

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

CLAIM NO. GDAHCV2000/0067

BETWEEN:

**EMERALD STEWART
(ADMINISTRATOR OF THE ESTATE OF VIRGINIA STEWART)
HERMIONE STEWART**

Claimants/Respondents

and

**JEANETTE FARRAY
ASHLEY SIMON
MARY FARRAY**

Defendants/Applicants

Appearances:

Ms. G. Etienne for the Applicants

Mr. R. Ferguson, Ms. D. Mitchell & Ms. A. Johnson for the Respondents

2010: May 4, 20

JUDGMENT

- [1] **PRICE FINDLAY, J.:** There are three applications before the Court brought by the Applicants. The Applicants were the Defendants in the substantive matter which was filed over 10 years ago.
- [2] The matter surrounds the disputed ownership of seven (7) poles of land situated at Beauregard in the parish of St. Andrew in the State of Grenada.
- [3] The parties in January 2008 entered into a Consent Order in an attempt to settle the matter before the Court once and for all.
- [4] Alas, this Consent Order, far from settling the matter between the parties, has been the cause of further litigation which, two (2) years after the Consent Order, still finds the parties before the Court.

[5] The Consent Order, entered on the 16th day of April 2008, reads as follows:

- "1. That the Thomas Ogilvie plan of 1922 be accepted by the parties as the basis for the settlement of matters, a copy of which is attached.
2. The access established to the west of the 7 pole lot on the said plan be respected by both parties, such access to be ten (10) feet wide, subject to paragraph 3 below.
3. The respective buildings of both parties be not interfered with by one another.
4. A boundary be established between them as a median line, such boundary to be established by a surveyor, to be agreed by the parties' respective Attorneys-at-Law."

[6] Subsequent to the Consent Order, some 18 months later, the Respondents to these applications made an application for an injunction restraining the Applicants from constructing any building or any structure on the 10-foot right of way, an injunction restraining the Applicants from obstructing or interfering with the said right of way, a mandatory injunction compelling the Applicants to demolish any building or structure built on the said right of way, among other things.

[7] Subsequent to several hearings on the application mentioned in the preceding paragraph, the Court made an Order entered on the 9th day of March 2010 in the following terms:

- "1. That the Defendants (Applicants) are to remove the concrete pillar, concrete slabs, and any other structures erected on the 10-foot access road as identified on the plan of Licenced Land Surveyor Mr. Denis Thomas and dated 23rd April 2008.
2. Should the Defendants (Applicants) fail to comply with paragraph 1 above by 23rd March 2010 the Claimants (Defendants) will have the said structure or obstruction removed and the Defendants (Applicants) will

reimburse the Claimants (Defendants) for any and all expenses associated with the removal.

3. The Defendants are to pay the Surveyor Mr. Denis Thomas a sum equivalent to 50 percent of the bill submitted for the survey of the boundaries related to the access road and seven (7) Poles of Land.
4. Neither the Claimants nor Defendants are allowed to park any vehicle on the 10-feet right away.
5. Cost to the Claimants in the sum of \$900.00.
6. Matter adjourned to Tuesday, 30th March 2010."

[8] The Applicants (Defendants) have filed three applications before the Court seeking the following:

- (a) An Application for a stay of execution of the Order dated 3rd March 2010
- (b) An Application for clarification of the Order dated 23rd January 2008 and,
- (c) An Application for the report of the licenced surveyor, Mr. Denis Thomas be struck from the Record of the Court.

[9] Affidavits were filed by the Applicants in these matters in support of these various applications. The Respondents also filed affidavits in response.

[10] I will deal with the application for clarification first as this application is at the heart of the Applicants' case.

[11] The Applicants' position is that there is a misunderstanding of the Order dated 23rd January 2008. Their position is that they were told by their then legal practitioner, Dr. Francis Alexis Q.C, that their existing buildings would not be interfered with.

- [12] They assert that there was an existing building or structure which is incomplete which is in the area where the 10 foot right of way has been designated by Mr. Denis Thomas, the agreed licenced surveyor.
- [13] In his affidavit sworn on 29th March 2010, Ashley Simon asserts "that the structure was at all material times attached to the main house. It consisted of concrete pillars about 6 feet high off the ground and concrete blocks of about four rows high from the ground." He further states, "I had also entrenched and cast a foundation for the part of the building which I was constructing and threaded and concreted the steel from the main part to the part under construction in order to join the two of them. In addition, I trenched and cast the foundations and constructed a beam in order to join the old and new parts together. Further I removed the wooden outer frame of the old part and replaced it with concrete. I commenced these works in 1997 and completed them in or about 2001."
- [14] According to the second Applicant all of this construction predated the Consent Order. The structure he referred to in his affidavit were there standing at the time they agreed to the Order of 23rd January 2008.
- [15] He goes on to say that it was with this knowledge that they entered into the Consent Order, and that they had given these instructions to their Attorneys.
- [16] It seems strange, to say the least, that armed with the knowledge that there was a partially constructed building on the area where the 10 foot right of way was to be placed that Learned Queen's Counsel for the Applicants would agree to such a Consent Order.
- [17] But that is not all. The Applicants were present when the surveyor attended to do the survey. In his report Mr. Denis Thomas states, "Present on that day were all the parties concerned." Each of the parties was served with a notice of intention to survey and all parties acknowledged receipt of same.

- [18] No objection was raised by the Applicants at the time of the survey (the 23rd April 2008) when they were present that the right of way was on the area where their building was.
- [19] In fact it is instructive that the survey plan shows clearly the structure situate on the 7 poles of land belonging to the applicants but does not show any structure other than three (3) wall pillars on the 10-foot right of way.
- [20] The surveyor was summoned by the Court to ascertain whether these pillars were the only things on the area of the right of way.
- [21] In the presence and hearing of the Applicants, the surveyor, Mr. Denis Thomas, indicated to the Court that at the time of the carrying out of the survey there were no buildings in the area of the designated right of way, but only as shown on his plan, the three concrete pillars. The Applicants made no objection and raised no issue with the Surveyor that he had in fact not conducted a survey, or that there were buildings erected or being erected on the right of way.
- [22] I find as a fact that the structures which the Second Applicant asserts were built by him between the years 1997 and 2001 were not in fact there when the survey was carried out in 2008.
- [23] I do not believe the Second Applicant when he states that, "We verily believe that we could continue construction of the unfinished building."
- [24] I do not believe the Second Applicant when he states that he continued to lay blocks on top of blocks between 1997 and 2001. I do not believe him when he states that he did not extend the building in width or length during this construction.
- [25] I also do not believe the Second Applicant when he states that he has not impeded in any way the passage of the Claimants or any part of the 10 foot access. I do not believe that he honestly believed that his actions were not in violation of the Court Orders.

- [26] It is interesting that even though much reliance is placed on the advice received from Dr. Alexis, Q.C, by the Applicants, that there was no affidavit forthcoming from Learned Queen's Counsel to support any of these allegations or to negative the evidence of the Respondents as to what transpired at the time of the making of the Consent Order.
- [27] More importantly, I do believe that the Second Applicant in knowing violation of the Court Order of January 2008, continued building, attaching the new construction to the pillars which were there at the time of the survey being done.
- [28] In fact, that is the very reason why the Respondents brought the application dated 16th June 2009, to restrain the Applicants from constructing any buildings or other structure on the 10 foot right of way.
- [29] In her affidavit in support, the First Respondent states that in May 2009 the Applicant began to build a wall structure on the access road. She stated that this structure appeared to be an addition to the Applicants' house. She went on to describe the six concrete pillars, with concrete blocks run up to the top of these pillars, as well as a framework for a concrete structure. Flower pots and plants were also placed in the access way.
- [30] But that is not all. After the completion of the survey, the Applicants parked their vehicles in the access way, obstructing the right of way and not allowing the Respondents to have use of it. In addition, they resorted to verbal abuse. I believe the Respondents.
- [31] The Applicants in their affidavits have tried to mislead the Court as to when they built the structures which now block the right of way.
- [32] The Applicants in their affidavit dated 28th September 2009 stated that they were building "well within the boundaries of the seven (7) poles of land."
- [33] Based on what the surveyor told this Court (in the presence of the Applicants) this is clearly not a true statement. I am satisfied that the Applicants knew that they

were building on the agreed right of way and continued to do so in the face of the Consent Order.

- [34] I accept in total the history of this matter as set out by the Second Respondent in her affidavit of April 12, 2010, paragraph 5 part 9 (i) to (ix).
- [35] One would have thought that if there was any confusion about the Order the Applicants would have sought clarification of the Order long ago, certainly before they began building on what they must have known was the 10-foot right of way they agreed that the Respondents should have.
- [36] It was only when faced with the prospect of having to remove the structures which they had built did they come to the Court for clarification.
- [37] It ought to have been obvious to the Applicants that if they put their buildings where they have that the 10-foot right of way to which they agreed would be an impossibility.
- [38] I find that the Applicants were present when the survey was carried out. They made no protest to the surveyor, to their lawyers or to the Court by way of application to clarify any misunderstanding. In other words, they did nothing until faced with the prospect of having to remove the structures they have put up that they came to the Court to say that they did not understand the Order.
- [39] I find that the Applicants have been less than truthful with the Court. In an affidavit filed on the 12th April 2010 by the Applicants, for the first time they say to the Court that Denis Thomas did not do a survey of the land in question. This is a remarkable statement as it comes some two years after the survey was carried out and a survey plan produced.
- [40] It is also remarkable in that in their affidavit in response to that of Ms. Hermione Stewart dated 16th June 2009, sworn by Jeanette Farray she states, "that I am not in agreement with the recent survey CONDUCTED by Licenced Land Surveyor Denis Thomas ..." These Applicants now brazenly say Mr. Thomas did not return

to do any survey. The Applicants are strangers to the truth. They have told this Court a tissue of lies.

- [41] They have made allegations against their previous legal representatives without compunction and have made scurrilous accusations against the Court. They will say whatever they think will get them their way, with little or no regard for the truth.
- [42] I find that the Applicants were well aware of the terms of the Order made by Consent in January 2008, but like their behaviour throughout these proceedings, they have done everything in their power to ignore the Order of the Court.
- [43] I find that as per the survey plan submitted by Mr. Denis Thomas, there were only three (3) concrete pillars in the area of the right of way. I find as a fact that the Applicants built the structures that are now in the right of way after the Consent Order of January 2008.
- [44] I also find that the Applicants were under no misconception or misunderstanding of the terms of the Consent Order. I find that the Applicants understood the contents of the Order as they waited for over a year after the January 2008 Order to begin their construction. This suggests to the Court that they were well aware that the Order prevented them from building on the right of way. If it were otherwise, the Applicants would have commenced building as soon as possible after the January 2008 Order.
- [45] Their attempts at blaming their various Attorneys, the Court, the Respondents, have all failed. They have sought to hide behind alleged misunderstanding of the Order, the alleged misunderstanding of their legal advice, all to no avail.
- [46] I find that the Applicants fully understood the Consent Order and agreed to its terms. The word "building" in paragraph 3 of the Order means just that, buildings. Three pillars are not buildings. The Applicants knowing this, after the making of the Consent Order sought to make the pillars into a building so as to circumvent the Order of this Court.

[47] The Applicants have misrepresented facts, have told outright untruths to this Court, both in their *viva voce* evidence and in their affidavits. As a result, the Court cannot and does not believe them.

[48] In the circumstances, the Court finds that the Consent Order of January 2008 is clear in its terms. Paragraph 3 is clear in its terms and meaning. The respective buildings of the parties mean the buildings. Three pillars cannot be considered buildings. If the Order had used the term 'structures' I could perhaps take the view of the Applicants that there was some misunderstanding.

[49] The Concise Oxford English Dictionary 11th Edition defines the word "building" as "a structure with a roof and walls; the process or trade of building houses and other structures." It is clear to this Court that the Order contemplated buildings in the ordinary meaning of the word.

[50] I therefore order that the January 2008 Consent Order is clear in its terms and should be carried out as per the Order of March 2010.

[51] Following on this finding, the Order of the Court dated 3rd March 2010 remains in force and will be varied in the following terms:

1. The Defendants/Applicants are to remove the concrete pillars, concrete slabs and any other structures erected on the 10-foot access road as identified on the plan of Licenced Land Surveyor, Mr. Denis Thomas, and dated 23rd day of April 2008.
2. Should the Defendants/Applicants fail to comply with paragraph 1 above by the 31st May 2010 the Claimants/Respondents will have the said structures or obstructions removed and the Defendants/Applicants will reimburse the Claimants/Respondents for any and all expenses associated with the removal.

The other aspects of the Order have been complied with.

[52] With respect to the application for a stay, I would dismiss that application in view of the decision with respect to clarification.

[53] This leaves the application to strike the Surveyor's Report.

[54] The Applicants' grounds are as follows:

- (1) That pursuant to CPR 32.14 no details of the expert's qualifications were provided, and further the written instructions given to the expert were not attached to the Report. Further, they contend that the certification required by the Rule was not contained in the Report.

[55] Rule 32.14 states:

"(1) An expert witness' report must –

- (a) give details of the expert witness' qualifications;
 - (b) give details of any literature or other material which the expert witness has used in making the report;
 - (c) say who carried out any test or experiment which the expert witness has used for the report;
 - (d) give details of the qualifications of the person who carried out any such test or experiment;
 - (e) If there is a range of opinion on the matters dealt with in the report –
 - (i) summarise the range of opinion; and
 - (ii) give reasons for his or her opinion and
 - (f) contain a summary of the conclusions reached.
- (2) At the end of an expert witness' report there must be a statement that the expert witness –
- (a) understands his or her duty to the court as set out in rules 32.3 and 32.4;
 - (b) has complied with that duty;

- (c) has included in the report all matters within the expert witness' knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
 - (d) has given details in the report of any matter which to her or her knowledge might affect the validity of the report.
- (3) There must also be attached to an expert witness' report copies of –
- (a) all written instructions given to the expert witness;
 - (b) any supplemental instructions given to the expert witness since the original instructions were given; and
 - (c) a note of any oral instruction given to the expert witness; and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party.
- (4) If a report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the opposite party at the same time as the service of the report.
- (5) If it is not practicable to provide a copy of the documents referred to in paragraph (4), those documents must be made available for inspection by the other party or any expert witness instructed by that party within 7 days of a request to do so."

[56] This rule is intended to regulate the giving of expert evidence to assist the Court. In these rules "expert witness" means an expert who has been instructed to prepare or give evidence for the purpose of Court proceedings. (Emphasis mine.)

[57] It is the overriding duty of an expert witness to help the Court impartially on matters relevant to his or her expertise.

[58] The expert referred to by the Applicants in this matter is the Licenced Surveyor, Mr. Denis Thomas.

- [59] Mr. Thomas was not a witness in this matter; he was not required to produce a report for the Court in these proceedings.
- [60] Mr. Thomas was appointed by the parties to carry out a survey of the lands in question to set out the 10 foot right of way agreed to by the parties pursuant to the Consent Order.
- [61] Mr. Thomas' involvement in the matter was not in the course of proceedings for the purpose of assisting the Court. His involvement was rather to assist the parties to conclude the agreement which they had reached.
- [62] In the circumstances, it is the view of the Court that CPR 32.14 does not apply in these circumstances.
- [63] Accordingly, this application is dismissed.
- [64] The Applicants having failed in the application for clarification, the application for the stay is also hereby dismissed.
- [65] The Applicants are to pay the Respondents' costs of these applications in the sum of \$3,000.00.



Margaret Price Findlay
High Court Judge