GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.18 OF 2002

BETWEEN:

[1] GORDON LESTER BRATHWAITE
[2] DAVID HENDERSON

Appellants

and

[1] ANTHONY POTTER
[2] GILLIAN POTTER

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Othniel Sylvester, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Cajeton Hood for the Appellants
Mr. Gregory Delzin and Mrs. Michelle Emmanuel-Steele for the Respondents

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2003: December 2;
2004: September 20.

JUDGMENT

[1] ALLEYNE, J.A.: This is an appeal against an order of a Judge in Chambers made on 3rd May 2002 granting permission to the Respondents to amend the defence filed in the action, after the case management conference. Leave to appeal was granted by a Judge of the Court below on 21st June 2002, and a Notice of Appeal was filed on 27th June 2002.

[2] The grounds of appeal may be summarised as follows:

[a] That the learned trial Judge was wrong in law to apply the general overriding objectives of the Civil Procedure Rules 2000 (CPR) contained

in Part 1, notwithstanding the particular requirements of Part 10.7(3) which relate specifically to applications of the type before the Court.

[b] That the learned Judge was wrong in law in proceeding to hear the said application before the Appellant's application for summary judgment, which had been filed before the said application.

The Appellant, however, at the hearing of the appeal, abandoned the second ground and argued only the first.

[3] The writ of summons and statement of claim were filed on April 3rd, 2001 and a defence was filed on July 30th 2001. A reply was filed on September 27th 2001. A case management conference was held on March 12th 2002, at which time a comprehensive case management order was made, including an order for a trial window in December 2002. At the case management conference no application was made to amend the defence. The order was entered on 14th March 2002.

[4] Notice of Application for permission to amend defence was filed on 25th April 2002, and was supported by an affidavit sworn by Michelle Emmanuel-Steele, legal practitioner for the Defendants/Respondents. Exhibited to that affidavit was a copy of a survey plan showing the boundary between the land of the second-named Appellant and that of the Respondents (the disputed boundary) surveyed by Henry W. Ogilvie, licenced land surveyor, at the request of the second named Respondent Gillian Potter, on 8th March 2001. This plan appears to demonstrate that the water tank which is the subject matter of the alleged trespass is built partly on the land of the second-named Appellant.

[5] By the proposed amended defence, the Appellants sought to raise the new defences of an estoppel against the second-named Respondent/Plaintiff on the basis of acquiescence, encouragement or allowance of the Appellants, leading them to believe to their detriment that the land on which they were building the tank was within their boundary, and in the alternative that the Respondents/Plaintiffs were barred by the operation of the Limitation of Actions

Act[1] from succeeding in their claim. The claim was for trespass in relation to the water tank.

[6] Upon the hearing of the application for permission to amend Counsel for the Appellants drew attention to Part 10.7(3) and 20.1(3) of CPR and objected to the application on the ground that there had been no significant change in circumstances which became known after the date of the case management conference. For the Applicant/Respondent, it was submitted that the Ogilvie plan did not exist until March 2001 and "did not become part of the instructions until 24th April 2002" when Mr. Delzin, Counsel for the Respondents, spoke to and took instructions from them. Mr. Delzin contended that the Applicant/Respondent could have brought a separate action seeking declaratory relief, but this would merely expand litigation and add to costs. He argued that the issues raised need to be fully ventilated and litigated, and that to allow the application for amendment would not cause substantial prejudice to the Appellants, the timetable set by the case management conference being well able to be accommodated, and any inconvenience being compensated in costs.

[7] In response, learned Counsel for the Appellant/Respondent to the application asserted that there had been no significant change in circumstances, and Part 10.7(3) and 20.1(3) apply.

[8] Parts 10.7 and 20.1(3) read as follows:

> Consequences of not setting out defence
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> 10.7 (1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.
>
> (2) The court may give the defendant permission at the case management conference.

[1] Chapter 173 of the 1990 Revised Edition of the Laws of Grenada

(3) The court may not give the defendant permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference.

Changes to statements of case

20.1 (3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference.

[9] Learned Counsel for the Appellant submitted that the Court has no discretion, where there are specific rules, to apply general rules; that the overriding objective cannot override a specific rule in the CPR. Counsel relied on the case of Vinos v Marks & Spencer plc[2]. In that case May L.J. at page 789, paragraph 20, in considering r 7.6(3) of the new English Civil Procedure Rules, held that the words 'only if' the stipulated conditions are fulfilled appearing in the rule as a precondition to the exercise of a discretion meant that 'the Court does not have power to do so otherwise.' His Lordship said:

> "The general words of rule 3.10 cannot extend to enable the court to do what r. 7.6(3) specifically forbids."

[10] The record of appeal does not indicate that the learned Judge gave any reason for his decision. In their written submissions and in argument before the Court, the Appellants suggested that the learned Judge exercised the discretion under Part 1.2(a) and (b) of CPR which requires the Court to seek to give effect to the overriding objective when it exercises any discretion given to it by the rules or interprets any rule. Rule 10.7 strictly circumscribes the discretion of the Court, and

[2] [2001] 3 All ER 784. See also Gibson L.J. at page 791, para. 26 & 27.

defines very closely the circumstances in which the discretion may be exercised. Rule 20.1(3) is for all intents and purposes identical to Rule 10.7, and neither expands nor reduces the scope of the discretion.

[11] The precondition to the Court exercising a discretion to allow an amendment to the defence after the first case management conference is that the defendant satisfy the Court that there has been a significant change in circumstances which became known only after the date of the case management conference. On the facts in this case as laid out in the affidavit of Mrs. Emmanuel-Steele filed in support of the application, this precondition has not been met.

[12] There had been no change in circumstances, far less a significant change, and even if it could be found that there was a significant change, namely the facts disclosed by the Ogilvie survey, that was known to the defendant well before the date of the first case management conference. The relevant date is the date on which the change of circumstances became known to the party applying for the exercise of the discretion, not the date on which the change of circumstances "became part of the instructions" to the party's legal practitioner.

[13] A change in circumstances in the context of these Rules is a change in the factual circumstances, not, as appears to be suggested by the Respondents, a change in the parties' awareness or understanding of their legal rights, or of the existence of possible defences to the claim made against them. I cannot agree with learned Counsel for the Respondent Mr. Delzin that instructions to Counsel may be a circumstance such as to trigger the rule.

[14] There appears to have been no occasion for the Court to exercise a discretion. The *ratio* in the case of Vinos v Marks & Spencer plc *supra* is equally applicable in this case where the words of the rule are as clear, and it seems to me that the learned Judge exercised a discretion which the CPR does not permit the Court to exercise.

[15] The appeal is allowed with costs to the Appellant, in the Court below as ordered by the learned trial Judge in his order dated the 3rd May 2002 in the sum of $1000.00, (which sum ought to have been already paid), costs of the application for leave to appeal in the sum of $250.00, the costs order made by the order for leave made on the 21st June 2002 in the said sum being hereby set aside, and costs of this appeal in the sum of $666.66.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, Q.C.
Justice of Appeal

[Sgd.]

I concur.

Othniel Sylvester, Q.C.
Justice of Appeal [Ag.]