

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA
(CIVIL)
A.D. 2021**

CLAIM NO. AXAHCV 2020/0041

BETWEEN:

AVONELLE CARAGLIANO

Claimant

and

CABLE AND WIRELESS (ANGUILLA) LTD (dba FLOW)

Defendant

Appearances:

Ms. Tona Simpson-Whyte instructed by Astaphan's Chambers of counsel for the claimant

Ms. Jean M. Dyer, with her Mr. Theon Tross of counsel for the defendant

2021: June 7, 29;
July 8.

Evidence – Expert witness – Part 32 Civil Procedure Rules 2000 ('CPR') – Application for leave to adduce expert evidence – Claimant filing witness statement prior to application to deploy expert evidence at trial and after time prescribed by case management order – whether leave should be granted to claimant to adduce expert evidence at trial

RULING

[1] **INNOCENT, J.:** The claim herein came on for Pre-trial Review ('PTR') on 7th June 2021. On even date, it appeared that the claimant had on 3rd June 2021 filed an application for permission to adduce expert evidence pursuant to CPR 32.6. At the PTR, counsel for the defendant indicated her intention to oppose the claimant's application and sought the court's permission to permit her time to do so. The hearing of the claimant's application was therefore adjourned to permit the defendant to respond to the claimant's application.

The notice of application

- [2] In the notice of application, the claimant sought the following orders, namely: (1) Dr. John St. C. Gill ('Dr. Gill'), Medical Officer and Consultant Neurosurgeon be appointed an expert witness; (2) Dr. Gill prepare a Medical Report in conformity with CPR 32 within 30 days of the court's order; (3) The Medical Report prepared by Dr. Gill be filed and served within 35 days of the order; and, (4) The Medical Report be admitted as an Expert Report.
- [3] In setting out the grounds of the application, the claimant relied substantially on the provisions of CPR 36.2 which gives the court the discretion to grant permission to a party to call an expert witness. The claimant's counsel submitted that while the general rule is that the Court's permission with respect to an application made under CPR 32 is to be given at a Case Management Conference ('CMC'), the Court can appoint an expert witness after a CMC, if such permission is required to be granted, in order to resolve the proceedings justly.
- [4] The claimant also relied on the provisions of CPR 26 in relation to the Court's duty to actively manage cases at a CMC and the Court can take any step, give any direction or make any order for the purpose of managing the case and furthering the overriding objective. In addition, the claimant relied on CPR 26.9 which empowers the Court to make orders to rectify matters where there has been a procedural error.
- [5] In addition, the claimant relied on the following matters which are summarised below, namely: (1) That it is in the interest of justice that the Court grants permission to adduce the expert evidence; (2) Dr. Gill is qualified to give the expert evidence; (3) The nature of the injuries suffered by the claimant requires an explanation from a medical practitioner who possesses the requisite qualification as Dr. Gill; (4) Dr. Gill is not afflicted by any conflict of interest in the matter; (5) The claimant had obtained a medical report from Dr. Gill in 2017 and that medical report was not in conformity with the requirements of CPR 32; and, in the circumstances, an updated report is necessary; (6) That the claimant and her legal practitioner made several attempts from on or about 2020 to make contact with Dr. Gill who resides in

Barbados. They were only able to establish communication with Dr. Gill on or about May 2021; and (7) Dr. Gill's witness statement was filed on 14th May 2021.

Procedural history

- [6] The claimant filed her claim on 14th August 2020. The claim was for damages for personal injuries sustained at premises owned and occupied by the defendant. At paragraph 17 of the statement of claim, under the rubric "Details of Medical Reports", the claimant listed the following, (a) Medical Report of Dr. John R. St. C. Gill Neurosurgeon dated March 1, 2017 (b) Medical Report of Dr. Jean Francois Bartoli dated December 1, 2014. The two Medical Reports were appended and exhibited to the statement of claim.¹
- [7] The defendant filed its defence on 13th October 2020. At paragraph 14 of the defence, the defendant made the following averment:
- "The Defendant contends that the opinions of Dr. Gill are predicated upon the veracity of the Claimant's self-reported account which is not admitted The Defendant in any case reserves the right to put questions to Dr. Bartoli and Dr. Gill or to obtain its own expert medical evidence subject to obtaining the permission of the Court."
- [8] The CMC was held on 7th December 2020. The Master ordered that the parties file and exchange witness statements on or before 19th February 2021 and further case management was ordered for 22nd March 2021.
- [9] On 18th February 2021, the claimant filed a notice of application seeking an extension of time to comply with the Court's case management order of 7th December 2020 in respect of the filing of witness statements of Dr. Gill and Dr. Rona Hodge. The grounds for this application were set out at paragraphs 2-11 of the notice of application. By order of the Master dated 27th April 2021, the claimant was granted an extension of time within 14 days of the order to file the witness statement of Dr. Gill.

¹ Exhibit "A.C.1".

- [10] On 22nd February 2021, the claimant filed a witness summary in respect of Dr. Gill. On 14th May 2021, the claimant filed a witness statement by Dr. Gill.
- [11] On 1st June 2021, the defendant filed its Pre-trial Memorandum, wherein at paragraphs 10-11, the defendant registered their objection to the claimant seeking to adduce the expert medical evidence of Dr. Gill on the ground that Dr. Gill's witness statement contained opinion evidence, and therefore, the claimant was in breach of CPR 32.6 by virtue of not having first obtained the Court's permission to adduce expert opinion evidence at the trial. In a nutshell, the defendant stated that the mere attachment of Dr. Gill's Medical Report to the statement of claim did not permit the claimant to deploy it as expert evidence at the trial. In this regard, the claimant referred to the decisions in **Bergen v Evans**² and **South Asia Energy Limited v Hycarbex-American Energy Inc.**³
- [12] The claimant filed her Pre-trial Memorandum on 2nd June 2021. At paragraph 6 of the Pre-trial Memorandum, under the rubric "Readiness for Trial", the claimant stated that:
- "The claimant is seeking the Court's permission for Dr. John St. C. Gill to be permitted to give expert evidence pursuant to CPR 32.6"
- [13] On 3rd June 2021, the claimant filed an application for leave to adduce the expert evidence of Dr. Gill at the trial. This application is opposed by the defendant.

The parties' submissions

- [14] Ms. Tona Simpson-Whyte, counsel for the claimant, contended that the failure to seek the Court's permission, pursuant to CPR 32.6 amounted to a procedural error which the Court had power to rectify in keeping with its case management powers under CPR 26.

² [2019] UKPC 33

³ [2018] ECSCJ No. 93

- [15] Counsel for the claimant further contended, that pursuant to CPR 32.6 the application for permission to adduce expert witness evidence can be made by a party at any stage of the proceedings including at the trial.
- [16] According to Ms. Simpson-Whyte, none of the parties has any proprietary interest in the expert so appointed. It is the duty of the expert witness to assist the Court on technical and scientific matters.
- [17] The general rule, according to Ms. Simpson-Whyte, to be applied in relation to CPR 32.6 is that the application must be made at a case management conference; but the Court retains the discretion to grant permission where there are cogent and persuasive reasons for so doing after the case management conference and could grant permission at a late stage in the proceedings where it is just to do so.
- [18] Ms. Simpson-Whyte also alluded to the provisions of CPR 26.9; and argued that no sanction is imposed upon a parties' failure to obtain permission under CPR 32.6. Therefore, counsel for the claimant, contended that the Court was empowered to make an order granting permission with or without an application by any party for the purpose of putting matters right and to cure procedural errors in the proceedings. Also, that the grant of permission in the present case would not affect any procedural step taken by any party in the proceedings.
- [19] According, to Ms. Simpson-Whyte, the Court must exercise its case management powers liberally so as to further the overriding objective of the CPR by seeking to obtain the just disposition of cases, taking into account such considerations as delay, the effect of the grant of permission on the other party, and the just and efficient disposition of issues to be resolved at the trial. Ms. Simpson-Whyte argued that, in the present case, the defendant would not likely be prejudiced by the grant of permission since in any event the defendant was entitled to avail itself of the procedure in CPR 32.8. In addition, she submitted that no trial date has been set.

- [20] Ms. Jean Dyer, counsel for the defendant, objected to the grant of permission to the claimant. Ms. Dyer argued that, whereas the Court has a discretion whether to grant permission, this discretion should only be exercised where there are cogent and persuasive reasons for doing so. According to Ms. Dyer, in the present case the claimant has not presented to the Court any cogent or persuasive reasons for the grant of permission.
- [21] Ms. Dyer, in her submissions did not object to the claimant's application on the ground that the claimant had failed to satisfy any of the requirements of CPR 32.6(3). The pith and gravamen of Ms. Dyer's objection was plainly that the claimant had failed to provide any cogent and persuasive reasons for seeking the exercise of the Court's discretion under CPR 32.6.
- [22] Ms. Dyer also launched a technical assault on the claimant's application. She argued that the testimony of the intended expert witness, Dr. Gill, was inadmissible by virtue of the operation of sections 25 and 26 of the Medical Act⁴, to the extent that Dr. Gill is not a registered and licensed medical practitioner in Anguilla.
- [23] In the present case, the claimant filed her application after the CMC and just prior to the PTR. It is indeed the case that the claimant failed to comply with the Master's case management order of 7th December 2020, which mandated the filing of all applications by 22nd March 2021, which was the date fixed for further CMC. Therefore, the Master's order of 7th December 2020 can be interpreted as setting time limits for the filing of any further applications by the parties while the proceedings were still at the CMC stage. The Master's order of 7th December 2020 provided for no sanction on failure to comply with the case management order.
- [24] In fact, the claimant filed an application for relief from sanctions and an extension of time to file the witness statement of Dr. Gill, which was granted by the Master. However, it appears that the claimant seemingly omitted to consider the implications and consequences of failing to comply with CPR 32 if it was that they had intended

⁴ R.S.A. c. M65

to rely on the expert evidence of Dr. Gill. To that extent the claimant had failed to comply with the Master's case management order.

[25] CPR 32.6(1) provides that a party may not call an expert witness or put in the report of an expert witness without the court's permission. The general rule is that the court's permission is to be given at a case management conference. However, it appears from the jurisprudence that permission may be sought and obtained at any stage of the proceeding prior to trial. Essentially, a party would not be permitted to deploy expert evidence at the trial without first having obtained the Court's permission under CPR. 32.6.

[26] In **Khouly Construction & Engineering Limited v Edmond Mansoor**⁵, the Court of Appeal held, that the general rule is that permission must be sought at a case management conference. However, a judge has a discretion to grant such permission at any stage of the litigation, where he is satisfied that there are cogent and persuasive reasons for doing so in the interest of justice.⁶

[27] Therefore, on an application for permission under CPR 32.6, the Court must satisfy itself by approaching the matter in keeping with its duty to apply the overriding objective of the rules uppermost in mind and must apply its case management powers in such a way as to further the overriding objective of the Rules.

[28] CPR 11.3 (1) provides that so far as is practicable, all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review; and if an application is made which could have been dealt with at a case management conference or pre-trial review, the court must order the applicant to pay the costs of the application unless there are special circumstances.

[29] Applying the provisions of CPR 11.3(1) it does not appear that the claimant's application for permission at this stage of the proceedings is fatal. The critical question in this case is whether there are cogent and persuasive reasons enabling

⁵ [2021] ECSCJ No. 527

⁶ Per: Farara JA (Ag.) at para. 49

the Court to exercise its discretion. The concepts of cogent and persuasive reasons are distilled within the context of the Court's duty to actively manage cases in keeping with the overriding objective of the CPR. The court's duty is to further the overriding objective by actively managing cases. The overriding objective of these Rules is to enable the court to deal with cases justly.

- [30] Part of the Court's power of case management is the general power of the court to rectify matters where there has been a procedural error. This power can be exercised in accordance with CPR 26.9, where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order. CPR 26.9(2) provides that an error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders. In addition, CPR 26.9(3) provides that if there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right. Additionally, the court may make such an order on or without an application by a party.
- [31] These judicial sentiments were expressed in the case of **Bergan v Evans** where the Privy Council held that CPR 32.6, when read in conjunction with the court's and the parties' general duty to limit expert evidence in CPR 32.2, these provisions were intended to work a sea-change in the approach to expert evidence in civil proceedings by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management, in the pursuit of the overriding objective and, in particular, the need to ensure proportionality and economy in the resolution of civil disputes.⁷
- [32] The Court's approach to the grant of permission is embedded in the provisions of CPR 32.2 which mandates, that expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. In this regard, the provision of CPR 32.2 must be read in conjunction with the provisions of CPR 32.6.

⁷ Per Lord Briggs at para. [41]

- [33] The provisions of CPR 32.6 were given judicial interpretation by the Court of Appeal in the case of **South Asia Energy Limited v Hycabex-American Energy Inc.**⁸, where it was held that CPR 32.6 contemplates that where a party intends to call an expert witness, the party must first seek permission and place before the court, the name of the expert and identify the nature of his/her expertise. On hearing the application for permission, the court will then assess whether the person put forward, satisfies it as to the nature of the expertise being sought, having regard to the parties' pleaded case. If so satisfied, the court then fixes a period for the submission of the expert's report.⁹
- [34] An approach consistent with the Court's duty to actively manage cases and the fulfilment of the overriding objective of the Rules was again espoused by the Court of Appeal in the case of **Khouly Construction & Engineering Limited**, where it was held that whether the court will permit a single expert witness or whether the court will permit each party to produce and to rely on the evidence of separate experts, is a matter to be decided by the court taking into account all the circumstances of the matter, including, the nature and complexity of the claim, the issue or issues upon which expert evidence may be of assistance to the court's determination of the claim, and the costs to the parties associated with obtaining expert evidence.
- [35] Applying the above principles to the circumstances of the present case, there appears to be no justification for not granting the claimant permission to adduce the expert medical evidence of Dr. Gill. Apart from the issue of liability arising in relation to whether the claimant's injuries were caused by the defendant's negligence as occupier of the premises where the alleged injuries occurred, it appears that there is the narrow issue of whether the nature of the injuries suffered by the claimant are directly related to her claim for special damages as it relates to loss of earnings and loss of earning capacity as alleged in her statement of claim.

⁸ [2018] ECSCJ No. 93

⁹ Per Pereira CJ. at para. 26

- [36] Having regard to what is canvassed at paragraphs 13 to 15 of the defendant's pleaded case, in relation to the issue of special damages identified by the Court, added to the fact that the defendant had sought further and better particulars in relation to that aspect of the claim; and had also filed an application to be furnished with such further and better particulars, it seems evident that this is an issue to be resolved at trial, in the event that the claimant succeeds on the question of liability. Therefore, this issue can only be resolved if the Court has the assistance of a medical expert in relation thereto. In the Court's view, this is a cogent and persuasive reason for granting permission to the claimant.
- [37] Ms. Dyer made much a hue and cry about the stage at which the claimant has made the present application. However, the Court adopts the view that the defendant had been put on notice that the claimant had intended to deploy such expert evidence as far back at the pleading stage of the proceedings. This is evident from what is contained in the statement of claim and in the witness statement of Dr. Gill. Also, it appears that the claimant was adverted to the procedural error in failing to make the application under CPR 32 by what is contained in the defendant's pretrial memorandum. In addition, the claimant's intention to make the application for permission to adduce the expert evidence of Dr. Gill was also foreshadowed in the claimant's pretrial memorandum.
- [38] In **Bergan v Evans**, Lord Briggs, delivering the reasons of the Board made the observation that the doctor "had a real contribution to make as to the precise nature and consequences (in terms of therapy) of the respondent's injuries, beyond the evidence to be found in Dr Laws' reports, and the Board can think of no good reason why, if the matter had been approached, as it should have been, as an application for permission under rule 32.6, permission should have been refused, all the more so since, by the date listed for the trial, the appellant had known for some time that the respondent wished to rely upon [the doctor's] evidence, and had taken no steps,

in particular at the pre-trial review or in response to the judge's question to the parties on the day before the trial, to raise any objection to its deployment.”¹⁰

- [39] Similarly, as in the case of **Bergan v Evans**¹¹, the Court regards the objections taken by the defendant to the deployment of Dr. Gill's evidence as not being in keeping with the defendant's duty, as a party to civil proceedings, to help the court to further the overriding objective.

The Medical Act

- [40] The objection raised by Ms. Dyer in respect of the Medical Act was meant to interrogate the admissibility of the expert medical evidence and testimony of Dr. Gill. However, the provisions of section 25 of the Medical Act pertains to the qualification of a person to practice medicine in Anguilla and prohibits the practice of medicine in Anguilla by a person not duly registered under the Medical Act. The provisions of section 26 creates an offence and provides a penalty where a person practices medicine in Anguilla in breach of section 25.
- [41] In the circumstances, the operation of the provisions of sections 25 and 26 of the Medical Act do not affect Dr. Gill's ability to testify as an expert in the proceedings. At the time that Dr. Gill examined the claimant and rendered his medical report he was a registered medical practitioner in Anguilla. In any event, the Court does not find that the provision of a medical report or the giving of expert medical testimony by Dr. Gill contravenes the provisions of sections 25 and 26 of the Medical Act. Therefore, Ms. Dyer's objection on this point fails. In arriving at this conclusion, the Court is also guided by the provisions of section 13 of the Evidence Act.¹²
- [42] What would be critical to the Court's assessment in relation to the admission of Dr. Gill's evidence at this stage is its compliance with the provisions of CPR 32.6(3)-(5), CPR 32.4 and CPR 32.7.

¹⁰ At para [45]

¹¹ At para [46]

¹² R.S.A. c. E065

Conclusion

- [43] The effect of the court's refusal to grant permission to the claimant to deploy the expert evidence of Dr. Gill would be to deprive the claimant the benefit of having her case heard on its merits on the basis that the court found that there had been a procedural irregularity. The Court has formed the view that it would be unfortunate to pursue such a course, in light of the options available to the Court to deal adequately with procedural breaches by a party to proceedings before it. This is clearly a case where the Court ought to permit the breach to be remedied and a cost order made against the claimant. In the Court's view, and for the reasons that the Court has already given it would not be in the interests of justice to deny the claimant permission in accordance with CPR 32.6.
- [44] It is the Court's considered view, that in the circumstances, the claimant's failure to avail herself of the procedural under CPR 32.6 should not deprive the claimant of the opportunity for her case to be heard on the merits. Courts exist to do justice between the litigants, though balancing the interests of an individual litigant against the interests of litigants as a whole in a judicial system that proceeds with speed and efficiency, which is in keeping with the overriding objective of the Rules.
- [45] Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys. In the Court's view, there is nothing in the Rules to suggest that there is a time limit on the Court's ability to excuse non-compliance with the Rules or permit it to be remedied, if the interests of justice so require. The Court retains that jurisdiction at all times.

Order

- [46] In the circumstances, the Court makes the following Order: -
1. Permission is granted to the claimant to call Dr. John St. C. Gill as an expert witness at the trial.

2. The claimant shall file with the Court Office and serve the written Report of the evidence which Dr. John St. C. Gill intends to give at the trial within 30 days of this order.
3. The written Report of Dr. John St. C. Gill shall comply with the provisions of CPR 32.4 and CPR 32.14.
4. Dr. John St. C. Gill shall be at liberty to apply to the Court for directions pursuant to CPR 32.5.
5. The defendant is entitled to put written questions to the expert witness Dr. John St. C. Gill about his Report within 28 days of service of the Expert Report.
6. Notwithstanding the observations that the Court has made regarding the defendant's conduct in opposing the claimant's application, the Court finds that given the nature of the proceedings and the fact that it was or should have been plainly obvious to the claimant that the Court's permission was required before seeking to deploy expert evidence at an early stage in the proceedings; and whereas the Court is of the view that the claimant ought to have made the said application for permission prior to pretrial review, the Court awards costs to the defendant in the sum of EC\$500.00.

Shawn Innocent
High Court Judge

By the Court

Registrar