ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2004

BETWEEN:

ST. KITTS DEVELOPMENT CORPORATION

Claimant/Respondent

AND

GOLFVIEW DEVELOPMENT LIMITED

Apellant/1st Defendant

and

MICHAEL SIMANIC

2nd Defendant

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Sylvester and Patrice Nisbett for the Appellant/1st Defendant
Mr. E. Anthony Ross, Frank Walwyn and Fitzroy Eddy for the Claimant/Respondent

---

2005: March 31

JUDGMENT

[1] RAWLINS, J.A. [AG.]: This is an appeal from an Order that Baptiste J made on 8th October 2004. In that Order, he directed that the assessment of damages on the judgment that he delivered on 7th September 2004 in favour of the Appellant, Golfview, should be conducted only on the evidence already adduced at the trial.

[2] In his judgment of 7th September 2004, the learned trial Judge dismissed the claim that the Claimant/Respondent Corporation ("the Corporation") brought against

Golfview. However, he ordered Golfview to return the sum of US$700,000 with interest from June 2000 until final payment to the Corporation. He awarded the Corporation 25% of its costs. He dismissed the claim that the Corporation brought against the 2nd Defendant, Michael Simanic, with costs. He awarded damages for breach of contract to Golfview on its counterclaim against the Corporation and costs on the counterclaim. He scheduled the assessment of damages for 15th September 2004. It was eventually rescheduled for 8th October 2004 for the convenience of the parties. It was at that hearing that the Court upheld an objection that Counsel for the Corporation made against the use of the witness statements that Solicitors for Golfview unilaterally filed for the assessment.

[3] The decision by the learned trial Judge that damages were to be assessed on the evidence already adduced at the trial meant that the Court did not intend to place any reliance on the witness statements and the documents attached thereto that Golfview filed. Counsel for Golfview contends that when the learned Judge scheduled the assessment, he really ordered a trial on the issue of quantum. He also contends that the Judge should therefore have given directions for disclosure, as well as directions for the service of witness statements and expert reports for the assessment. He relies on Part 16.4 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the Rules) to support this contention. He insists that because the Court failed to give those directions, he acted proactively to file the witness statements in order to facilitate the assessment of damages.

[4] On the other hand, Counsel for the Corporation says that there was no proper procedural basis upon which the witness statements could have been filed at that stage of the proceedings, particularly as the Court had given no directions for filing them.

[5] Golfview appealed on 5 grounds. I distilled 2 issues from them. The first encompasses grounds 1-4 of the appeal. I state it thus: the trial only determined liability, so that the assessment of damages was, in effect, another trial to determine quantum of damages, for which it is necessary to call witnesses to adduce evidence to prove the damages. The learned Judge erred when he did not give directions for the filing of witness statements and other relevant documents under Part 16.4 of the Rules for the assessment of damages.

[6] The second issue is essentially ground 5 of the appeal. It states that the learned Judge erred in law and principle when, by his Order of 8th October 2004, he purported to overrule his original Order of 7th September 2004, which allowed assessment of damages to take place. I shall consider this issue first.

Did the Judge overrule his Order?

[7] Counsel for Golfview did not expand upon this ground in his written submissions. He relies on the submissions that are encompassed in the first ground of appeal. As I understand it, his contention is that in his Order of 7th September 2004, the learned trial Judge ordered a trial of the issue of quantum when he ordered an assessment hearing. He therefore filed the witness statements in preparation for the trial. At the commencement of the assessment hearing, the Judge overruled his prior direction for a trial on the issue of quantum when he refused to rely upon those witness statements, and, instead, ruled that he would only rely upon the evidence that was already taken at the trial.

[8] In my view, the Court could only have overruled its Order of 7th September 2004 if, in its Order of 8th October 2004, it retracted a direction that it gave in the previous Order. I see nothing in the latter Order that overruled any direction in the prior Order.

[9] Nothing in the Order of 7th September 2004 specified a trial of the issue of quantum or a trial for assessment of damages. There are references to a hearing, but the exact nature of the hearing was not specified. There is no indication whether that hearing was to be in the nature of a full trial. Item 6 of the Order simply stated that assessment of damages was to be heard on 7th September 2004. Paragraph 98 of the judgment stated, in part:

> "The Defendants requested that upon a determination of liability, the court should set a date for the hearing of assessment of damages. The assessment hearing will be on 15th September 2004".

At paragraph 106 of the judgment, the Court stated that the Corporation was liable in damages to Golfview for breach of contract, such damages to be assessed.

[10] Counsel for the Corporation says that these statements did not mean that Golfview could adduce new evidence. He insists that the judgment contained nothing that indicates that the Judge intended to re-open the trial on the issue of quantum. He submits that a trial on the issue of quantum is not necessarily the same thing as an assessment of damages. He states, further, that since the Court did not specify the mode or form for the assessment, the Court had an inherent jurisdiction to vary its own Order to clarify what it meant by an assessment hearing. He contends that the Court clarified its initial Order on 8th October 2004 when it ordered that no new evidence was to be adduced for the purpose of the assessment.

[11] I agree with these submissions. The judgment of 8th October 2004 was not inconsistent with the initial Order. When the Judge directed that, for the assessment, he would rely on the evidence that was taken at the trial, he clarified his Order of 7th September 2004 but did not overrule it. Golfview's appeal therefore fails on this ground.

The witness statements

[12] The issue that I framed in paragraph 5 of this judgment from grounds 1-4 of the appeal is the crux of this appeal. Counsel for the Corporation insists that, in the first place, it would be wrong in law to permit this appeal because the Court made no Order to bifurcate the case or to have separate trials on the issues of liability and damages on the Golfview's Counterclaim. He says that Solicitors for Golfview did not apply for a separate trial of these issues.

[13] Learned Counsel for the Corporation contends that it is an erroneous view of an assessment of damages to focus on the trial aspect of an assessment hearing. He pointed to the definition of assessment that is provided in Black's Law Dictionary, 8th Edition, at page 125. According to that definition, "assessment" means a determination of the rate or amount of something, such as a tax or damages.

[14] The perspective that Counsel for the Corporation gives is that, at the trial, the Defendants led evidence that related to quantum of damages on the Counterclaim, but requested no specific amount of damages. After the trial ended in December 2003, the Court ordered Counsel for the parties to file written submissions. The Corporation filed extensive submissions on both issues. Golfview and the 2nd Defendant, Michael Simanic, also filed extensive submissions. These contain a number of pages that relate to the measure of damages for breach of contract. In the final paragraph of the written submissions, Solicitors for Golfview asked the Court to order a hearing for the assessment of damages after it determined liability.

[15] Learned Counsel for the Corporation submits that, in the second place, Golfview did not advance any evidence of special circumstances to justify separate trials on the issues of liability and damages.

[16] In the third place, Counsel for the Corporation points out that this case underwent significant case management before the trial. A number of case management Orders were issued. These included the final pre-trial Order by Mitchell J on 14th February 2003, which ordered that witness statements and documents were to be exchanged by 21st February 2003. Counsel for the Corporation insists that this direction was in keeping with Part 28.13(1) of the Rules.

[17] Part 28.13(1) provides that a party who fails to disclose documents by the date ordered, or who fails to permit inspection, may not produce those documents at the trial. Counsel for the Corporation states that the further documents, which Golfview now seeks to produce for the assessment, were available before disclosure closed. He insists that Golfview could not now bring in the documents that it did not disclose during the disclosure process without an Order of the Court, particularly after the conduct of a 9-day trial in which evidence was led on damages in its Counterclaim.

[18] Counsel for the Corporation submits, in the fourth place, that by this appeal, Golfview is inviting this Court to disturb a discretionary Order of the trial Judge. He contends that the questions that this appeal raises revolve around the control of evidence, which is within the purview of the trial Judge. This is correct. Rule 29.1 provides that the court may control the evidence that is to be given at a trial or hearing, by giving appropriate directions as to the issues on which it requires evidence and the way in which the matter is to be proved.

[19] Counsel for the Corporation insists that in relation to his fourth submission, Golfview failed to show that the Order that the Judge made on 8th October 2004 was clearly wrong or exceeded the Judge's discretionary remit. He cites as authority the statement of principle by Brooke LJ in Tanfern Ltd. v Cameron-McDonald [2000] 2 All E.R. 801, at paragraphs 31 and 32. The principle that was stated in these paragraphs was quoted with approval by this Court in Bank of Antigua v Williams

[2003] E.C.S.C.J. No. 58, Civil Appeal No. 23 of 2001 paragraph 28 and in Peters v Superintendent of Prisons [2000] E.C.S.C.J No. 36, Civil Appeal No. 9 of 1999.

[20] The principle, which Brooke LJ stated in Tanfern Ltd. was in fact adopted from the statement that Lord Fraser made in G v G [1985] 2 All E.R. 225, at page 229. It states:

> "… the appellate court should only interfere when it considers that the Judge of first instance has not only preferred an imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[21] Counsel for Golfview contends that the learned trial Judge erred because he did not appreciate that an assessment of damages is a process in the nature of a trial in which witnesses must be called to give evidence. This, he says, requires a Judge to give directions under Part 16.4 of the Rules for witness statements to be filed.

Finding and Conclusion

[22] The view that learned Counsel for Golfview holds that the Order for assessment is, in effect, another trial on the issue of quantum reflects an opinion that he holds regarding the nature of the assessment hearing. His focus is on the trial aspect of an assessment hearing. It is not an erroneous opinion because there are instances in which an assessment of damages is conducted as a hearing to determine the amount that is to be awarded in monetary terms. However, this opinion does not go to the core of the difficulty that occasions this appeal. In my view, the question is one of procedure and discretion.

[23] In this case, no application was brought or Order made for a separate trial of the issues of liability and damages. Directions were given during the case management process for disclosure, inspection, the filing of evidence in chief by way of witness statements and the filing of documents to be used at the trial. In the absence of a

bifurcating Order, these directions were for the purpose of the trial of both issues. There was a trial over 9 days. Evidence was adduced on both issues. By way of a post trial suggestion that was contained in its written submissions, Golfview asked the Court to determine liability and then set a date for assessment. The Court agreed. Golfview did not ask the Court to direct the parties to file witness statements.

[24] Golfview proceeded to serve witness statements on the Corporation on the day before the re-scheduled assessment. Its Solicitors attached a number of documents to the statements that were not disclosed during the disclosure process. The Corporation had no opportunity to serve and file witness statements of its own. In effect, contrary to the purpose of the Rules, Golfview took the procedural process out of the Court's purview. It also did so in a manner that left the Corporation at a disadvantage. The overriding objective of the Rules stated in Part 1 does not contemplate this.

[25] In my view, Part 16.4 of the Rules does not assist Golfview. Part 16.4(2) confers discretion upon the Court to give directions for the trial of the issue of quantum either at a case management conference, on the hearing of an application for summary judgment, or at the trial of a claim or of an issue. Part 16.4(3) makes it mandatory for the Court to exercise the powers of a case management conference if it gives directions for the trial of the issue of quantum. In particular, the Court may give directions for disclosure under Part 28 of the Rules. It may also direct the parties to file and serve witness statements under Part 29 or expert reports under Part 32.

[26] Counsel for Golfview submits, correctly, that Part 16.4 applies where the Court makes a direction for the separate trial of the issue of quantum. The Court gave no such direction. It scheduled a date for assessment at the behest of Golfview.

[27] It was not within the purview of Golfview to file and serve witness statements with documents exhibited thereto, unilaterally. The trial Judge, within whose control the evidentiary process lies, is satisfied that the evidence that is needed for the assessment was already adduced by way of witness statements and oral evidence during the trial and the disclosure process. His view is that it is not necessary to adduce new evidence for the assessment. This is within his discretion under Part 29.1 of the Rules.

[28] There is nothing that indicates that the learned trial Judge exercised his discretion wrongfully or unjustly. The case was already extensively case managed and disclosure made that should have related and in fact did relate to liability as well as damages because there was no bifurcation of these issues. There was a long trial in which evidence was taken that goes to both issues. During the assessment, the learned trial Judge will no doubt indicate to the parties what assistance they might render in that process. In these circumstances, there is no ground on which this Court will interfere with his decision. The result is that this compendious ground of the appeal also fails.

Costs and Order

[29] The general rule on costs that is stated in Part 64.6 of the Rules is that a successful party is entitled to costs, unless the court finds that there are circumstances that are provided in this Rule, which permits it to depart from this Rule. None of the exceptional circumstances that the Rule provides exists on this appeal. The Corporation is therefore entitled to its costs.

[30] In the foregoing premises, the appeal is dismissed. Golfview will pay the costs of the Corporation in this appeal in the sum of $2,000.00. The Registrar shall, within 21 days of today's date, schedule this case for the assessment of damages with such

directions, if any, that the trial Judge or a Judge of the High Court who will conduct the assessment might issue.

Hugh A. Rawlins
Justice of Appeal [Ag.]