade the court that the evidence is relevant to the issue to be determined and if it is not heard it may result in an unfair and unjust decision…*

[48] ***Where judgment is reserved or has been delivered but not perfected, the court will consider factors similar to Ladd v Marshall in determining whether the overriding objective will be achieved by allowing further evidence at that stage. See Blackstone's paragraph 59.40. Implicit in this consideration is the principle of finality of litigation*** *(emphasis added)."*

22. Though in the context of permitting rebuttal evidence prior to judgment and before the order was perfected, I believe the principles emanating from ***Douglas*** are applicable to the application before me.

23. BOB's counsel correctly submits that an order is in place providing a strict deadline for filing and service of witness statements with severe penalties attached. There has indeed been noncompliance with the order. Accordingly, an application for relief from sanction ought to have been made promptly by the Claimants to avoid any sanction. This has not been done. I must therefore be satisfied that there is good reason to depart from this procedure.

24. Based on the foregoing, I am not satisfied there is any good reason. If this Estimate was of such importance, the witness statement of Mr. Nixon ought to have been filed since 2020 when the Estimate came to the knowledge of the Claimants. Further, even if Mr. Nixon was a reluctant witness, the Claimants simply could have approached another contractor willing to give evidence at trial.

25. Based on the evidence before me, there is no other reason provided for me to consider. I am therefore not satisfied there is good reason to depart from the procedural requirement to apply for relief from sanction.

26. Nevertheless, I will apply the relevant law relating to reopening a case after trial, should my interpretation of the law and procedure for relief from sanction in the circumstances not be accepted.

27. Applying the ***Ladd v Marshall*** test, and based on the Ferguson Affidavit, this Estimate has been in the Claimants' possession since 2020, yet the Claimants' counsel did not find it necessary to have Mr. Nixon prepare a witness statement in relation to it until now. They merely state that they wanted to, but his refusal to appear to give evidence made it impossible. If it was that significant to the Claimants' case, another contractor could have been approached to provide evidence. This could have been obtained earlier with reasonable diligence. It appears that the Claimants rested on their laurels.

28. When considering the second part of the test (i.e. "*the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive*"), in my considered view, I do not see the value in calling Mr. Nixon to provide evidence in relation to the Estimate after the close of the Claimants' case. Whereas there may be some influence on the case with respect to the Estimate, it is difficult to accept an Estimate as evidence from a witness unwilling to testify. To my mind, if a witness is likely to be hostile – as the evidence confirms that he is unwilling to come and testify of his own volition - extracting the relevant evidence would appear quite difficult and highly unlikely. I do not believe calling him would yield fruitful results. It will likely have a very negative influence on the Claimant's case and be of no import due to Mr. Nixon's refusal to testify.

29. In relation to the third tier, I do believe the Estimate itself is credible on its face. Again, it is curious why Mr. Nixon would need to be called in relation to an Estimate for *likely expenses* to be incurred in repair of the Home.

30. Furthermore, and bearing in mind the overriding objective, the Court is to deal with matters expeditiously and ensure the parties are all on equal footing. I must also endeavor to ensure that precious Court time and resources are not unnecessarily utilized.

31. In relation to relevance, it evidences *the likely expenses to be incurred* and *not the actual expenses incurred*. This is what is pleaded by the Claimants. Special Damages must be specifically pleaded and specifically proven (***Bahamas Power & Light Company Ltd v Ervin Dean BS 2022 CA 070***). Special Damages relate to damages incurred/suffered. I will say no more on the subject. I see no value in him being called to testify on an Estimate at this stage of the proceedings.

32. With respect to prejudice, it will likely prejudice BOB to permit this witness to be called at this stage of the proceedings. It will undoubtedly cause extra expense, further cross-examination and potentially additional evidence being adduced to address anything which may or may come out of Mr. Nixon's testimony.

33. This segues into the factor of delay. I also bear in mind the very real possibility that Mr. Nixon may not be co-operative and may not be easily located to come and give evidence before this Court. This may unnecessarily delay conclusion of the matter and cause both parties needless additional expense in trying to locate Mr. Nixon, bring him to court and allow the parties to extract evidence from him. It is also unlikely that he would be willing to provide any witness statement or expert report when it appears he is quite reluctant and likely to be recalcitrant at trial.

34. As the evidence suggests, he may elude any effort made to bring him to Court. I cannot allow precious court time and resources to be used when it is not likely to be of any practical utility to the Court or the parties. It would certainly also delay the matter as the Claimants would need time to prepare the requisite witness statement and the Court would need to fix a date for cross-examination.

35. Moreover, as already stated, the Claimants could have called another building contractor willing to give evidence at the trial. The overriding objective under the CPR compels me to ensure that justice is done and to ensure matters are dealt with without unreasonable delay, expense, or unfairness.

36. Both counsel elected to close their respective cases and I have already given directions in relation to the completion of this trial. I have not been provided with any good or substantial reasons to allow the Claimants' case to be reopened nor do I find there is any real risk of injustice in this case if I were not to accede to this application.

37. Understandably, the Claimants tried to reopen their case for what they believed was necessary and no doubt required to strengthen and prove their case. I, however, was not convinced. I, however, acknowledge that the application was not brought to obstruct justice or unnecessarily delay trial.

38. I keep at the forefront of my mind principles emanating from Rules **71.10 and 71.11 of the CPR** (i.e. the conduct of all parties, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue, and the care, speed and economy with which the case was prepared).

Conclusion

39. Based on the law, evidence and circumstances of this case, I refuse the Claimants' requested leave and therefore dismiss this application.

40. The trial is to follow the usual course.

41. Bearing in mind the factors the Court must consider under ***Part 71 of the CPR***, costs shall be in the cause.

Senior Justice Deborah Fraser

Dated this 17 day of May 2024