ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.5 OF 2003

BETWEEN:

LESTER BRYANT BIRD

Appellant

and

[1] OBSERVER RADIO LIMITED
[2] OBSERVER PUBLICATIONS LIMITED
[3] SAMUEL DERRICK
[4] WINSTON DERRICK
[5] MONIQUE KIM BARUA
[6] THE DAILY OBSERVER LIMITED

Respondents

LESTER BRYANT BIRD

Appellant

and

[1] BALDWIN SPENCER
[2] HAROLD LOVELL
[3] COLIN DERRICK
[4] WILMOTH DANIEL

Respondents

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian D. Saunders — Justice of Appeal
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal

Appearances:

Mr. John Fuller for the Appellant
Mr. Justin Simon for the intended examinees Gatesworth James and Dulcie Christian
Dr. Errol Cort for the intended examinee Joan Underwood

2003: September 17;
2004: January 12.

JUDGMENT

[1] SAUNDERS, J.A.: This is a procedural appeal from a judgment of Joseph-Olivetti, J. It concerns the proper interpretation of a section of the Civil Procedure Rules 2000 ("CPR"). For the purpose of deciding this appeal it is unnecessary to delve into all the facts and circumstances that gave rise to the filing of these two suits. Suffice it to say that Mr. Bird has instituted two defamation actions against the respondents. The actions have been consolidated.

[2] In the course of the proceedings, Mr. Bird applied to the court for an order that several persons be examined by a Judge in Chambers and be compelled to produce documents in connection with the actions. The intended examinees have resisted the application. Mr. Bird contends that he has an unqualified right to his order pursuant to Part 33.7 of CPR.

[3] It is necessary to set out Part 33.7 in its entirety. It reads thus:

> Evidence by disposition before examiner
>
> 33.7 (1) A party may apply for an order for a person to be examined before the trial or the hearing of any application in the proceedings.
>
> (2) In this rule -
>
> "deponent" means a person from whom evidence is to be obtained following any order under this rule, and "deposition" means the evidence given by a deponent.
>
> (3) An order under this rule shall be for a deponent to be examined on oath before-
>
> (a) a judge
>
> (b) a legal practitioner who has practiced for a least 5 years;
>
> (c) a magistrate;
>
> (d) a master;
>
> (e) a registrar; or
>
> (f) the Chief Registrar.
>
> (4) A person listed in paragraph (3) is referred to as an "examiner".
>
> (5) The order must state-
>
> (a) the date, time and place of the examination; and
>
> (b) the name of the examiner.
>
> (6) The order may require the production of any document which the court considers may be necessary for the purposes of the examination.
>
> (7) Rule 2.7 applies to an examination under this rule.

(8) At the time of service of the order the deponent must be offered or paid traveling expenses and compensation for loss of time in accordance with rule 33.6.

(9) An application may be made by any party whether or not that party would otherwise call the witness.

(10) If the application is made by the party who would call the witness to give evidence, the court may order that party to serve a witness statement or witness summary in relation to the evidence to be given by the person to be examined.

- Part 29 contains general rules about witness statements and witness summaries.

[4] Counsel for Mr. Bird contends that Part 33.7(1) must be given its natural and ordinary meaning. He submits therefore that he has a right to examine any person whether he intends to call that person as a witness or not. The respondents oppose this wide interpretation of the rule.

[5] It cannot be doubted that Part 33.7 was intended to augment and facilitate the process of discovery, all with a view to furthering the overriding objective of the rules. I agree with Counsel that, in construing the rule, it is appropriate to consider the working papers, discussions and Reports that led to its creation. In this regard, there can be no better authority to which to turn than Mr. Justice Richard Greenslade who played a pivotal role in the drafting of the Rules.

[6] In considering this matter, Justice Greenslade stated at pages 72-73 of his Report on Civil Procedure:

> "The benefits of oral discovery are that it is possible to test evidence of crucial witnesses, such a procedure can frequently encourage early settlement and lead to an overall saving in costs. However the risk of increasing costs without proportionate benefit should be remembered and for this reason I recommend that while it should be open to the court at a case management conference or subsequently to direct oral discovery this should merely be a tool to be used only when the potential benefits can be seen to outweigh the likely costs.
>
> Such "oral discovery" can be obtained by the present procedures for taking depositions before an examiner……..

The evidence from such an examination is not normally directly admissible at the trial. The purpose is to test the potential witnesses……."

[7] At page 74 of his Report, Justice Greenslade recommended as follows:

> "16.13 - That a party may apply for leave to cross examine a witness of the other party or take evidence of a witness in advance of the trial (oral discovery).
> 16.14 - That an order for oral discovery be normally made only in the more complex cases – whether of fact or expertise.
> 16.15 – With the consent of the parties such examination could take place without the formal appointment of an examiner."

[8] Having considered the above, I don't think that a dispassionate appraisal of the reasoning that led to the creation of Part 33.7 could lead one to take the view that a literal approach should be taken to the words of Part 33.7(1). Or if indeed, a party wished to take those words literally, it would be entirely wrong for a court, willy-nilly, to grant such applications.

[9] It seems to me that before a court can grant an application made pursuant to Part 33.7, that court should be satisfied, among other things, that the intended deponent is in possession of material evidence or that there are solid grounds for believing the same to be the case and that an order for examination is necessary in order to obtain disclosure of that evidence. A closer look at the quoted sections of Justice Greenslade's Report will elucidate the category of person to which reference is being made in the rule. The Report refers to "a witness", "a potential witness", "a crucial witness". In other words, it would be wholly improper for a litigant to seek and obtain orders that would in effect sanction what the legal profession might refer to as fishing expeditions and it is the duty of the court to ensure that this does not occur.

[10] On each of the applications placed before the learned Judge, there was a dearth of material to show that the intended deponents fell into any of the categories listed above or that it was necessary to obtain a court order to require production of any relevant documents in their possession. Typical of these for example was

the application made in respect of Mr. Ronald Gonsalves. Mr. Gonsalves had sworn an affidavit on behalf of the defendants in these proceedings. In that affidavit, he deposed that he always attended meetings of the UPP, an opposition political party in Antigua, as he is interested in current affairs; that he had attended a particular meeting that was widely advertised as a "bombshell meeting"; that a few days prior to the meeting he had heard a statement by Mr. Bird where the latter had addressed very serious and scandalous allegations made about him (Mr. Bird); that his (Mr. Gonsalves') curiosity was piqued; and that at the UPP meeting which he attended he saw a videotape that was played.

[11] The meeting in question attended by Mr. Gonsalves was a public meeting. The press subsequently announced that it had been similarly attended by a huge throng. Merely on the strength of this affidavit sworn to by Mr. Gonsalves, Mr. Bird has applied to the court for an order that Mr. Gonsalves be examined. But no attempt has been made to show that Mr. Gonsalves has any evidence that might be material to the case for Mr. Bird.

[12] The other applications follow in the same vein. No sufficient basis is laid to properly persuade a court that an order should be made to examine the particular person cited. Significantly, prior to making the application to the court, no attempt was made to elicit any information from any of the intended examinees.

[13] I cannot see that Part 33.7 was intended to be used in the open-ended manner prayed for by the appellant. The learned trial Judge in my view rightly exercised her discretion to refuse the applications sought and I would dismiss this appeal.

[14] In dismissing the applications, the learned Judge had ordered "costs to the defendants and to the intended deponents who had Counsel in this matter to be assessed in accordance with CPR 2000 Part 65 if not agreed." Judging from what was said in court, it is evident that the parties will not be able to agree costs. I would quash the learned trial Judge's order for costs and substitute the same with

an order that costs of $750.00 be paid to any defendant or intended examinee who had Counsel appear before the learned Judge and a further $500.00 for any such defendant or intended examinee who had Counsel appear before this court. There shall be liberty to apply to a Judge in Cambers with respect to this order for costs.

Adrian D. Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal