

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2006/0291

BETWEEN:

LOUISE MATTHIAS
DOROTHY GILSTRAP

Claimants

and

LENNIE DE GALE

Defendant

Appearances:

Mr. Ian Sandy and Ms. Claudette Joseph for the Claimants

Mr. Richard Williams and Ms. Gennilyn Ettienne for the Defendant

2009: July 7th, 13th

JUDGMENT

[1] MICHEL, J. (Ag.): By Notice of Application filed on 26th June 2009 the Defendant applied to the Court for the following orders:

1. Permitting the Defendant to put the following additional questions to the court-appointed expert –

Having regard to the photogrammetric plot done in 1977 and the earlier plan or diagram marked "A" and referred to in the conveyance dated 18th February 1952 and made between Simeon Augustine Francis of the first part, Barclays Bank (Dominion Colonial and Overseas) of the second part and Eversely William Gittens of the third part

- (1) Is the road shown in this wither of these plans of the entire area straight or does it turn to the left in the direction from the Grand Anse Main Road to the Silver Sands beach?

- (2) Is the expert still of the view that the road runs in a straight line from the Grand Anse Main Road to the Silver Sands beach?
 - (3) Would the expert superimpose the Degale plan as well as the Hosten plan and the Frank Albert Baker plan on the 1952 plan described above?
 - (4) Would the expert superimpose the Degale plan as well as the Hosten plan and the Frank Albert Baker plan on the photogrammetric plot?
2. That the supplemental list of documents filed on 26th June 2009 be deemed duly filed.
 3. That the expert, Henry Ogilvie, do comply with the provisions of Part 32.14 (2) & (3).
 4. Permitting the Defendant to call an additional expert witness.
 5. That the Court gives any other necessary further directions.

[2] The application is supported by an affidavit of the Defendant and accompanying exhibits filed on 26th June 2009 and also by the affidavit of Gilbert Massell filed on the said 26th June. There was also an affidavit of Renee Johnson filed on behalf of the Defendant on 7th July 2009, which stated that it was filed pursuant to Rule 32.7, but obviously meant to refer to Rule 32.6 of the CPR.

[3] The application is opposed by the Claimants and an affidavit by Jacolynne Stratton, an attorney appointed by the Claimants, was filed on 3rd July 2009, together with exhibits, setting out the Claimants' objections.

[4] The application was heard on 7th July 2009, with oral submissions made and authorities handed in by Counsel on behalf of both the Claimants and the Defendant.

[5] The Claimants consented to the items numbered 2 and 3 of the Defendant's application and contested the items numbered 1 and 4, with consideration of the item numbered 5 being dependent on the outcome of the application in respect of items numbered 1 and 4.

- [6] Having listened to the detailed submissions of Counsel on behalf of both parties, it appears to be clear that there is a fundamental difference of perspective between the parties on the issue addressed by the court-appointed expert in this case and that the determination of this issue is crucial to the final determination of the case itself.
- [7] This being so it would appear that in order to properly and justly determine the issues in dispute between the parties the Court would need to or would at the very least benefit from diversifying the expert evidence available to it on a crucial technical question on which the parties remain divided after the presentation of and two sets of questions on the report of the court-appointed expert.
- [8] Having regard therefore to the Court's powers under Rule 32.6 of the CPR, the Court hereby directs that Mr. Chester Bedeau, a Licensed Land Surveyor to be instructed by the Defendant, produce to the Court within seventy two hours of the making of this order a report on the location of the access road to the beach, the location of which is in dispute between the parties to this case. The report of Mr. Bedeau shall be in accordance with Rule 32.3 and 32.4 of the CPR. The Defendant shall cause a copy of the report to be served on the Claimant no later than 4.00 p.m. on Thursday 16th July 2009. Mr. Bedeau is to attend at the trial of this matter on Monday 20th July 2009 to be cross-examined on his report, otherwise his report shall not be considered by the Court. Mr. Bedeau's costs for the preparation and presentation of his report and for his attendance at Court shall be borne entirely by the Defendant.
- [9] The Claimants shall be at liberty to put written questions to Mr. Bedeau no later than 4:00 p.m. on Friday 17th July 2009, in which event Mr. Bedeau shall provide written answers to the questions no later than 9:00 a.m. on Monday 20th July 2009.
- [10] Having dealt with the issue numbered 4 in the Defendant's Notice of Application, I turn now to deal with the other contested issue arising from the Defendant's Notice of Application, that is, the additional written questions to the expert addressed as issue numbered 1.
- [11] Rule 32.8 (2) of the CPR provides that written questions to an expert witness may be put once only, must be put within 28 days of service of the expert's report and must only be in

order to clarify the report. The additional questions proposed to be put to the court-appointed expert by the Defendant would, if allowed, be the third occasion on which written questions would be put to the expert by the Defendant, they would be put almost 20 months after the service of the expert report and they would not only be in order to clarify the report. Although the Court can permit a departure from the provisions of Rule 32.8 (2), the Defendant seeks to have the Court depart and depart significantly from all three of the specific stipulations of the Rules. Moreover, Counsel for the Defendant concedes that in order to accommodate the Defendant's request, the trial date set for 20th July 2009 would have to be vacated. In the circumstances, and having regard to the fact, which the Court was reminded of by Counsel for the Claimants, that this case was filed over three years ago and one of the Claimants is 86 years old and ailing and possibly not with us for very much longer, the Court will not delay the trial of this matter. The Defendant's application to put additional written questions to the court-appointed expert is refused.

[12] The proper consideration of the reports of the two experts in this case would however require that they both attend the trial of the matter so as to be available for cross-examination on the contents of their reports. It has already been ordered that Mr. Bedeau is to attend at the trial to be cross-examined on his report and so it is now ordered that Mr. Ogilvie is to attend at the trial of this matter on Monday 20th July 2009 to be cross-examined on his report. The Defendant shall be responsible for securing the attendance of Mr. Bedeau whom he has caused to be appointed as an expert witness, but the court-appointed expert, Mr. Ogilvie, shall be summoned to attend court on Monday 20th July 2009, which summons the Court directs shall be issued today and shall be binding on Mr. Ogilvie although it will be served less than 14 days before the date on which the witness is required to attend court.

[13] The Court noted the submissions made and the several authorities cited by Counsel for the Claimants on the issue of relief from sanctions and has determined that relief from sanctions is not required for any of the orders being made today by the Court.

[14] Just as was the case with the application by the Claimants which the Court dealt with without argument on 7th July 2009, there shall be no order as to costs in respect of the Defendant's application.



Mario Michel
High Court Judge (Ag.)