

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/GEN/01221

BETWEEN

CARLA ANITA CECILIA BRAYNEN TURNQUEST

Plaintiff

AND

WATER AND SEWERAGE CORPORATION

Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mrs. Krystal Rolle Q.C. appearing along with Ms. Cyd Ferguson for
the Plaintiff

Mr. Dywan Rodgers for the Defendant

Hearing Date: 27th July, 2020

Ruling Date: 27th July, 2020

RULING

1. By Summons filed 22nd July, 2020, the Defendant sought leave of the Court to appeal a portion of an order made on the 22nd June, 2020, whereby leave was granted to the Defendant to call a new expert witness, Mr. Allan Young ("**Mr. Young**"), to address only specific documents exhibited in the Supplemental Witness Statement of Emile Ledee ("**Mr. Ledee**") filed 18th March, 2020 (**the "Supplemental Witness Statement"**). The Affidavit of Glibert A. Thompson filed 2nd July, 2020 was filed in support of its application.
2. Mr. Young was substituted as the expert for the Defendant because of the death of the Defendant's former expert witness, Stafford Coakley, who died before he was able to respond to the Supplemental Witness Statement of Mr. Ledee.
3. The direction was made as a result of the Court, on the 12th March, 2020, directing the Plaintiff's expert witness to file a Supplemental Witness Statement, only to produce documents referred by to him in the plan produced at the trial, to determine the southern boundary markers of the property in question (**the "12th March Order"**).
4. During the hearing of the Defendant's application for leave, Counsel for the Defendant, Mr. Rodgers contended that directions were previously given by the Court and agreed to by all parties, which stated that the Defendant would be able to call a new expert as a

result of the former expert's death and that the new expert witness's evidence would be limited.

5. He further contended that the documents exhibited in the Supplemental Witness Statement were put before the Court late in the day and that the Defendant should have had the opportunity to examine them and consider whether they accurately reflected what was purported to be on plan 600AN, especially as the point was continuously raised that plan 600AN was created by the joint venture partner of the Plaintiff, who they contended, had every benefit to gain by saying that a Water and Sewerage plant is situate on the Plaintiff's purported property.
6. Mr. Rodgers confirmed that the original witness statement of Mr. Ledee was filed on the 26th November, 2019 and referred to the documents however, he admitted that he did not make any application prior to trial for disclosure or discovery of these documents nor did he make an application for the action to be struck out as a result of the Plaintiff's failure to make full discovery pursuant to the Rules of the Supreme Court. However, he did cross-examine Mr. Ledee on his witness statement but without the benefit of the additional documents which the Plaintiff initially had said were not being relied on.
7. Mr. Rodgers cited authorities which set out the guidelines for an application for leave to appeal, namely that a Court would only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. He also relied on Order 31A of the Rules of the Supreme Court which speaks to the powers of the Court in support of his contention that a new witness could be called even at the end of a party's case.
8. In turn, Mrs. Rolle Q.C., on behalf of the Plaintiff, contended that pursuant to the case management order made on the 1st July, 2019, Mr. Ledee filed a witness statement on the 26th November, 2019. Within that witness statement, he prepared a comprehensive schedule which set out various documents that he relied on for the purposes of preparing plan 600AN. Subsequently, on 7th November 2019, the parties filed an agreed bundle of documents after Mr. Rodgers attended the chambers of Rolle & Rolle and reviewed each document contained therein, including plan 600AN, which in the legend referred to the same documents produced in the witness statement.
9. Thereafter, on the 2nd December 2019, a pre-trial review was held and both parties indicated that they were ready to proceed with trial. Trial commenced on the 11th December, 2019 and all parties and their witnesses had the benefit of the bundle of documents that included plan 600AN and all of the documents listed therein as having been relied upon for the purposes of preparing that plan and that no objection was taken and the trial continued ("**11th December Hearing**").
10. Mrs. Rolle Q.C. continued that during the 11th December Hearing, the Court asked about the documents utilized by Mr. Ledee for the purpose of establishing the southern boundary and directed him to produce them, after which they were sent to the court under cover letter dated the 2nd February, 2020. On the 12th March, 2020 the Court directed Mr. Ledee to file the Supplemental Witness Statement exhibiting only the documents relied upon for the purposes of establishing the southern boundary, based on its request at the 11th December hearing.
11. Mrs. Rolle Q.C. additionally submitted that the order that the Plaintiff intended to appeal could not be appealed regardless of the grounds put forth, based on the fact that the

order made was a case management order. She further submitted a case management order is in the exercise of the Court's unfettered jurisdiction to govern the matter in which the proceedings that it has carriage of are being disposed of. She added that there could only be a narrow ability to appeal if it were not properly made. Mrs. Rolle Q.C. contended that the Defendant had never challenged the 12th March Order.

12. Mrs. Rolle Q.C. further submitted that there was a problem with the Defendant's contention that the provisions of Order 31A of the RSC vested the court with the jurisdiction to allow a new witness to be called after the close of their case. She said that it had nothing to do with case management as it was an evidentiary application governed by the rules of evidence and the requirements for so doing were very strict. She continued that there was no evidence to even allow the Defendant to reopen its case.
13. Mrs. Rolle Q.C. contended that the Defendant's previous expert, as a licensed surveyor, could have obtained the documents but clearly opted not to. She further contended that the jurisdiction to reopen a case could only be exercised for the purpose of introducing material or evidence that had arisen ex improvis, i.e. no human ingenuity could have foreseen it, which did not occur in this instance as they were listed in the witness statement and on the plan.
14. Mrs. Rolle Q.C. further contended that the stay application should also be refused, even if the Defendant was granted leave to appeal as it also depends on there being a good and arguable appeal.

DECISION

15. The principles that must be considered on an application for leave to appeal are all too familiar. Leave to appeal will only be refused if the applicant has no realistic prospect of succeeding and may even be granted where there is no realistic prospect of success but where there is an issue of a public interest or the law requires clarification. Therefore, the Court has a duty to single out and dismiss hopeless appeals. If there is any doubt by the Court as to whether or not leave should be granted, it is advisable to refuse leave as a party still has the option to apply to the Court of Appeal to seek leave.
16. After hearing both parties and reviewing and considering all of their evidence and submissions, I deemed it prudent to deny the Defendant's application for leave. The events which led to the Defendant's application were correctly set out by the Plaintiff and therefore needs no repetition.
17. I am not satisfied that the Defendant has made out a good and arguable case. To my mind, the Defendant's application, which was made at the end of the Defendant's case, is an attempt to reargue its case. It was in fact the Court who directed that the Plaintiff's expert witness produce these documents referred to in his witness statement, which spoke to the southern boundary as I considered the exact location of the southern boundary is an issue the Court has to determine. The Court gave leave to the Defendant's expert witness to respond to the Supplemental Witness Statement and to examine the witness on these documents, an order that was never objected to by the Defendant.

18. Unfortunately, the Defendant's expert passed away without complying with the court order, and, therefore, there was the request by the Defendant to have a new expert file a witness statement in addition to seeking other ancillary orders. At the hearing of the Defendant's application, the Court granted the defendant leave to substitute Mr. Young in the place of Mr. Coakley to respond to the Supplemental Witness Statement in addition to attaining the Defendant to cross examine the Plaintiff's expert on that statement. What is of concern to this Court is that this action had been pending for some time and the Defendant had knowledge of these documents, because they were originally set out in the witness statement of Mr. Ledee. They chose not to obtain copies of the documents for whatever reason.
19. I must make it clear that the order made was not for leave to be given to the Defendant to call another additional witness, but was in fact an extension of the 12th March, 2020 Order, whereby the Defendant's previous witness Mr. Coakley, who had unfortunately passed away, was given leave to respond to Mr. Ledee's evidence.
20. The rules of Court allowed the Defendant to make an application if they felt that there was an obligation on the part of the Plaintiff, but they did not do so. They did not obtain copies if they thought them to be relevant and important to the proper disposal of this action. It was only after evidence had been closed on both sides that the Court itself determined that it needed to see the specific documents referred as they highlighted where the southern boundary of the property would be. They would assist the Court in determining the exact location of the property in issue. The Defendant would be able to cross examine Mr. Ledee on these documents or choose not to.
21. The evidence in this trial is finished, except for the narrow issue of what Mr. Ledee relied on to establish the southern boundary and the Defendant's response to the same. I have not been provided with an application to reopen the trial and there has to be a finality to litigation. The Defendant had ample opportunity to seek disclosure of these documents. It was their choice not to and now cannot be seen to use this opportunity to address other issues now that the litigation has come to an end.
22. Leave to appeal is denied and as such the application for stay is also denied.
23. The Plaintiff is awarded costs to be taxed if not agreed.

Dated this 27th day of July, 2020



G. Diane Stewart