



[2014] JMSC Civ.155

IN THE SUPREME COURT OF JUDICATURE

THE CIVIL DIVISION

CLAIM NO. 2011 HCV 03742

BETWEEN	LETHE ESTATE LIMITED	1 st CLAIMANT
AND	GREAT RIVER RAFTING AND PLANTATION TOUR LIMITED	2 nd CLAIMANT
AND	JAMAICA PUBLIC SERVICE COMPANY LIMITED	DEFENDANT

IN OPEN COURT

Mr. Hugh Wildman instructed by Hugh Wildman & Company for the Claimants.

Mrs. Symone Mayhew, Attorney-at-Law for the Defendant.

Heard: 15th October 2013 & 21st October 2014

Easement – Grant of Easement – Omission of specific route in Grant of Easement – Claimants’ Application for Court Order for Summary Judgment – No annexure of Easement path for the transmission and/or distribution of Electricity – Factual disputes cannot be resolved on Summary Application – Application for Court Order for Summary Judgment refused.

CAMPBELL. J.

Background

[1] The Claimants are companies incorporated under the Companies Act of Jamaica with their registered offices at Lethe, in the Parish of Hanover. They are a landowning development company and tour operator respectively. Mr. Francis Tulloch is the majority shareholder and Chief Executive Officer (CEO) of both companies.

- [2] The Defendant, Jamaica Public Service Company Limited, (hereinafter called "JPS") is a public utility company, incorporated under the Companies Act of Jamaica, with an exclusive licence under the Electric Lighting Act (hereinafter "the Act"), to generate, transmit, distribute and supply electricity throughout Jamaica. JPS has the right under the Act, to enter into wayleave agreement with owners of land to permit it to carry its wires, poles, posts and towers over and on property for an agreed consideration for the purpose of supplying customers with electricity in accordance with its licence.
- [3] On the 4th November 1996, the 1st Claimant, Lethe Estates Limited became the registered owner of lands, at Lethe District, in the Parish of Hanover, described in the Certificate of Title; registered at Vol. 1283 Folio 504 of the Register Book of Titles, having had it transferred from Mr. Francis Tulloch.
- [4] In 1995, JPS wanted to construct a transmission line from Orange Bay, Hanover to Bogue in St. James and entered into negotiations with Mr. Tulloch, then the owner of the lands registered at Vol. 1283 Folio 504, to secure an easement for a path over the lands. On the 31st August 1995, a sketch diagram was faxed to Mr. Tulloch, which showed an "easement path".
- [5] On the 27th March 1996, JPS wrote to Mr. Tulloch, requesting what it understood to be Mr. Tulloch's "*final requirements to settle the matter*". In that letter under the caption, "*Items of Consideration*", was the following;
- "Compensation for grant of easement for the Orange Bay – Bogue transmission line, the easement path being approximately 2700 feet long by 100 feet wide (approximately 6.2 acres) and containing three transmission tower locations. It is recognized and agreed that three subdivision lots will be affected by the presence of the transmission lines."*
- [6] A week later, the 4th April 1996, Mr. Francis Tulloch and JPS, executed a Grant of Easement, pursuant to which JPS paid the sum of Five Million Dollars (\$5,000,000.00) to Mr. Francis Tulloch, for various purposes, including the sum of Three Million Dollars (\$3,000,000.00) paid in respect of considerations for compensation for the grant of easement for the Orange Bay – Bogue transmission line.
- [7] This Grant of Easement had an alarming omission. Although it contained a reference to the easement contained in the Second Schedule and an agreement that the "*grant hereby made shall run with the said land and be binding on the owner or owners for the time being of the said land,*" the specific route that the

Easement should take was not expressed in the Grant. No route was embodied in the said Grant, in that, there was no annexure showing the easement path along which the transmission and/or distribution of electricity would be carried out on the land, and to which JPS rights over the land were to be confined.

- [8] Under the Grant of Easement, JPS undertook at paragraphs (2)(b) and 3 as follows;

"2(b) To indemnify the Grantor against all damages claims and demands whatsoever that may be claimed or made against him and all costs and expenses in relation to the same by reason or arising out of the exercise by the Company of any of the rights hereby granted."

"(3) In the event of it becoming expedient to alter the route of the transmission and/ or distribution line across the said land by reason of any cause beyond the control of the Company, the Grantor and the Company shall mutually agree upon a new location and the Grantor shall grant such new route to the Company and in the event of their failure to agree, the matter shall be referred to arbitration under the Arbitration Law."

However, neither side has made a reference to arbitration.

- [9] On the 15th March 1997, JPS wrote to Francis Tulloch & Co., for the attention of Mr. Francis Tulloch, under the reference, **Relocation of Orange Bay Bogue 69kv Line Section**. The letter reads in part;

*"The section of the Orange Bay – Bogue 69KV Transmission Line, **which was being constructed** in your property located at Lethe St. James, will have **to be relocated** for better clearance from your tourism attraction, including the area known as "the Green". To ensure that there are no repeat incidences of time consuming and expensive relocations, we have **flagged on the ground a proposed new routing which you have inspected and approved as satisfactory for your tourism business. The proposed new route is defined in the attached copy of drawings #JPS/t12/Ftull -15/3/97**...Based on your acceptance of this new route, **JPSCO, will presently proceed with construction activities.** Please sign below to indicate your*

agreement with the new route shown.” [Emphasis provided].

The letter had a space, for Mr. Tulloch to sign. No further or subsequent proposal was issued to the Claimants or Mr. Francis Tulloch. It is common ground in these proceedings that Mr. Tulloch never signed or made a written response to this letter.

- [10] Almost eight years later, on the 6th June 2005, Mr. Tulloch springs to life with a letter to JPS, asking “*if there is a possibility of meeting with you as he would appreciate a short discussion.*” Followed with another letter, the next day, which stated inter alia, “*Lethe Estate has never agreed upon a route for the easement.*” Six years later, to the day, 6th June 2011, the Claimants filed a claim for damages against JPS, arising from a breach of contract in the erection of its Transmission System on the Claimants’ property, and for continuing trespass by JPS.
- [11] On the 13th January 2012, the Claimants applied for Orders: an Order striking out the Defence and/or for Default Judgment and /or for Default Judgment and an Order for Summary Judgment for the Claimants. In respect of the application for Default Judgment, the complaint was that the Defendant had failed to file an acknowledgment of service, despite having purported to file a defence. On the 29th February 2012, the Defendant applied to extend the time within which to file a defence, and that the Defence that was filed stands. The Defendant’s application was based on the ground that the Defendant has a real prospect of successfully defending the claim, and a good explanation for the failure to file a defence in time. On the 27th June 2012, the Court granted the Defendant’s application.
- [12] On the 11th October 2013, the Defendant applied that paragraph 11 and the corresponding exhibits of the Further Supplemental Affidavit of Francis Tulloch (2nd affidavit) and paragraph 16 of the Particulars of Claim be struck out. Pursuant to **Part 26.3 (1) (b) and (d) of the Civil Procedure Rules**, respectively, the court may strike out parts of a statement of case if it appears to the court;

(b) that the statement of case to be struck or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

Pursuant to **Part 30.3(3) of the Civil Procedure Rules**, the Court may order any scandalous, irrelevant or otherwise oppressive matter out of an affidavit to be struck out.

Counsel for JPS submitted that the offending paragraphs prevent the just disposal of the matter because they are “*oppressive, scandalous, vexatious and an abuse of the process of the Court.*” Mrs. Mayhew submitted that Paragraph 16 of the Particulars of Claim, introduced evidence in the Statement of Case. The detail went too far which may prejudice the just outcome of the matter.

The learned Author, Stuart Simes, in **Civil Procedure**, Ninth Edition, at page 142 stated;

‘Generally, a party will comply with its obligations when drafting statement of case if it sets out the facts of its claim or defence, *and avoids setting out the evidence it intends to adduce to prove its case. Material document simply should be referred to, but with sufficient detail to enable them to be identified.*’

The learned Author also cautions against lengthy quotations, which can counter the overriding objectives.

Additionally, in Paragraph 11 of the 2nd affidavit of Francis Tulloch, filed on the 3rd October 2013, Mrs. Mayhew submitted that, Mr. Murray’s statements constituted double hearsay.

The Claimants’ application for Summary Judgment

[13] The Claimants are contending that the Defendant is liable for a breach of contract and trespass to property by virtue of the Defendant having erected certain infrastructural works on the Claimants’ land in breach of a contract made on the 27th March 1996. The Claimants further contended that, “*on the pleadings and defence as pleaded; amounts to a lack of any traversing of the critical issues, which constitute a breach of contract.*”

The submission continued, that JPS constructed towers and transmission lines in and over areas that were never agreed on. That construction was in breach of the agreement, which states, “1500 feet of road reservation, 3 lots were to be affected.” This has been confirmed by the Surveyor. (See, **Jamaica Public Service Company Limited v Enid Campbell & Marcia Clare** [2013] JMSC Civ. 22).

- [14] There are no issues or the need of further calling of witnesses or for cross-examination to be embarked on. The issues can properly be resolved by an examination of the pleadings without resort to the adducing of further evidence or by cross-examination. According to Mr. Wildman, the Defendant's admission in paragraph 13, of the Defendant's defence; that the Claimants did not agree for the relocation of the infrastructure means, there was no consensus. There was therefore no contract. See paragraph 8 of Michael Gordon's Affidavit filed on the 1st October 2013, which provided that no more than three lots were to be affected. See also paragraph 20, of Francis Tulloch's affidavit dated 15th March 1997, "*that he could not agree until he saw the plan.*" (See, **Swain v Hillman** [2001] 1 All E.R. 91; and **Lloyd Michael Pommels v EW Lewis Investments & Finance Limited** [2013] JMCC Comm.10, at paragraphs 16 and 23).
- [15] Mr. Wildman submitted that there is no place for acquiescence in the law of contract, unless relying on the principle of promissory estoppels. He argued that the Claimants were not told what the Defendant was doing so they could object. JPS had a right to be on the property, for specific purposes. But they went beyond what was agreed by the parties.

Submission in opposition of the application for Summary Judgment

- [16] It was submitted on behalf of the Defendant, that notwithstanding that Mr. Tulloch did not sign the letter dated March 15th 1997, the terms were agreed. The letter had a diagram to accompany it. The Defendant disputes all of Mr. Tulloch's assertions in which he denies expressed points in that letter. The letter of March 15th 1997 shows they are disputed issues which can only be resolved at trial. It is submitted that the claim is statute-barred. The companies were around whilst Mr. Tulloch was ill. Additionally, the Defence is not fanciful or hopeless. (See **Chin v Chin**, SUIT NO. E.467/93 – applicable to the extent of the resolution of factual disputes).

Discussion

- [17] The principles relevant to an application for striking out the case of a litigant, is expressed in **Swain v Hillman** (1999) WIR 85, Lord Woolf said;

" the Court now has salutary power, both to be exercised in a claimant's favour or where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects

of success or, as Mr. Bidder submits , they direct the court to the need to see whether there is a “ realistic “ as opposed to a “fanciful” prospect of success.”

[18] The judgment encourages the use of the powers, in achieving the overriding objectives of the Rules. If a Claimant's case is “bound to fail”, then it is in the Claimant's interest to know as soon as possible, that is the position. Likewise, if a claim is bound to succeed, a Claimant should know that as soon as possible. The judgment identified several issues that were controversial, requiring investigation at trial, and not at a summary hearing.

[19] Should the Defendant's case be dismissed summarily on the grounds, that it has no real prospect of success? It is unchallenged that the parties had achieved consensus as expressed in the letter dated 27th March 1996. The Claimants had been paid compensation of some \$5 Million dollars (\$5,000,000.00) in respect of the agreement reached. The letter of 15th March 1997 is instructive. It indicates that there were subsequent discussions between the parties. The Defendant, had forwarded for the signature of Francis Tulloch & Co signifying Mr. Tulloch's approval. This letter claims that there had been a relocation, of a route that was under construction. According to Mr. John Murray's letter, on behalf of the Defendant, the proposed route was flagged on the ground, and Mr. Tulloch had inspected and approved the new route. The purpose of the relocation was to have “*better clearance from your tourism project.*” Was there such an inspection by Mr. Tulloch? Did Mr. Tulloch approve, the route flagged on the ground? If there was such an agreement would it have the effect of varying the terms of the routing agreed in the letter of 15th March 1997?

[20] The affidavit of Katherine Francis, Legal Officer of JPS, dated the 11th October 2013, disputes points raised in Mr. Michael Gordon's Affidavit of the 21st November 2011, where at paragraph 8, Mr. Gordon says;

“early in 1997 Mr. John Murray and I met with Mr. Tulloch on the property of the 1st Claimant and marked on the ground a location for a tower in the banana plantation thereon, but there was no agreement on this location as Mr. Tulloch stated that this location would have serious negative effect on the river lots of the 1st Claimant subdivision which were the most valuable lots of the subdivision.”

This is inconsistent with Mr. John Murray's contemporaneous letter which asserts that it was a new routing that had been approved, and not a location of a tower. That routing was defined in a drawing that was attached.

[21] Mr. Tulloch in his letter dated, 7th June 2005, recalls not wanting to sign, because, “*there were many outstanding issues that were not committed to writing that had been negotiated between the signing of the Grant of Easement and time the JPS decided on the final route.*” Was the final routing, reduced to writing in the letter of 15th March 1997, and exhibited in a plan, an outstanding issue? JPS disputes the assertion that the relevant route is contained in the March 27th 1996 document, and contends that an agreement was struck as outlined in the letter of 15 March 1997.

[22] The learned Authors of **Modern Law of Real Property**, tenth edition, states at page 483;

“At common law, a grant of an easement made orally or by an unsealed writing creates only a licence, but courts of equity, acting upon the principle that what ought to be done must be regarded as actually done, a view that has given rise to the doctrine of Walsh v Lonsdale –and expanding the doctrine of part performance, are prepared to rectify the want of a deed of an easement when the altered position of one of the parties gives him an equitable right against the other party. If a grantee under a parol grant of an easement materially alters his position for the worse in reliance on the grant, as for instance by the expenditure of money deliberately acquiesced in by the grantor, the latter will not be allowed to say there is a mere licence not an easement.”

[23] Mr. Tulloch, and the Claimants (having come into possession of the property in November of 1996), and been aware of the new routing, which had been proposed by JPS in the letter of 15th March 1997, have not denied examining the new routing on the ground and being shown a plan of it. Even if no examination was done on the ground by the Claimants, they were aware of the plan in the letter of March 15th 1997. However nothing was done in relation to JPS submission from the date of receipt of the letter dated 15th March 1997, until 5th June 2005. This is a period of eight years. During which period, the Defendant actively pursued the rights of the grantee of the easement, as proposed in the letter of 15th March 1997. The activity of JPS as grantee was not shrouded in secrecy. There were numerous factual disputes between the parties. Mr. Tulloch was saying that he had not agreed the path. Mr. Michael Gordon was saying Mr. Tulloch did not agree the route. The letter of 15th March 1997, shows disputed areas of facts.

[24] The Defendant applied to amend their defence to allege, that the Claimants' claim is statute barred pursuant to the **Limitations Act**. Mr. Wildman had argued that, there was no evidence in the pleadings that has been proffered by the Defendant as to the exact time the infrastructural work took place.

Amendments to pleadings generally, may be presented before a court at any stage of the trial for the purpose of bringing forward and determining the real question and issues in controversy between the parties.

[25] The letter that the Claimants received indicated that work had started, and that the location was been undertaken. Was there a parol grant of an easement? If so, did the grantee, materially alter his position for the worse acting on that grant? They are factual disputes that cannot be resolved on a summary application.

[26] In light of the submissions and evidence presented to this Honourable Court, the Application for Court Order for Summary Judgment by the Claimants is refused.