

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

SAINT LUCIA

Case Number: SLUHCV2023/0115

BETWEEN:

DERRECK DANIEL

Claimant

-and-

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before the Honourable Mr. Justice Alvin Pariagsingh

Appearances: Ms. Jadia A. L. Jn Pierre for the Claimant; and
Mr. Seryozha Cenac for the Defendant.

2024: June 13
July 08

JUDGMENT

Defendant's Application to adduce fresh evidence after judgment was reserved but before it was delivered; Defendant's application for the Claimant to provide security for costs.

[1] **PARIAGSINGH, J:** - On May 09, 2024, after judgment was reserved in this claim following a trial of the Claimant's claim for Constitutional relief on April 22, 2024, the Defendant filed two applications. The first application, filed on May 09, 2024, seeks to adduce fresh evidence. The second application, filed on May 15, 2024, requests the Claimant to provide security for costs. I propose to deal with these applications in the order of their filing.

Application to Adduce Fresh Evidence (Filed May 09, 2024):

[2] The application to adduce fresh evidence is supported by the affidavit of the Attorney General. The Defendant seeks to introduce an agreement for sale dated July 24, 2018,

between the Claimant and Ronald Kendal John for the sale of a polyester vessel with two motors. The Attorney General contends that the VIN number of the vessel referred to in the agreement for sale is the same as the VIN number of the vessel "Ti Fre," which is the subject matter of this claim and which the Claimant contends is registered in Guadeloupe.

- [3] In his affidavit, the Attorney General comments generally on the Claimant's evidence and expresses the view that the additional evidence is highly relevant and probative to the facts in issue in the claim, namely the ownership of the vessel. The Attorney General contends that as of the date of the filing of the claim for Constitutional relief, the Claimant was not the owner of the vessel. Furthermore, he asserts that at the time of the making of the two confiscation orders, which are the genesis of the claim, the vessel had been sold to Ronald John. Thus, he argues, this evidence is relevant and ought to be admitted.
- [4] The Attorney General contends that the agreement was only recently discovered in preparation for making disclosure in another matter namely; **SLUHCV2023/0444, Ronal Kendal John and Eric Kareem Samuel -v- The Attorney General of Saint Lucia**, filed on November 08. Having pursued the file in this matter, I noted that the agreement which the Attorney General seeks to introduce in evidence was neither identified nor annexed to the statement of claim filed in the connected matter. Similarly, the agreement was neither identified nor annexed to the defence filed by the Attorney General in the connected matter.
- [5] The connected matter came before the Master for the first case management conference on April 09, 2024 and directions were given inter alia for disclosure to be made on or before May 07, 2024. It is in preparation for filing his List of Documents, the Attorney General contends the said agreement was only recently discovered in the police file submitted to his office. The instant application was filed two (2) days later in this claim. The Court also took judicial notice that the Claimants in the connected claim

are represented by the same counsel. The Defendant is not. The Defendant is represented by a different Crown Counsel in the connected matter.

- [6] In opposition, the Claimant contends that in July 2018, while visiting Saint Lucia to attend to "Ti Fre," he met with Ronald John through his former attorney. After discussions, he agreed to sell one of his vessels to Mr. John. The Claimant maintains that the vessel he sold to Mr. John was "Twister One," not "Ti Fre." He explains that the VIN number stated in the agreement for sale being the same as the VIN number of "Ti Fre" was an error. He asserts that the agreement had annexed to it his ownership documents, which the Defendant omitted to create mischief and mislead the court.
- [7] The Claimant further contends that he has verified with Mr. John that the vessel he sold is still in Mr. John's possession and is now named "Journey," equipped with two 350 HP Mercury engines, unlike "Ti Fre," which has two 255 HP engines. He highlights that the Defendant's documents show "Ti Fre" has a grey interior while "Journey" has a red interior, supporting his claim that they are different vessels.
- [8] Mr. Ronald John has also provided an affidavit supporting the Claimant's version of events. He corroborates the sale details and exhibits several documents from the Customs and Excise Department, including a Clearance Declaration authorizing "Journey" to depart from Saint Lucia to Union Island, St. Vincent, on August 26, 2022. He offers to make "Journey" available for court inspection if necessary.
- [9] Mr. John also explains his inability to produce the original documents for the vessel he purchased. He asserts that after purchasing "Twister One," his documents remained in the file of his previous attorney for safekeeping. This file was subsequently passed to the now Attorney General, which is why he does not have his original documents.

Applicable principles to an application to admit fresh evidence before the trial judge:

[10] The Defendant relied on the case of **Andriy Malitskiy & Anor v Stockman Interhold SA**¹ and commend that the key consideration was ‘to deal with the case justly’. This was the conclusion of the learned judge after considering the well-known **Ladd v Marshall**² principles. The **Ladd** approach involve three considerations. These are:

“..... To justify the reception of fresh evidence or a new trial, 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; secondly, 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.”

[11] A more recent discussion of the application of the **Ladd** principles post CPR was decision of Neuberger J, in **Charlesworth v Relay Roads Limited & Ors**³. In this case, after considering the applicable authorities in a case in which he was asked to allow fresh evidence to be put in after judgment had been handed down but before the order had been perfected. The Court stated:

“Nonetheless, it seems to me that, as a matter of principle, if, as those cases all show, the judge retains control of the case, to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which he has decided, there must be power to permit pleadings to be amended, even if that involves a new argument being put forward, or further evidence being adduced, or even both, as the defendants seek here.....

“As is so often the case where a party applies to amend a pleading or 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

¹ BVHCOM2015/0008

² [1954] 1 WLR 1489

³ [2000] 1 WLR 230

a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted.”

That view could be said to derive support from the observations of Millett L.J. in *Gale v. Superdrug Stores Plc.* [1996] 1 W.L.R. 1089, 1098– 1099:

“The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice.”

In *Clarapede & Co. v. Commercial Union Association* (1883) 32 W.R. 262, 263, Brett M.R. said:

“however negligent or careless may have been the first omission, and, however late the pro-posed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs ...”

I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity.

On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds.”

“In these circumstances, I conclude that the following principles apply where a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up: (1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with

any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v. Marshall*; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare.”

[12] As stated by Lord Justice Mummery, in **Townsend v Achilleas**⁴:

“In principle, however, it is difficult to see why there should be a more restrictive test for the reception of fresh evidence by the judge who has tried the case than would be applied by the Court of Appeal on an appeal from the judge. **Indeed, there is a good case for the cautious application of a slightly more flexible test for the reasons given by Neuberger J in *Charlesworth v. Relay Roads Ltd* (supra) at 238 B-H.** The trial judge would have the advantage over the Court of Appeal of having seen the witnesses. He would be in a better position to look at the evidence as a whole closer to the trial. In that way it might be possible to avoid the risk of the Court of Appeal having to inflict on the parties the expense and delay consequent on ordering a retrial by a different judge at a much later date.”

"In the exercise of the general power to receive fresh evidence under this rule the court must seek to give effect to the overriding objective enabling the court to deal with the case justly ... The proper application of the overriding objective justifies the court in setting stringent limits to the reopening of issues after the judge has delivered final judgment in an action ... The power is to be exercised 'very cautiously and sparingly' in accordance with the overriding objective. Litigants are not to be allowed 'unlimited bites at the cherry'..."

Evidence could not have been obtained with reasonable diligence for use at the trial;

[13] The agreement is a document to which the Claimant was a party. He has not disclosed it in this case, presumably because his position is that it relates to another vessel. The

⁴ [2000] EWCA Civ 210

fact that the agreement contains the same VIN number as the vessel which is the subject of this claim, in my view, makes it relevant.

[14] The Attorney General's explanation of how the agreement came to his attention has not been challenged or rebutted. Given the timeline, the application was made two (2) days after disclosure was made in the other claim. Taken at its highest, the time between the first case management conference, when the order for disclosure was made, the obtaining of the police file, making disclosure, and making this application all took place within one month.

[15] In my view, the agreement could not have been obtained with reasonable diligence for use at trial, as at the time the order for disclosure was made in the connected matter, 9th April 2024, the trial before this Court was already fixed for 22nd April 2024. Moreover, all evidence had been filed, including evidence of ownership. It is difficult to see how, in the absence of the police file in the connected matter, the agreement could have been discovered at all.

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;

[16] It is common ground that before the Claimant can succeed on this claim, the Court has to make a finding that the Claimant is the owner of the vessel. This Court is not bound by the Order of the Magistrate declaring that the Claimant is the owner of the vessel. This is in the context of the Defendant's submission that the Magistrate had jurisdiction to make the order for the return of the vessel to the Claimant in the first instance as at time that order was made, there were criminal proceedings pending before the High Court.

[17] On the issue of ownership, save for the physical description, the documentary evidence is thin. What is consistent is the identification of the vessel by a VIN number. This agreement introduces the possibility that the vessel which the Claimant says was

confiscated was actually sold before any order was made by the Criminal Court. It is the Claimant who must prove ownership. The agreement, in my view, is of probative value. It goes directly to a germane issue in this case, the issue of ownership.

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;

[18] The agreement is the Claimant's document. The Claimant has not denied it but puts forward an explanation. The Claimant explains what he contends is an error in the agreement and further contends that the complete agreement had documents attached to it. Documents he says he cannot produce as his lawyer has his original.

[19] All of these explanations are matters which can be tested, and the Court can make a finding of fact. In my view, the Defendant passes the **Ladd** criteria. Additionally, the overriding objective favours the grant of the application. Whilst allowing the evidence will lead to a delay in the resolution of the matter, the Defendant ought to be permitted to advance all evidence relevant to its case once any resulting prejudice can be cured in costs.

[20] In my view, any prejudice by allowing this application can be cured in costs. Additionally, the Claimant will have the opportunity to file any evidence in reply and both parties will be given the opportunity to cross-examine on the new evidence, if they deem fit.

[21] For these reasons, I grant the application filed on 9th May 2024.

[22] On the issue of costs, the relevance of the new evidence on the outcome of the issue of ownership can only properly be addressed after the trial. In this regard, I propose to deal with the costs of this application at the conclusion of the trial.

Application for Security for Costs (Filed May 15, 2024):

[23] The Defendant's application is premised on the fact that the Claimant is ordinarily resident out of the jurisdiction, had potentially two addresses, is a fisherman, has not been honest in this claim and enforcement will be an issue if costs is ordered in its favour.

[24] In opposition, the Claimant contends that he not hidden his address. He is a Dominican national but he is resident in Guadeloupe for over 30 years. He denies that he represented himself as reside in Dominica. He contends that he has honoured all obligations and submitted himself to Saint Lucian authorities in respect to his vessel, is of good character and any order made for him to provide security for costs will stifle his ability to seek redress through this claim.

The applicable principles to the grant of an order for security for costs:

[25] Security for costs is provided for in **Part 24 of the Civil Procedure Rules (Revised Edition) 2023 (CPR)**. The application is to be made at an early stage and if practicable at the case management or pre-trial review; See **Rule 24.2(2) CPR**.

[26] The grant of an order is discretionary having regard to all the circumstances of the case; See **Rule 24.3 (3) CPR** and one of the conditions in **Rule 24.3 (a) to (g) CPR** is satisfied.

[27] The guiding principle in determining this type of application was stated by the Court of Appeal in **Dr. Martin Didier et al v Royal Caribbean Curises Ltd**⁵ where it was stated that:

“As a general rule, if the court is satisfied that there is a significant risk of a defendant suffering an injustice by having to pay to defend proceedings, with no real prospect of being able to recover costs if successful, the court may, if it is just to do so, order a claimant to put up security for the defendant's costs.”

⁵ SLUHCVP2017/0051

[28] In **Nasser v United Bank of Kuwait**⁶ it was stated that:

“..the discretion has to be exercised applying the overriding objective, and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in the case in question”

[29] The factors to be taken into account in determining whether it is “just” to order security are set out in **Pan Am World Airways Dominicana SA v Carlos Bentiez and Anor**⁷. These are:

1. The risk of not being able to enforce a costs order, and /or the difficulty or expense of being able to enforce a costs order, if the defendant is awarded costs.
2. The merits of the claim. This has an impact on the risk of needing to enforce a costs order against the Respondent.
3. Whether the Defendants may be able to recover costs from someone other than the Claimant
4. The impact on the Claimant of having to give security.
5. Delay in making the application.

Rule 24.3 – condition:

[30] It is undisputed that the Claimant is resident outside of the jurisdiction. The mere fact that the Claimant is ordinarily resident out of the jurisdiction does not make it impossible or a substantial obstacle to enforcing an order for costs; See **KCL Market Brokers Limited v The Attorney General of Saint Lucia**⁸.

All of the circumstances:

[31] The starting point of considering all of the circumstances is bearing in mind that this is not a claim in private law. This is a claim in public law for the vindication of Constitutional

⁶ [2001] EWCA Civ 556

⁷ ANUHCv2016/0131

⁸ SLUHCv2016/0696

rights. **Rule 56.11 (6)CPR** specifically provides that the general rule is that no order as to costs may be made against an applicant for an administrative order unless the court considers that the applicant acted unreasonably in making the application or in the conduct of the application.

[32] This is a material deviation from the general rule that costs follows the event which obtains in private law. This alone in my view provides a layer of protection to the Applicant for an administrative order. Even if unsuccessful, the Court must look at whether the Applicant's conduct was unreasonable or the conduct of the litigation was unreasonable.

[33] Orders for security for costs in administrative claims are approached with great caution so as to not stifle access to the Court. The instances where security has been ordered have been in very pronounced and obvious situations. In **R v Westminster City Council, ex p Residents Association of Mayfair**⁹, security for costs ordered where corporate claimant was unlikely to be able to pay costs, and it was highly likely that resources could be found by those who were behind the application. In **R v Leicestershire County Council, ex p Blackfordby & Boothorpe Action Group Ltd**¹⁰ security was ordered where an action group was incorporated at the time of the challenge or for the sole purpose of bringing it.

[34] In **Pooran v Attorney General of Trinidad and Tobago**¹¹, Mohammed J in refusing a similar application stated:

"The Claimant is an individual who has bought a claim wherein there are alleged breaches of her fundamental human rights enshrined in the Constitution. The law clearly states that the order should not be used as an instrument of oppression that will stifle genuine claims."

[35] In the instant case I can find no such comparative obvious reason that justifies security for costs. I go on to consider the **Pan Am** considerations.

⁹ [1991] COD 182

¹⁰ [2001] Env LR 2 at [37]

¹¹ CV2020/00511 (Trinidad and Tobago) (Unreported)

[36] There is a risk that if the Defendant is successful there will be challenges in enforcing the order. The challenges will not prevent the Defendant from enforcing but will necessarily increase the costs and resources to be expended to recover costs.

[37] The merits of the case if the issue of ownership is resolved in the Claimant's favour are good. This is not a vexatious or frivolous case.

[38] There is no evidence that the Defendant will be able to recover costs from someone other than the Claimant.

[39] The impact on the Claimant giving security will not only affect the Claimant but will affect the administration of justice. Significant resources have gone into this claim including public resources, judicial time and resources. If the Claimant is unable to give any security ordered, it would result in a colossal waste of judicial time by having case managed this case and conducted a full trial as well as public resources with the Defendant having defended the matter up to and including a trial.

[40] The delay in making this application weighs heavily against the grant of the application. The application is made after judgment has been reserved. Nothing relied on in this application was unknown to the Defendant when it was served with the application.

[41] Additionally, when asked about the quantum of costs which the Defendant was seeking the Claimant give security for, the costs suggested was far less than prescribed costs, which is not even applicable to this claim. This in my view goes against the very rationale behind making an order for security for costs.

[42] Having considered all the circumstances, I am of the view that the application for security for costs is too late and not justified in the circumstances of this case.

[43] Accordingly, the application is dismissed.

[44] Unlike the previous application, the costs of this application can be dealt with at this stage. The Defendant must pay the Claimant's costs of this application. These costs are to be assessed in default of agreement.

Orders:

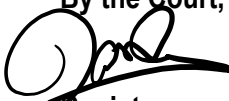
[45] In the circumstances, I make the following orders:

1. Permission is granted to the Defendant to reopen its case and lead fresh evidence of the agreement for sale dated July 24, 2018, between the Claimant and Ronald Kendal John for the sale of a polyester vessel with two motors only;
2. The Defendant shall file an affidavit from the appropriate deponent exhibiting the agreement and only containing facts and matters concerning the agreement, on or before July 15, 2024;
3. Permission is granted to the Claimant to file any affidavit in reply on or before July 22, 2024;
4. The deponents of all affidavits filed are to be personally present at the next hearing in the event that there is a desire to cross examine by either party;
5. The costs of the application of May 09, 2024 shall be dealt with at the end of the matter;
6. The Defendant's application filed on May 15, 2024 is dismissed;
7. The Defendant shall pay the Claimant's costs of the application filed on May 15, 2024 to be assessed by this Court in default of agreement;

8. All directions for submissions given at the conclusion of the trial on April 22, 2024 continue to be stayed until the next hearing; and
9. The trial of this matter shall resume on July 29, 2024 at 1:00pm in person.



Alvin S. Pariagsingh
Judge

By the Court,

Registrar