[2022] JMSC Civ 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 03058

BETWEEN	**ARLENE ELMARIE PETERKIN**	**CLAIMANT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**1ST DEFENDANT**
AND	**THE TOWN AND COUNTRY PLANNING AUTHORITY**	**2ND DEFENDANT**
AND	**NATIONAL HOUSING TRUST**	**3RD DEFENDANT**

IN CHAMBERS VIA ZOOM

Mr Robert Collie instructed by Collie Law for the Claimant/Respondent.

Miss Faith Hall instructed by the Director of State Proceedings for the first and second Defendants.

Lord Anthony Gifford, Mrs Ingrid Clarke Bennett and Miss Renae Robinson instructed by Pollard Lee Clarke for the Applicant/third Defendant

Application to strike out inadmissible affidavit evidence - Rule against hearsay - Rule 30.3 of the Civil Procedure Rules

Date Heard: January 24, and February 1, 2022

Pettigrew Collins J

BACKGROUND

[1] The claimant filed a Fixed Date Claim Form (FDCF) on the 27th of September 2019, seeking certain declarations and administrative orders. One declaration

in effect is asking the court to say that the Natural Resources Conservation Authority (NRCA) acted illegally or irrationally in not requiring the National Housing Trust (NHT) to submit with their application for permission for construction, an Environmental Impact Assessment (EIA). Another seeks to have the court make a similar pronouncement with regard to the alleged relaxing of standards for discharging sewage effluent contrary to certain NRCA Regulations. The orders sought are for certiorari regarding the grant of environmental permit for subdivision of lands, prohibition in relation to certain environmental permits and constitutional redress by way of damages and injunction.

[2] The claim was filed pursuant to leave to apply for judicial review which was granted on the 16th of September 2019.

[3] In her FDCF, the claimant contends that she is the owner of property situate at Industry Cove in the parish of Hanover and that her property is impacted by the decision of the first and second defendants in approving environmental licences to permit the construction and operation of a sewage treatment plant which would allow for the discharge of sewage onto the beach. This sewage plant is to be constructed by the third defendant in order to serve a housing development in close proximity to the claimant's property.

[4] The claimant does not dispute that the affidavits of Messrs Peter Wilson Kelly and Emmor Scarlett were filed in support of the Notice of Application for Leave to Apply for Judicial Review and that there are no affidavits of these individuals filed in support of the FDCF for judicial review. In fact, in her own affidavit in support of the FDCF, the claimant states that she relies on those affidavits which were filed prior to the filing of the FDCF.

THE APPLICATION

[5] The application before me is that of the third defendant, the National Housing Trust to strike out certain paragraphs of the claimant's affidavit filed in support of her FDCF. This application was filed on the 19th of May 2021.

[6] The applicant relies on the provisions of rules 26.3(1)(b), 30.3 (1) and 30.3(3) of the Civil Procedure Rules (CPR). The applicant asserts that each paragraph or a part thereof, referred to in the application, recites an alleged fact or opinion which the claimant does not assert to know from her personal knowledge but to have been informed about by third parties. Counsel contends that it is an abuse of the process of the court for the claimant to include these paragraphs, contrary to the rules of court and that the offending paragraphs are therefore subject to striking out based on the provisions of rule 26.3(1)(b).

THE LAW

[7] **Rule 26.3(1**) provides that

> *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(a)…*
>
> *(b) that the statement of case 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;*

[8] On the matter of admissibility of evidence, in the 9th edition of the text, **Murphy on Evidence** by Peter Murphy, it is stated at page 25 that:

> *"Evidence is said to be admissible or receivable if it is relevant and if it is not excluded by the rules of evidence. The rules of evidence are rules of law, and it follows that, unlike relevance, which is determined solely by reference to logical relationship between the evidence and a fact in issue, admissibility is a matter of law. To be admissible, evidence must be relevant, but relevance is not enough to result in admissibility. While evidence must be relevant to be admissible, the converse proposition is not true. Not all relevant evidence is admissible."*

[9] It is hardly open to dispute that the claimant is seeking to rely on the impugned aspects of her affidavit as proof of the truth of the contents. The well known and often cited rule in the case of **Subramaniam v Public Prosecutor** [1956] 1 WLR] 965 at 969 is that:

"*evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when what is proposed to establish by evidence is not the truth of the statement but the fact that it was made*."

[10] In **Caren Cranston v Tamazine Samuels and Gairy Toorie** [2018] JMSC Civ 73 at paragraph 69 of her judgment, Nembhard J defined hearsay thus:

"*According to the rule against hearsay, an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. This formulation conflates two (2) common law rules, the rule that the previous assertions of the witness who is testifying are inadmissible as evidence of the facts stated (sometimes spoken of as the 'rule against narrative', or the rule against 'self-corroboration'), and the rule that assertions by persons other than the witness who is testifying are inadmissible as evidence of the facts asserted (the rule against hearsay in the strict sense)."*

It is noted that the decision of the Learned judge was overturned on appeal but that fact has no bearing on the definition.

[11] It is also equally clear that the matters that the claimant asserts in most of the paragraphs are not matters within the claimant's personal knowledge, as she has in fact identified the source of the information.

[12] Lord Anthony Gifford directed the court's attention to rule 30.3 of the Civil Procedure Rules which addresses what an affidavit may contain.

Rule 30.3 (1) and (2) provide that:

(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However, an affidavit may contain statements of information and belief

(a) where any of these Rules so allows;

(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates:

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source for any matters of information and belief.

(3) *The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit*

[13] There are stipulations as to what else must be indicated in affidavits filed in support of interlocutory proceedings. The exceptions are not applicable in the instant case as the claimant's affidavit in question was not filed in interlocutory proceedings. It may be stated at this point, that since her affidavit was not prepared for use in interlocutory proceedings, the fact that the claimant states the source of the information contained in her affidavit does not make the inclusion of the information permissible.

CLAIMANT/RESPONDENT'S SUBMISSIONS

[14] In his submissions Mr Collie contends that the claimant is able to give evidence on the technical observations made by Mr Kelly provided Mr Kelly is a witness in the matter. It is also his contention that Mr Knight has provided evidence in the matter as a witness for NRCA and that he may attest to the truthfulness or otherwise of the email exchange between himself and Professor Cooper. As it relates to the claimant's expression as to the impact on the community in paragraphs 45 and 46, Mr Collie takes the view that the claimant is permitted to give this evidence as an advocate on behalf of the community. He also submitted that as someone who has lived in Jamaica, the claimant can give evidence as to the failure of sewage treatment systems in Jamaica.

THE IMPUGNED PARAGRAPHS

[15] Most of the paragraphs are said to offend the rule against hearsay in so far as they regurgitate matters that are said to be contained in the affidavit of Peter Wilson Kelly on whose expertise the claimant is seeking to rely and in one instance, in the affidavit of Emmor Scarlett. Further, some of those same

paragraphs are said to be inadmissible on the basis that the claimant arrived at conclusions which are within the realm of expert evidence. Paragraphs 18, 20, 21, 22, 23, 37, 47, 53 and 55 are said to fall within either or both categories.

[16] Paragraph 18 sets out certain findings said to be a part of Mr Wilson Kelly's report. Paragraph 20 speaks to the contents of an email between Professor Cooper and Mr Peter Knight which the claimant said was shared with her by Professor Cooper. The claimant sought leave in that same paragraph to refer to an email thread between Professor Cooper and Mr Knight, which series of emails she said was exhibited to her affidavit filed in support of the application for leave to apply for judicial review.

[17] In paragraph 21, the claimant arrived at the position that certain sewage systems have failed or had failings which have caused mal odour. She stated that her position was arrived at based on her knowledge and experience with Jamaican sewage systems and based on information received from neighbours, her Attorney at Law, and a former Director at NEPA. It is clear that to the extent that her statement is based on what she was told, it is inadmissible. It is difficult for this court to say what aspect of her statement is based on her own knowledge and what part is based on what she was told by others. It is for the claimant to put forward affidavit evidence that is admissible based on a reading of a sentence in its entirety. It should not be for this court to attempt to truncate a sentence to save non offending portions. However, I am mindful that the witness has spoken of her own knowledge and experience I am inclined to allow this paragraph to remain and for the matter to be dealt with in cross examination if necessary.

[18] In paragraph 22, the claimant said:

> *"It may be deduced that, due to the similar topography and weather patterns of these areas, that a sewage treatment system in Industry Cove constructed similarly to those in Orange Bay, Montego Bay, and Negril, is likely to have the same negative consequences. A risk of this nature should not be tolerated by the government authorities and regulators, without first reviewing environmental impact assessments of the area, and communication with members of the community*."

I entertain some degree of ambivalence with respect to the admissibility of this paragraph as it contains matters in relation to which the claimant could conceivably have made her own observations, and formed her own views. I decline to strike out this paragraph.

[19] Paragraph 23 in part speaks to defects in the design of the sewage system on the basis of what is contained in the affidavit of Mr Wilson Kelly. That paragraph also contains information said to be from Mr Wilson Kelly's affidavit earlier referred to, as well as a letter exhibited to that affidavit.

[20] Paragraph 37 contains evidence as to matters Mr Wilson Kelly is said to have addressed. The source was not stated. In that same paragraph, the claimant sought leave to refer to an item previously exhibited in her affidavit filed in support of the application for leave for judicial review.

[21] In paragraphs 45 46 and 53, the claimant asserted that the wider community is also affected by the matters complained of.

[22] Objection was taken to all but the first sentence of paragraph 47. The offending portion speaks to matters which the claimant said she learnt from Mr Wilson Kelly. This court understood her to be making reference to matters addressed by Mr Wilson Kelly in his report and/or affidavit.

[23] In paragraphs 53 and 55, the assertion is made that all the members of the Industry Cove community will be severely impacted by the development and the proposed sewage plant as the recreational beach source will no longer be available. The source of the information in paragraph 53 is the affidavit of Mr Emmor Scarlett filed in support of the application for leave to apply for judicial review and the source for paragraph 55 is Mr Wilson Kelly's affidavit. Paragraph 61 merely highlights what the claimant projects will occur.

[24] I accept Lord Anthony Gifford's submission that the claimant has also sought to give her opinion on matters which require expert opinion. This is not permissible. The first portion of paragraph 23 up to the words "to occur therein" and the first sentence of paragraph 55 exemplify this breach. It is noted that the remaining portions of those two paragraphs contain reference to the affidavits

of Emmor Scarlett and Peter Wilson Kelly as the basis of the assertions. That aspect will be addressed in due course.

[25] Reference in paragraphs 45, 46 and 53 as to how the wider community will be affected may at first blush appear to be objectionable because such assertions speak to the state of mind and or the views of the community members which the claimant may not necessarily be able to properly address. There exists an ancient exception to the hearsay rule having to do with matters in the public and general interest. Whilst the claimant's statement may be in relation to such a right, the exception only arises if it were a declaration made by someone who is now deceased. See **R v Bedfordshire (Inhabitants)** (1885) 4E. & B. 335, 342. However, the claimant's assertion that the wider community is affected could well have resulted from her own discernment. Paragraph 53 is objectionable on other grounds.

[26] Regarding the reference to the email thread between the claimant and Mr Peter Knight in paragraph 20, certainly any reference to the contents of the email sent between Mr Knight and Professor Cooper must be regarded as "he said that she said", in other words, multiple hearsay and is inadmissible. An examination of what the claimant says is contained in Mr Knight's email, even if he is in fact a witness in the present proceedings, is not admissible as the truth of its contents, because Mr Knight purports to give information as to a matter that would, it seems to me, properly fall within the realm of expert opinion.

[27] I now address the paragraphs dealing with matters contained in the affidavits of Messrs. Wilson Kelly and Emmor Scarlett. Phillips JA in the case of **Chester Hamilton v Commissioner of Police** [2013] JMCA Civ. 35 at paragraph 34 of the judgment had the following to say with regard to the use of affidavits filed in support of the application for leave to apply for judicial review being used in the claim for judicial review:

> *"It is also my view, however, that the previously filed affidavit could not satisfy rule 56.9(2) and so there would not have been compliance with that rule. As indicated, rule 56.9(2) states that the affidavit must be filed with the fixed date claim form. In order to comply with that rule therefore, the affidavit would have to be filed subsequent to the order granting leave just as the fixed date claim has to be so filed to have efficacy, which was*

stated in ***Lafette Edgehill, Dwight Reid, Donnette Spence v Greg Christie*** *[2012] JMCA Civ 16 ...there is no similar provision in the CPR to clause 425 of the Judicature (Civil Procedure Code) Law (CPC), which permitted the use of affidavits previously made and read in court, to be used before a judge in chambers. Prima facie therefore, service of the affidavit previously filed (in support of the application for leave to apply for judicial review) with the fixed date claim form (filed 14 days after the grant of the leave), would have been irregular."*

[28] The affidavits of Messrs Peter Wilson Kelly and Emmor Scarlett were not filed in support of the claim for judicial review but were filed before the commencement of the claim. As was observed in the case of **Chester Hamilton** (supra)**,** and as Lord Gifford pointed out to this court, rule 56.9(2) requires the claimant to file with the claim form, evidence on affidavit. The claimant cannot therefore rely on those affidavits without more in this claim. By extension, those affidavits do not constitute evidence (more accurately admissible evidence) in this claim.

[29] Being no doubt mindful of the potential hardship that this position can result in, the Learned Judge of Appeal also stated at paragraph 49 of **Chester Hamilton** (supra) that:

"The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3). (ii). The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refilling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules."

[30] However, having regard to the fact that the application to strike out was filed, I now consider whether it would now be appropriate for me to seek to address the irregularity by virtue of the provisions of rule 29.9. Although dealing with an entirely different set of circumstances, dicta in the case of **Index Communication Network Ltd. V Capital Solutions Ltd. Et al** [2012] JMSC Civ. 50 may be helpful. The court was there concerned with the filing of an

amended statement of case after an application to strike out had been filed. Mangatal J said:

> *"I am of the view that, even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, it is not correct that a party could simply, "pull the rug out" from under the feet of the party applying to strike out on the basis of alleged weaknesses in the pleaded case, or omissions or admissions, by simply turning up with a newly amended statement of case that has been filed without the court's leave. In Jamaican parlance, leaving the applicant to simply "Hug, it (the amendment) up!" or "Love dat!" In my judgment, that would, at the very least, offend the rules of natural justice and the Constitutional right to a fair hearing. Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party's Statement of Case, the Statement of Case cannot be amended without the leave of the Court. As Mr. Robinson stated in his written submissions, the stage at which the case has reached is distinguishable from "whether or not there has been a case management conference". I find that this application is being made at a late stage in the proceedings as the Defendants have argued, and not an early one as advanced by the Attorneys for Index. This is because, if the true position is that, but for the amendment, Index's claim is in danger of being struck out, then that is a stage at which there could be no more proceedings if the application for an amendment should fail. As put by Brooks J. in the first instance judgment, at page 10 of* ***Pan Caribbean v. Cartade*** *"If the application to amend the Particulars of Claim is successful, the claim would have been saved from the fate requested by the Defendants in their respective applications to strike out".*

[31] In the same way a party should not be permitted to interject an application to amend a statement of case in the face of an application to strike out, I consider that the court should not, especially without there being an application to that end, make and order regularizing the affidavits that the claimant seeks to rely on. There will in my view be no injustice done to the claimant if the offending paragraphs are struck out.

[32] If the claimant wishes to rely on the contents of the two mentioned affidavits, she must take the necessary steps in order to be able to do so.

[33] Even if steps are subsequently taken so that those affidavits ultimately form a part of the evidence in this matter, it is unnecessary for the claimant to seek to give evidence on matters contained in the affidavits of the

experts and which are matters within the remit of their expertise and ought property to be dealt with by them. It is also repetitive and renders her affidavit evidence unnecessarily lengthy.

CONCLUSION

[34] Having regard to the above analysis, paragraphs 18, 20, 23, 37, 53 and 55 are struck out in their entirety. I decline to strike out paragraphs 21 and 22. With respect to paragraph 47, from the word "*based*" in line two to "*fisher folk*" in line 10 are struck out. I also decline to strike out any portion of paragraphs 45, 46, and 61. The claimant is required to file and serve a redacted affidavit omitting those portions which have been struck out. This must be done within 14 days of the making of this order.

[35] The costs of the application are awarded to the third defendant against the claimant to be taxed if not sooner agreed.

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A. Pettigrew-Collins
Puisne Judge