

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2001/1006

BETWEEN:

(1) THERESA HUSBANDS
(2) WINSTON HUSBANDS

Claimants

and

JAMES A. KYLE

Defendant

Appearances:

Mr. Richard Frederick for the Claimants.

Mr. Peter I. Foster for the Defendant

2003: October 21
October 24

DAMAGES FOR BREACH OF CONTRACT...CASE WEIGHED HEAVILY ON EXPERT WITNESS' REPORT...PRELIMINARY OBJECTION ON DATE OF TRIAL...NO EXPERT WITNESS STATEMENT...NON-COMPLIANCE WITH PART 32 OF CPR 2000...ATTEMPTS MADE ON TRIAL DATE TO ADJOURN MATTER TO PRESENT WITNESS STATEMENT OF EXPERT...PART 32.6 AND 32.16 REFERRED TO...OVERRIDING OBJECTIVE OF RULES...CASE OF ST.BERNARD v THE ATTORNEY GENERAL OF GRENADA RELIED ON.—
CALIM DISMISSED SUMMARILY

RULING

1. **HARIPRASHAD-CHARLES J:** Winston Husbands and Theresa Husbands (the Husbands) are husband and wife. Mr. James Kyle was a contractor engaged in the business of the construction of dwelling houses. In January 2001, the Husbands sought the services of Mr. Kyle to provide an estimate for the construction of a dwelling house and eventually, the parties signed a contract for the construction of a dwelling house for the price of \$421,166.31. Problems arose between the parties and on 18th September 2001, the Husbands wrote to Mr.

Kyle with an attached report by a proposed expert Neville Trim detailing among other things an overpayment to Mr. Kyle. Mr. Kyle's solicitors wrote to the Husbands on 24th October 2001 vigorously contesting the allegations. Subsequently, the Husbands instituted the present proceedings claiming a total loss of \$40,413.61 with interest and costs.

2. Mr. Kyle denied being indebted to the Husbands in the sum of \$40,413.61 or any sum or part thereof and counterclaimed for \$39,325.12 as well as for general damages for breach of contract and or anticipatory breach of contract, interest and costs.
3. A Reply to Defence and Defence to Counterclaim was subsequently filed. On 28th February 2003, the matter came up for Case Management Conference. On that day, the Husbands were represented by their Counsel while Mr. Kyle and his Counsel were notably absent. Suffice it to say, by the date the matter came up for trial on 21st October 2003, the Case Management Order was complied with, albeit late. However, on the trial date, Mr. Foster representing Mr. Kyle raised a preliminary objection.
4. Mr. Foster submitted that at paragraphs 19, 20 and 21 of the statement of claim, the Husbands made financial claims which could only have been supported by expert testimony regardless of whether or not there is a breach or liability flowing from Mr. Kyle to the Husbands and the Husbands still have to prove their claim on a balance of probabilities.
5. Mr. Foster submitted that after reading the Statement of Claim, defence, witness statements and case management order it is clear that the Husbands were of the opinion that their evidence would suffice. They have disclosed an expert report by Mr. Neville Trim without seeing it fit to produce this report in accordance with Part 32 of the Rules or to file witness statements or to stretch it further, not even to request Mr. Trim to appear at the trial as he was conspicuously absent.

Part 32 of CPR 2000

6. Part 32 of the Rules deals with Experts and Assessors. An expert witness means an expert who has been instructed to prepare or give evidence for the purpose of court proceedings. Mr.

Trim is not a party to these proceedings and is not a witness as to the events which led up to the allegation of breach of contract by the Husbands.

7. Mr. Trim was introduced to these proceedings by way of his alleged expertise in determining certain matters pertaining to the construction of the dwelling house, the subject matter of this claim. Mr. Trim's report which has been disclosed, is therefore presented to the court as nothing more than an opinion of an expert as to his findings regarding the dwelling house. Mr. Trim's report can therefore only be admissible in accordance with Part 32.

Part 32.6

8. Part 32.6 (1) states that a party may not call an expert witness or put in the report of an expert witness (my emphasis) without the court's permission. Part 32.6 (2) states that the general rule is that the court's permission is to be given at a case management conference.
9. Part 32.16 deals with the consequences of failure to disclose expert's report. Part 32.16 (2) states that the court may not give permission at the trial unless the party asking for permission can show that it was not reasonably practicable to have applied for relief at an earlier stage.
10. Mr. Foster argued that the Husbands were aware of the existence of Mr. Trim's report from as far back as July 2001. In contravention of Part 32.6 (3), they failed to name that expert and identify the nature of this expertise.
11. He next argued that in accordance with Part 32.16 (2) even if the Husbands were to seek permission to use Mr. Trim's report or to call Mr. Trim as a witness that it would be too late to make such an application as they cannot show it was not reasonably practicable to have applied for relief at an earlier stage.
12. Mr. Frederick for the Husbands submitted that the Court must be concerned with the overriding objective of the Rules to deal with cases justly. He blames junior counsel in his chambers for not being more vigilant at the Case Management Conference and seeks an adjournment on the trial date to cure the fatal defect.

13. In *Kenton Collinson St. Bernard v The Attorney General of Grenada* (Civil Case No. 0084 of 1999) [unreported] [Grenada], Barrow J. (ag) went into a useful dissertation on non-compliance with the Rules and the sanctions flowing therefrom. At paragraph 9 of his judgment, he said:

“The court can only consider granting relief, at the trial, if the defaulting party gives good reason for not having previously applied for relief. A tight structure is therefore established to deal with non-compliance. However convincing may be the explanation for non-compliance the court cannot even start to consider it, far less allow itself to be affected by any explanation, unless the defaulter has a good reason for not having made a formal application for relief from sanctions. The effect of rule 29.11 is that a defaulter may have a good explanation for non-compliance but no good reason for having failed to previously apply for relief from sanction and in that event the defaulter must suffer the sanction.”

14. It seems to me that the application for an adjournment by Mr. Frederick to order ‘to set his house in order’ is too late and it is in direct contravention with the overriding objective of the Rules: “ensuring that the case is dealt with expeditiously.”

Conclusion

15. In the light of the foregoing, the Husbands would be unable to substantiate their claim. Pursuant to Parts 15.2 and 26.1, the court may give summary judgment on a claim if it considers that the claimant who has no real prospect of succeeding on the claim. In the premises, the claim is dismissed summarily with costs to the defendant in the sum of \$5,000.00.

Indra Hariprashad-Charles
High Court Judge