In The Supreme Court of Judicature of Jamaica

In Civil Division

Claim No. 2006 HCV 03802

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| Between | Delbert Fearon | Claimant |
| And | New Era Homes 2000 Ltd. | Defendant |

Mr. Garth Lyttle instructed by GEL & Co. for the Claimant.

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn for the Defendant.

Trespass; Hearsay evidence in witness statement, Expert witness and no case submissions

Heard: 11th February, 2009 & 27th April, 2010

Gayle, J.

The claimant Delbert Fearon is an Agronomist and Commercial farmer residing at #14 Charlton Drive, Kingston 8 in the parish of St. Andrew and the lessee of 22 acres of land owned by the Government of Jamaica known as Lot 41 Block E. Bernard Lodge in the parish of St. Catherine.

The defendant is a company duly registered under the laws of Jamaica having its registered office at No. 6 St. Lucia Avenue, Kingston 5, Island Life Building in the parish of St. Andrew and is engaged in the construction of residential and commercial complexes for sale to the public.

The claimant's claim is that on the 12th day of November, 2005, the Defendant by itself, its servant and or agents wrongly entered Lot 41 Block E, Bernard Lodge, St. Catherine by driving heavy duty tractors, truck and workmen in and upon the Claimant aforesaid land and willfully, deliberately and unlawfully destroying his:

a). Growing and matured crops

b). Drip Irrigation system

c). Pipes

d). Fencing and

e). Material

The claimant's claim as a result is for damages and aggravated damage and that he suffered loss and incurred expenses due to the trespass of the defendant and or servant or agents.

An application by the defendant herein to strike out certain portions of the witness statement of the claimant Dalbert Fearon, on the basis that it offends against the hearsay rule.

The Court

**Part 29.8 (2) of the Civil Procedure Rules 2002 (The C.P.R.)** states:

> "Where a witness is called to give oral evidence under paragraph (1) his or her witness statement shall stand as evidence in chief unless the Court orders otherwise."

**Phipson on Evidence, 11th Edn. Para 632**

> "Former oral or written statements of any person whether or not he is a witness in the proceedings may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them."

I made the following ruling in relation to the allegedly offending paragraphs in response to the application. Paragraphs 7, 8, 9, 10, 11 and 12 struck out as hearsay evidence.

Claimant's Case

The evidence of the claimant Delbert Fearon is contained in his witness statement as exhibited. He was allowed to amplify his witness statement. He said by way of amplification that he had a lease for 25 years and he was on the property for 11 years and he has not received any compensation.

Cross examination by Mr. Kinghorn

He said he did not engage the Government for compensation in 2005.

That he did not ask the Government for compensation of $7 million in 2005.

He said that on 29th September, 2005 he wrote a letter to the National Land Agency – attention Mr. Hayden and asked for compensation of $7 million.

He said he agreed that in 2005 there was negotiation between the Government and himself for compensation for the property.

Mr. Lyttle asked that the reports of John Hall and Vernal Tulloch be tendered and admitted as expert reports.

Mr. Kinghorn submitted that the Claimant must first obtain permission of the Court and the procedure must be followed as it relates to expert witnesses.

He submitted that no permission has been sought and none has been given for John Hall and Vernal Tulloch to be called as witnesses at the trial.

Mr. Kinghorn relied on Part 32.6(1), 32.6(2), 32.6(3), 32.7, 32.12 and 32.13 of the Civil Procedure Rules 2002 (The CPR).

Mr. Kinghorn further submitted that the order at Page 111 of bundle made by the Honourable Ms. Justice Paulette Williams on the 1st of July 2007 relates to an application for interim payment by the Claimant and that he objected to the contents of the report.

That he Mr. Kinghorn cross examined the witness before the Honourable Mr. Justice Campbell and that the ruling of Mr. Justice Campbell is outstanding.

That the order made by Ms. Justice Williams is not an order for the experts to testify at the trial.

Mr. Lyttle submitted that the order made by Ms. Justice Williams extend to the trial and that it was not necessary for another order to be made at Case Management Conference since the order was made by a Judge of the Supreme Court. And that it was not necessary to seek

permission at Case Management Conference that the order covers this aspect of the proceeding.

**The Court**

The Civil Procedure Rules 2002 (CPR).

The admission of expert witness in Civil Trials is governed by Part 32 which sets out the procedure to be followed in order for a party to be able to adduce expert opinion evidence in Civil Trials. The manner in which such is to be given and the duties of the expert witness. Part 32.4 appears to mirror the conditions set out in the case of **Ikarian Reefer [1993] 2 Lloyds report 68** by Crosswell J with regard to the duties of the expert witness

Before the expert witness can be allowed to give evidence however, it is the duty of the Attorney who is seeking the aid of the expert to apply to the Court for permission to call such witness or to put in the expert witness's report.

**Rule 32.6 (1)** of the CPR stipulates this condition.

**Rule 32.6 (1)**

> "No party may call an expert witness or put in an expert witness's report without the Court's permission.

**Rule 32.6(2)** states that- the general rule is that the Court's permission is to be given at a Case Management Conference.

**Rule 32.5(3)**: When a party applies for permission under this rule-

a. That party must have the expert witness and identify the nature of the witness expertise and

b. any permission granted shall be in relation to that expert witness only.

**Rule 32.6(4)**

No oral or written expert witness's evidence may be called or put in Unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intend to give.

**Rule 32.6(5)**

The Court must direct by what date such report must be served.

**Rule 32.6(6)**

The Court may direct that part only of an expert witness's report be disclosed.

**Rules 32.3, 32.4, 32.12 and 32.13** apply to the duties of the expert witness's and the procedure he should follow in preparing the report and **Rule 32.7** stipulates that expert witness evidence is to be given in a written report unless the Court directs otherwise subject to any enactment restricting the use of 'hearsay evidence.'

I have examined the minutes of the various Case Management Conferences.

I find that no permission was sought or obtained for expert witnesses to be called at the trial.

I find that an omission to obtain permission to adduce expert evidence is a fundamental breach of the rules.

It is to be noted however that **Rule 26.9** under Case Management – The Courts power – headed – 'General powers of the Court to rectify

matters where there has been a procedural error', appears to give the Court power to rectify matters where a rule has not been followed.

I find that the CPR gives the Court a discretion to order that a breach be rectified in an instance such as that in which permission was not sought to adduce expert evidence.

I bear in mind the overriding objective set out in Part 1 of the C.P.R. to deal with cases justly.

In the case of **Calenti v. North Middlesex N.H.S. Trust (2001) L.T.L.** 10th April, 2001- the defendant was refused permission to call medical expert two weeks prior to trial because to do so would work a significant injustice to the defendant.

I find that to allow the claimant to adduce the evidence of John Hall and Vernal Tulloch would work a significant injustice to the defendant.

I therefore rule that the evidence of John Hall and Vernal Tulloch are inadmissible.

At the close of the Claimant's case Counsel for the defendant having elected to rest on his no case submission.

Submitted that the defendant should not be required to state a defence to the Claimant's claim as it had not been identified or implicated by any evidence in the Claimant's case. He further submitted that there is no direct or circumstantial evidence that the damage complained of by the claimant was caused by the defendant.

That paragraphs 7, 8, 9, 10, 11, 12 have all been struck out as hearsay evidence. The Claimant speaks to leaving his property on the 11th November 2005 and returning the next day where he saw the level of devastation and the tractors still on the premises. That the owners of the tractors has not been identified.

Mr. Lyttle asked that judgment be entered for the claimant.

The Court

It must be remembered that the burden of proving on a balance of probabilities is and remains with the claimant.

The question which is outstanding as between the claimant and the defendant is whether he has established his case on a balance of probabilities against the defendant.

There is no evidence as to whose tractor or who caused the damages to the claimant's property.

I regret that on the evidence before me I cannot say that on a balance of probabilities the claimant has established his case against the defendant.

I agree with the submission of defendant's attorney and accordingly award judgment to the defendant with costs to be agreed or taxed.