SAINT VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO SVGHCV2008/245

BETWEEN:

NICOLE SYLVESTER

Applicant/Claimant

AND

BERNARD PUNNETT

Respondent/Defendant

Appearances
Ms Patina Knights Ms L. John and Ms V. Benjamin for the Applicant/Claimant
Mr Samuel Commissiong for the Respondent/Defendant

……
2013: April 15; June 25
……..

DECISION

INTRODUCTION

[1] LANNS, M: By Amended Claim Form and Statement of Claim filed 28th August 2008, the Claimant Nicole Sylvester instituted proceedings against the Defendant Bernard Punnett alleging that the Defendant encroached unto her land at Twenty Hole Penniston by 1,984 square feet. The Claimant further alleges that the Defendant removed soil and other material from the land thereby changing the landscape of the western boundary from gently sloping, to a thirty feet cliff face which is very unstable and prone to slippage. The Claimant also allege that the Defendant had pursued mining operations with little or no regard to the Claimant's property, and in so doing, has diminished the value of the Claimant's land.

[2] Since the claim had been filed, a number of events have marked the progress of this matter through the system. These include (1) the determination of several applications; (save for an amended Notice of Application by the Claimant for summary judgment filed 6th February 2012;[1] (2) adjournments to facilitate the provision of survey and engineering reports commissioned by the Court; and (3) adjournment to allow for settlement discussions.

[3] Eventually, the matter progressed to the stage of the issuance of trial directions on the 26th February 2013. The Claimant was to call no more than 5 witnesses. The Defendant was to call no more than 4 witnesses. The parties were to file and exchange witness statements on or before 21st June 2013; The Pre-Trial review was scheduled for 27th September 2013; and the trial date was to be listed by the Court Office during 2014.

[4] However, the trial directions seemed to have been effectively overtaken by the Order of Master Taylor Alexander dated 20th March 2013. In the preamble of the Order, the Learned Master stated that the summary judgment application would negate the trial directions issued. It will be convenient to reproduce the order for its full effect.

> "UPON this matter coming on for the hearing of an application for summary judgment which application would negate the trial directions issued;
>
> THE COURT noting that submissions of the defendant remain outstanding;
>
> COUNSEL for the defendant Mr Commissiong is currently off island as a witness in Ireland and request an adjournment;
>
> THE COURT prepared to deal with the application for summary judgment given the overwhelming evidence of the court appointed expert;
>
> ORDER
>
> The application for summary judgment is rescheduled for hearing to the 15th April 2013."

THE SUMMARY JUDGMENT APPLICATION

[5] By Amended Notice of Application filed on 6th February 2012, the Claimant applies to the Court for summary judgment on her Amended Claim and Statement of Claim filed 28th August 2008 in which she sought the following reliefs:

a) Damages spent to date in the sum of $2000.00;

[1] First Notice of application for summary judgment was filed on 9th December 2011

b) An injunction restraining the Defendant from mining, excavating and/or carrying away any earth, soil or minerals from within and under the Claimant's land or adjacent to the boundary of the Claimant's land;

c) An enquiry as to what earth, soil, minerals or stones have been removed by the Defendant from the land of the Claimant situate at Twenty Hill, Hog Hole, Penniston, and what has become of them, and any of them, and any (sic) of them have been sold, what sums have been received in respect thereof;

d) Payment over of all sums as aforesaid;

e) A mandatory Order that the Defendant cause to be erected and constructed a wall of sufficient strength to permanently support the Claimant's land at her boundary and adjacent to the Defendant's land;

f) Further damages occasioned by the unlawful mining and withdrawal of support from the Claimant's land situate at Twenty Hill, Hog Hole, Penniston.

g Interest, (h) costs; and (i) such other reliefs as the court deems just.

[6] The main grounds of the application are that (1) the Defendant does not have a realistic prospect of successfully defending the claim; (2) the Defendant has admitted liability.

[7] The application is supported by the Amended Affidavit of the Claimant sworn to and filed on 6th February 2012.

[8] The Defendant filed an Affidavit in Reply on 15th February 2012.

THE EVIDENCE

[9] The evidence to support the application is set out in the affidavit of the Claimant in support of the application for summary judgment. The affidavit sets out the chronological history of the matter. It speaks to the orders of Thom J appointing Mr David Frederick to prepare a Survey Report and Mr Glenford Stewart to prepare an Engineering Report. It also speaks to an adjournment for report on settlement. The Claimant states that through their respective counsel, the parties told the Court that the only bar to settlement was on the issue of cost per square foot of the land at Hog Hole. The affidavit referred to an undertaking given to the court to abide by the valuation per square foot by a mutually agreed Valuator in the person of Mr Christopher Browne, who subsequently submitted a

Valuation Report providing the cost per square foot at EC$400.00. The Claimant deposed that at all material times, the Defendant admitted liability on the issues, and the only issue left for determination was the quantum payable to her. She detailed the terms of an out of court agreement reached voluntarily between the Claimant and the Defendant in the presence of Mediator Simon Kamara, and she indicated that the Defendant has failed to pay her any monies. She reiterated that the Defendant has admitted liability and does not have a real prospect of successfully defending the Claim.

[10] No documents were exhibited to the Claimant's Affidavit.

[11] In his replying affidavit, the Defendant referred to his pleadings at paragraphs 2, 3, 4, 5, 6, 8, 9 and 12 of the Amended Defence, adding that he pleaded that the Claimant was the agent of her own problems because she had in the past hired someone to level the hilly land.

[12] He next referred to Mr Stewart's Report and went on to state that Mr Stewart did not come to any conclusion of liability on his part. He stated that the only direct evidence of land slipping of the Claimant's land came from Mr Frederick, but if Mr Frederick knew the facts he may have come to a different conclusion.

[13] He stated that the Court has reached no decision on liability, but he agreed that following the submission of the Reports, the Court suggested that the parties hold discussions with a view to settlement of the issues. He deposed that his Counsel has informed him and he verily believes that when parties are engaged in an effort to settle any matter before the Court, the parties must never report to the Court any matters tentative to settlement, unless they have actually arrived at a concluded agreement which will form the substance of the order to be made to the Court. He deposed that most of what the parties discussed in the settlement negotiations now appear in the Claimant's affidavit. He stated that Counsel has informed him and he verily believes that these matters should never be put before the Court in the absence of a concluded settlement agreement. He reiterated that he never actually or impliedly admitted liability.

[14] No documents were exhibited to the Defendant's affidavit.

THE ISSUE

[15] The main issue for determination is whether in view of

(a) the issues arising on the pleadings;

(b) the facts in dispute and the undisputed facts shown in the affidavits in support of and in opposition to the Application

(c) the result of the survey done by Mr David Frederick, commissioned by the Court;

(d) the findings contained in the report submitted by Glenford Stewart of Stewart Engineering, commissioned by the Court,

the Defendant's Amended Defence filed on 25th November 2008 has any prospects of success or ought to be summarily dismissed and judgment entered for the Claimant.

[16] The corollary issues are whether in view of

(a) the issues arising on the pleadings;
(b) the facts in dispute and undisputed facts;
(c) the reports submitted by the Court appointed experts;

the Defendant has pleaded a viable defence in answer to the claim; or has offered any evidence to prove that the Claimant was the agent of her own problems because she had in the past hired someone to level the hilly land; or that he has not carried out any mining operations on the Claimant's land or that he did not enter into any agreement in settlement of the claim; or that he did not admit liability.

(d) Ultimately, the question is whether summary judgment should be granted or whether the matter should proceed to trial for a determination of all the issues raised in the pleadings with the aid of evidence.

THE SUBMISSIONS

Ms Knights' submissions

[17] The Claimant's position is that although the Defendant denies any mining on his lands which is adjacent to the Claimant's land, the Report of Stewart Engineering stated that "we observed that quarry operations have been undertaken on lands of the Pembroke Estate

which lie due southwest of the lands described on the Survey Plan A412"(the Defendant's Lands).

[18] Claimant's Learned Counsel also referred to the Report of David Frederick wherein he stated that "marks were missing as a result of some mining (sand) operations done by Mr Punnet." Ms Knights went on to state that the parties agreed to be bound by the Reports ordered by the Court. She pointed to Mr Punnette's Affidavit of 22nd October 2008 in which he admitted at paragraph 3 that "other people have been carrying out quarrying operations in the said location on my land." As far as Ms Knights is concerned, the "other people" were Mr Punnette's servants and/or agents or otherwise.

[19] Counsel also pointed to Mr Punnette's Affidavit of 21st November 2012 wherein he stated that the persons carrying on mining operations were independent contractors. Ms Knights found it noteworthy that the Defendant in his Defence denies any mining on his land but failed to mention the operations of any third party.

[20] Ms Knights also sought to disclose that the matter came up for report on settlement on 17th September 2010, and counsel for both parties indicated to the court that the only bar to settlement was the issue of cost per square foot of the subject land. Ms Knights posited that that was a formal admission to the Court which could be relied upon in support of an application for summary judgment.

[21] Ms Knights submits that in light of the admissions, taken together with the Reports of Stewart Engineering and David Frederick, the Amended Defence has no real prospect of success.

[22] Ms Knights went on to stress that at the hearing to report on settlement, liability was not an issue. The only live issue was that of quantum, submitted Counsel. In Counsel's view, the Defendant, despite having made admissions, is now seeking to approbate and reprobate.

[23] Ms Knights concluded her submissions by urging the Court to grant summary judgment, having regard to all the circumstances including the pleadings, experts' reports, admissions and the undertaking made to the Court.

Mr Commissiong's submissions

[24] Mr Commissiong prefaced his submissions with numerous factual allegations which, to my mind should be included in a witness statement or in an affidavit instead of in the submissions. For example, Mr Commissiong sought to give a history of the litigation in which he alleged that the Claimant is the agent of her own injury. He submitted that it was the Claimant and her agents who disturbed the soil in 1995 and now seeks to pass the blame onto the Defendant.

[25] Counsel next stated that the Claimant in 1995 employed one, Mr Leon Samuel to level her land in preparation of a suitable foundation to build a dwelling house. The excavation work carried out by Mr Samuel disturbed the loose soil and caused it to flow down on both parties' lands which are adjacent to each other. He stated that the Claimant abandoned the attempt to develop a foundation for her house. Counsel had no doubt that Mr Williams is prepared to testify at trial on this aspect of the case.

[26] Mr Commissiong also prefaced his submissions with the following allegations: Around 2007 building contractors in Buccament discovered that the loose soil was ideal to build commercial blocks and began to quarry the Defendant's land to get the loose material. When the Claimant discovered that the contractors were carrying on the quarrying operations, she brought the claim to stop them, claiming damages and an injunction to prevent further quarrying.

[27] As regards the Application for Summary Judgment, Mr Commissiong submitted that the claim is not suitable for summary judgment because the Defendant pleads that the Claimant has no cause of action since she is the agent of her own wrong doing. Counsel described the application for summary judgment as "most daring" in light of the history of the proceedings.

[28] Mr Commissiong submitted that the Court must at least pause to hear the evidence of Leon Samuel, Clifford Williams, Bernard Punnett and Glenville Stewart of Stewart Engineering. Counsel was of the view that the Court must look at paragraphs 2, 3, 4, 5, 6, 8, 9 and 12 of the Defence before dealing with the application for summary judgment. Contrary to counsel's submission, there is no paragraph 9 and 12 in the Amended Defence. Those paragraphs were deleted in the Amended Defence and no amendments were made in respect of them.

[29] Counsel stated that there are two conflicting stories before the Court, as set out in the Statement of Claim and the Statement of Defence. He pointed to the Reply to the Defence and went on to submit that the only response to the Defence is a bare denial. Counsel further submitted that the Claimant's grounds to strike out the Defence do not meet the test stipulated by the Court of Appeal in the case of Spencer v the Attorney General of Antigua and Barbuda.

[30] Mr Commissiong pointed out that the Claimant in her second application for summary judgment seeks to take a second bite at the cherry by stating that the defendant agreed to settle the case in the presence and hearing of one Simon Kamara, Mediator on the Court's List of mediators. He referred to paragraph 5 of the Affidavit of the Claimant filed 6th February 2012 which details the Order of the Court made on 12th December 2008 appointing Mr Frederick to carry our a survey of the subject lands, and directing Mr Stewart to submit his report by a specific date. He stated that the statement there is true and correct. Counsel admitted that the parties had agreed to enter into discussions with a view to settlement but were unable to reach settlement in the terms suggested by the Claimant. Further, the attempt at settlement was compromised when the Claimant introduced Simon Kamara into the discussions, submitted Counsel. Claimant's counsel replied.

Ms Knights' Reply

[31] In her replying submissions, Ms Knights indicated that Mr Commissiong has introduced issues and reports that are not before the Court. She submitted that the only reports

before the Court are the Reports of Keith Francis dated 15th July 2008; (b) the Report of David Frederick filed 5th February 2009; (c) the Report of Stewart Engineering filed 18th May 2009; and the Report of Chris Browne dated 29th September 2010. As far as counsel was concerned, there is no report of Clifford Williams before the Court.

[32] Ms Knights denied the allegation made by Mr Commissiong to the effect that the Claimant introduced Mr Kamara in the settlement discussions unknown to him, and she went on to explain that it was the Defendant who approached Mr Kamara seeking his intervention. I will now address the principles which govern applications for summary judgment.

THE APPLICABLE PRINCIPLES

[33] CPR 15.2 (a) provides that the Court may give summary judgment on the Claim or issue or on a particular issue if it considers that the Claimant has no real prospect of succeeding on the claim or issue.

[34] The prospect of success must be real as opposed to being fanciful. The case of Saint Lucia Motor and General Insurance Company Limited v Modest[2] is sound authority for this principle. In that case, Her Ladyship, Madame Justice of Appeal Janice George Creque (as she then was) referred to the cases of Baldwin Spencer v The Attorney General of Antigua and Barbuda, the Attorney General of Antigua and Barbuda v Antigua Aggregates Limited et al, Swain v Hillman and the text Blackstone's Civil Practice, and went on to state, among other things, at paragraph [21] that:

> "[21] … The principles distilled from these authorities by which a court must be guided may be stated thus: Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or the defence has no 'real' (i.e. realistic as opposed to fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. … The court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it, and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the

[2] High Court Civil Appeal 2009/008, Saint Lucia

exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case, then it is open to the court to enter summary judgment."

[35] The approach of the court is also stated in the BVI case of Bank of Bermuda Limited v Pentium[3] wherein Saunders CJ [Ag] observed at paragraph [18]:

> "A judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim. …"

APPLYING THE PRINCIPLES

[36] The Claimant contends both in her amended Affidavit and in the submissions that the Defendant has no realistic prospect of successfully defending the claim brought against him in that the defendant has admitted liability; and they both had arrived at an out of court settlement on 10th June 2011. The Claimant says the Defendant agreed to pay her on or before the 24th June 2011, the sum of $44,000.00 in full and final settlement of the Claim. The Defendant agrees that there were settlement discussions but says that he never accepted liability.

[37] Clearly, the Claimant is relying on the purported admission of liability, the settlement said to be reached between the parties; the reports of Keith Francis, David Frederick, Glenford Stewart and Chris Browne.

Admissions by the Defendant

[38] Looking at the Defence, I note that the Defendant in his Amended Defence only admitted paragraphs one and two of the Statement of Claim relating to the identity of the parties.

[39] The Claimant in her affidavit and in her submissions claims that at all material times the Defendant admitted liability. The Defendant in his affidavit in reply refutes that he has

[3] BVI Civil Appeal No 14 of 2003

accepted liability. He countered that the Court has reached no decision on the issue of liability but rather, the Court suggested that the parties hold settlement discussions of the issues – a suggestion which he accepted with no taint of liability. He stressed that he "never actually or implicitly admitted liability for any damage to the Claimant's land".

[40] CPR 14.1 provides the procedure for making an admission: "A party may admit the truth of the whole or part of any other party's case. A party may do this by giving notice in writing (such as in a statement of case or by letter) before or after the issue of proceedings.

[41] There is nothing in the Defence indicating an admission of liability. Nor is there any letter or any documentary evidence suggesting an admission of liability. Apart from her mere say so, there is no evidence before me to suggest that the Claimant accepted liability. That ground of application therefore fails.

[42] As regards the purported agreement reached between the parties, there is no dispute that the matter was adjourned to facilitate settlement discussions. Nor is there any dispute that settlement discussions took place. By his own admission, the Defendant acknowledges that the parties held settlement discussions. This is borne out in his affidavit in reply in which he laments the presence in the Claimant's Amended Affidavit (filed 6th February 2012) of most of what was discussed in the settlement negotiations.

[43] It is arguable that if the Defendant was so confident that he had a viable defence, why did he bother to negotiate an agreement in the terms suggested by the Claimant in her Affidavit?. He has not denied that he came to such an agreement with the Claimant. In these circumstances, it appears to me that the Claim has been compromised by the agreement purportedly reached in the settlement negotiations. But it is arguable that to be effective, the Agreement should have been reduced to writing, e.g. a Release reflecting a discharge from the Action, and showing the consideration in respect of the Agreement).

[44] I am therefore not inclined to grant summary judgment based on the purported agreement. That ground fails.

Denials by the Defendant

[45] The Defendant's Amended Defence raises a number of defences:

(a) The survey purportedly done by Mr Keith Francis was in relation to excavations of land owned partly by the Claimant and partly by the Defendant. The excavation was done at the instance of the Claimant;

(b) Mr Francis' Report made no reference to Survey Plan A433 prepared by Mr Clifford Williams who had previously surveyed the Claimant's land;

(c) A denial of any encroachment on the Claimant's land; either by himself or any of his agents;

(d) A denial that he or anyone acting on his behalf removed any survey boundary marks from the Claimant's land;

(e) A denial that the Defendant encroached on 1,984 square ft, and removed soil and other material from the land;

(f) An averment that the markings and the alleged encroachment on 1,984 square ft of land were all made when the claimant was trying to develop house foundations by excavating her hilly lands;

(g) A denial of the allegation that the Claimant's mining operations has resulted in a diminution in value of the Claimant's land;

(h) A denial that the Claimant is entitled to any of the reliefs she seeks;

(i) A denial that the Defendant carried on any activity on his land that changed the Claimant's land in any way.

The Reports

[46] Ms Knights in her submissions placed heavy reliance on the reports of Mr Frederick and Mr Stewart quoting from specific passages of those reports.

[47] Mr Commissiong on the other hand took me on a tour of four reports, which he said were conducted on the issue of causation, namely; the report of Keith Francis dated 15th July 2008, commissioned by the Claimant; (2) the report of Clifford Williams, Licensed Land Surveyor dated 17th October 2008, commissioned by the Defendant; (3) the report of David Frederick dated 5th February 2009, commissioned by the Court; and (4) the report of Gilbert Stewart, Structural Engineer dated 8th May 2009 commissioned by the Court.

Counsel obviously was not happy with the Report submitted by Mr Frederick and Mr Francis. He described their Reports as 'partisan'. As regards Mr Stewart's Report, Mr Commissiong was of the view that it was an objective report in that it did not apportion blame on anyone.

[48] For the purposes of this application, I am content to restrict my comments to the Reports of Mr David Frederick and Mr Glen Stewart only, as these Reports were commissioned by the Court.

[49] I make the observation that the Reports do not conform to CPR 32.14 which specifies certain things that must be contained in an expert witness' report.; in particular 32.14 (2) and (3). There is no need to dwell on this irregularity as no issue has been raised regarding it.

[50] Mr Frederick began his report by referring to the Court Order: "To conduct a survey of the property of the Claimant and Defendant situated at Hog Hole to determine the boundaries between the two properties." Under subheading 'Information gathered' Mr Frederick detailed the measurement of the land conveyed to the Claimant. He continued that Plan A412 shows the original survey done by Surveyor M. Robertson in February – March 1994.

He stated that Surveyor Keith Francis had occasion to survey a portion of A412 – that portion of the boundary separating Ms N. Sylvester and Mr B Punnett. He continued "My understanding is that Mr Francis reported that all marks on A412 except B 5, B6 and B7 were found. These marks were missing as a result of some (sand) mining operations done by Mr Punnett. Mr Francis replaced the missing marks to conform to their original positions – to agree with A412. These marks that he found checked out well. He also reported that he made a determination of the extent of some encroachment on A412 as a result of the mining operation." Under the sub-heading "Procedure" Mr Frederick detailed the procedure he adopted. He got two copies of Plan A412 from surveys Department. He had arranged to go on site with Mr Francis on Sunday 1st February 2009. He went to the site instead on 29th January 2009 with Mr Robertson and one of his workmen on 29th

January 2009. They did some survey measurements and found that the replacement boundary put by Mr Francis checked well with the original plan A412 done by Mr Robertson.

[51] Mr Glenford Stewart, a Structural Engineer, commenced his report by stating "We have conducted a technical survey of the quarry site situated at Hog Hole, Penniston." He reported that the quarry site is situated on the southern slopes of a hill close to its crest. It is an elevation of 450 feet to 520 feet above mean sea level. He stated that "We have observed that quarry operations have been undertaken on lands of the Pembroke Estate which lie due south west of lands described on Survey Plan A412. Mining operations consisted of (i) the removal of vegetation (forest); (ii) the excavation and overburden soil 10 ft to 18 ft thick; (iii) the extraction of natural deposits of sand and gravel which lie beneath the forest and over burden soil. The mining operations are such that they could have been undertaken with the use of heavy equipment such as a bulldozer, backhoe or excavator. We consider that no explosive blasting was necessary, and from our investigations none was reportedly used. We observed that the northern limits of the excavation works for the quarry operations lie approximately 20 feet from the southwestern boundary of the lands of Survey Plan A412."

Mr Stewart advised that no further excavation works be undertaken at the northern boundary of the quarry site because the natural process of erosion may ultimately affect the adjacent lands of Survey Plan A 412. He opined that the mining of sand and gravel may continue at the quarry site at an appropriate or measured distance from its northern boundary provided that (i) the ultimate slope of the quarry face dos not exceed 12 degrees; (ii) Quarry reinstatement works consisting of the spreading of top soil, the planting of grass, shrubs and trees on abandoned areas, be undertaken as the mining operations progress southwards.

[52] It does not appear that Mr Stewart or Mr Frederick received any written clarifying questions on their Reports. Apart from the Court Order, no instructions from the parties were mentioned.

[53] I am of the opinion that, prima facie, the documentary evidence (the Reports of Mr Frederick and Mr Stewart) destroys the Claimant's Defence that no mining operations were carried out on his land, and that neither the Claimant nor his agents encroached on the Claimant's land.

[54] However, the Engineer and Surveyor are not advocates. And their reports cannot substitute trial by the judge. Their Reports are for the assistance of the judge at trial. In my judgment, it is reasonable for the Defendant to be allowed to cross examine the Experts on their Reports if he so desires. It will be open to judge at trial to give credence to the finding in the Reports having heard all the evidence including that solicited at cross examination. This may however be subject to whether the Defendant did undertake to be bound by the Reports of the Court appointed experts. I believe Justice Thom is best placed to make that determination since the Learned Judge made the orders appointing the experts. This Court has no transcript of the proceedings before the Learned Judge.

[55] The Court finds that there is merit in Mr Commissiong's contention that the application for summary judgment is premature as the Court must hear the evidence of Mr Stewart as well as Mr Francis cross examination. I believe their reports ought to be regarded as their evidence in chief and that they should be presented at trial to put their reports in evidence and be tendered for possible cross examination.

[56] However, it is clear that the Defendant is looking to call witnesses to bolster his case that the alleged encroachment relate to, and is as a result of excavations carried out at the instance of the Claimant since the year 1995 to carve out an house foundation partly on the Claimant's land and partly on the Defendant's land. I am of the opinion that notwithstanding the Reports commissioned by the Court, the Defendant should be afforded that opportunity if he so wishes.

[57] The Court is aware of, and fully recognize the learning and guidance of our Court of Appeal in the case of Lynnette Stewart and Lynnette Stewart (Administrator of the

Estate of Anthony Stewart, Deceased) v the Attorney General[4] wherein the Hon George-Creque, JA (as she then was) explained the significance of continuing to defend, and the corroborative relevance of the further expert's report. However, I think the facts there are not on all fours with the facts of this case. There, the Defendant was seeking to call another expert merely to corroborate the jointly appointed expert. The court took the view that that takes the matter no further in respect of the assistance the Court can derive therefrom. The critical passages in my view are paragraphs 5, 6 and 8:

> "[5] As the appellants 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 a 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 the 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 anyway dissatisfied with the jointly appointed expert. Indeed, the appellants rely on the said expert in support of their case."

> "[6] Having another expert 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."

> "[8] 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."

[4] Grenada High Court Civil Appeal No 006 of 2008

[58] The decision in that case must be taken to be correct on its peculiar facts, and the Court respectfully accepts that decision. However, Lynnette Stewart's case may be distinguished in that the purpose for which the Defendant in that case wished to call expert witness was different. Additionally, the Defendant in Lynnette Stewart's case expressed no dissatisfaction with the report of the joint expert. In the instant case, while he has not expressed any dissatisfaction with Mr Stewart's Report, the Defendant is not happy with the Report of Mr Frederick and wishes to cross examine him on it. In these circumstances, I think the correct approach is not to accede to the Claimant's application and to allow the matter to proceed to trial.

Causation

[59] There remains the issue of causation raised in the Defence, which the Claimant has not addressed in her Amended Affidavit in support of her application for summary judgment.

In the Defence, and in his submissions, the Defendant has placed much emphasis on the issue of causation, alleging that it was the Claimant who caused the problem of which she has complained. As to whether or not that is a viable answer to the Claimant's case, is a matter for the trial judge with the aid of evidence, which also suggests that this matter may not be suitable for summary judgment and should proceed to trial for a determination of that issue as well.

[60] In the case of Alpha Telecom Turkey Limited, v Cucorova Finance International Limited et al, BVI Civil appeal 2009/001, Gordon JA delivering the decision of the Court of Appeal stated at paragraph 20:

> "… if the pleaded case of the parties indicates that there is a factual issue to be tried, which if proved, in favour of the respondent to the application might result in a decision in the latter's favour, then the preemptive power [summary judgment] of the of the court should not be used"

[61] In dismissing the appeal against the learned trial judge's refusal to grant summary judgment, Gordon JA upheld the trial judge's conclusion that there were "many conflicting facts and in depth issues to be dealt with in this matter."

[62] Likewise, I am of the considered opinion that there are conflicting facts and in-depth issues to be dealt with in this matter.

CONCLUSION

[63] I have come to the conclusion that despite the Reports commissioned by the Court, and despite the agreement allegedly reached between the parties, the case is not a suitable one for summary judgment. The Court is of the opinion, that there are conflicting facts and in-depth issues to be dealt with in this matter. I think the matter should proceed speedily to trial for a determination of the issues raised in the pleadings.

[64] In all the circumstances, and on the totality of the evidence, I dismiss the application for summary judgment and remit the matter to the court office to be set down for further case management.

[65] The Defendant is entitled to costs incurred for responding to the application.

[66] The Court is grateful to counsel for their helpful submissions.

The Order

[1] The Application by the Claimant for summary judgment is refused.

[2] The matter is to be set down for further case management during the next sitting of the Master unless a consent order is sooner filed.

[3] The Claimant do pay to the Defendant costs of the summary judgment application to be assessed if not otherwise agreed within 21 days of today's date.

PEARLETTA E LANNS
MASTER