GRENADA

IN THE COURT OF APPEAL

HCVAP 2008/006

BETWEEN:

[1] LYNETTE STEWART
[2] LYNETTE STEWART
(Administratrix of Estate of Anthony Stewart, Deceased)
Appellants

and

THE ATTORNEY GENERAL
Respondent

Before:
The Hon. Mde. Janice George-Creque Justice of Appeal

On written submissions:
Alban M. John of the Law Office of Alban M. John for the appellants

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2009: April 16.
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DECISION

[1] GEORGE-CREQUE, J.A.: This is an appeal from the order of the Master made on 18th April 2008, wherein she ordered to be struck out of the claimant's reply all references to the report of one Dr. Hughvon des Vignes, and refused permission for the said Dr. des Vignes to be called as an expert witness at the trial.

[2] The background to this matter maybe briefly stated thus:

(1) In December 2006, the claimant brought proceedings against the Attorney General as legal representative of the Government of Grenada, for damages in respect of the death of her husband, resulting allegedly, from the negligent care or treatment administered to her late husband.

(2) The respondent filed its defence on 16th January 2007.

(3) Both sides were seeking to have an expert appointed to opine as to the cause of death. However, on the matter coming on for case management on 26th February 2007, the master directed that the parties jointly appoint an expert to assist the Court. The parties issued joint instructions to a medical expert in the name of Dr. Carlisle Goddard. His report was received by the Court on or about 10th May 2007. There has been no appeal from that order.

(4) At a further Case Management Conference, the appellants were granted leave to pose clarifying questions to the jointly appointed expert. The expert provided answers to those questions around June 2007. The respondent then amended its defence.

(5) At a further Case Management Conference held on 17th July 2007, directions were given for filing witness statements, and for standard disclosure, for pretrial review and a trial window of March 2008 identified.

(6) During disclosure the appellants served upon the respondent a list of documents which included a receipt for payment and a medical review report of Dr. des Vignes. The respondent objected to these documents.

(7) The appellants also served a witness statement from Dr. des Vignes.

(8) On 17th January 2008, the appellants sought leave to file and serve a reply to the defendant's amended defence. The reply relied extensively on the report of Dr. des Vignes. The respondent applied to strike out the reply. The appellants also applied for leave to call Dr. des Vignes as an expert witness.

(9) The Master, whilst not striking out the entire reply, ordered that all references in the reply to the report of Dr. des Vignes be struck out, and refused leave for him to be called as an expert witness.

The grounds of appeal

[3] The appellants contend that in refusing permission to call Dr. des Vignes as an expert that the Master:

(1) failed to consider the significance of the defendant continuing to defend the case in the face of the clear conclusions reached by Dr. Carlyle Goddard the mutually appointed expert;

(2) failed to sufficiently weigh and consider the significance and corroborative relevance of Dr. des Vignes' evidence;

(3) failed to apply her mind to CPR 32.2 and 32.6(2) and the overriding objective; and

(4) failed to consider the logic and significance of her case management order made on 17th July 2008, for the listing and filing of documents agreed, and those not agreed.

[4] Grounds 1 and 2 can be conveniently dealt with together.

The significance of continuing to defend and the corroborative relevance of the further expert's report.

[5] As the appellants correctly submit, a defendant has a right to defend. As to whether or not that defence is successful, at trial, is a matter for the Trial Judge. The fact that a defendant persists in defending in the absence of what appears to be insufficient grounds for so doing, is not a good ground for seeking to rely upon a different expert, when an expert has already been jointly appointed and has provided a report. To allow another expert to be called in these circumstances merely as a bolster to the jointly appointed expert does not serve the purpose of CPR, in keeping with its overriding objective, nor does it fulfill the end for which the evidence of an expert is intended, i.e. to assist the Court. The focus is not to be on quantity but on quality. The appellants do not say that they are in any way dissatisfied with the jointly appointed expert. Indeed the appellants rely on the said expert in support of their case.

[6] Having another expert called merely by way of corroborating the jointly appointed expert in my view takes the matter no further, in respect of the assistance the Court can derive therefrom, and certainly, allowing a further expert does not thereby restrict, or prevent the respondent from pursuing its defence. These grounds in my view have no merit.

The provisions of CPR 32.2 and 32.6(2)

[7] It appears to me that the Master clearly directed her mind to CPR 32.2 and 32.6 as in refusing the appellant's request, she went on to note that the Court had already exercised its powers under CPR 32.9 in directing that one expert be appointed having been faced with the situation where each party was seeking to appoint an expert. There is no suggestion that in so doing, she exercised her discretion given thereunder wrongly.

[8] It is the Court's duty to control what expert evidence may be necessary, so as to resolve the case justly. The addition of a further expert in the face of having a joint expert, merely, it appears, for the purpose of corroborating the joint expert, is an unnecessary expense since it takes the matter no further in assisting the Court in respect of the issue to be resolved. The appellants accept that the opinions of the joint expert are clear, and therefore, must be taken to be reasonably capable of resolving the issue in question. Accordingly, this ground of appeal also fails.

The significance of the Judge's order directing the filing of the lists of "agreed" documents and "not agreed" documents.

[9] In their submissions, the appellants contend that this order begs the question "what is the purpose of having an opportunity to put in documents not agreed upon if there is no chance that they may be used?" This shows that the purport of this order is misunderstood. A readily discernable purpose of such an order is to alert a party seeking to rely on a document not agreed, of the need to persuade the Court to admit such document into evidence, notwithstanding the other side's objection to its admission.

[10] As it relates to the report of Dr. des Vignes, the position is simply this: Though the Doctor's report is contained in a document, given its nature, (i.e. as an expert report) it does not cease being governed by the rules (CPR 32) in relation to experts, and the manner in which expert evidence may be received by the Court. Were such a documented report merely to be treated as simply a document, then clearly there would be no need for the special provisions governing the provision of expert reports. This is in clear recognition of the type of evidence, and the treatment accorded to expert evidence, and the purpose for which it is to be given. CPR 32.4 and 32.14 are instructive in this regard, and clearly sets out that it should be seen as the independent product of the expert uninfluenced as to the form or content by the demands of the litigation; and requiring the expert at the end of his report to state that he understands his duty to the Court, and to state that he has complied with that duty.

[11] An expert's report, therefore, cannot be treated as an ordinary document, such as a medical receipt or invoice. This ground also fails.

[12] Based upon the foregoing, there is no merit in the grounds of appeal raised herein, and I would dismiss the appeal.

Conclusion

[13] The appeal is dismissed. The stay of the proceedings granted by the Court on 27th May 2008 is lifted. The appellants shall bear the costs of this appeal in the sum of $1,000.00.

[14] Finally, it is unfortunate that this matter, being a procedural appeal was not dealt with as expeditiously as contemplated by the Rules, due to the failure of the court office below to transmit the relevant documents to the Court of Appeal.

Janice George-Creque
Justice of Appeal