

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2009/1028

BETWEEN:

HOTEL CHOCOLAT ESTATES LTD

Claimant

and

DASHEEN (1988) Limited Trading as Ladera Resort

Defendant

Appearances:

Mrs Kimberly Roheman for Claimant

Mr. Leslie Prospere for the Defendant

2011 October 12th
 October 20th

Decision

- [1] The Parties filed separate applications which came on for hearing on the 10th October 2011. On that date the court relieved both parties from sanction; granted the Defendant an extension of time to 14th October 2011 to file and serve a list of documents, and the Claimant an extension of time to 26th October 2011 in which to file and serve the witness statement of Lester Arnold in compliance with the Case Management Order.
- [2] Other applications were scheduled for hearing on 12th October 2011. On 12th October the court heard two applications from the Defendant, (1) the application dated July 29th 2011 for leave to file Expert witnesses' Report of Errol Frederick on or before 19th August and (2) an application for leave to file and serve the Expert Report of Julius Polius.

- [3] The Court also heard the Claimant's applications for four additional witnesses who had been summonsed to be added to the witness list, for assessment of damages claimed to be adjourned to a Hearing after determination of the question of liability and for leave to file an expert report on the question of the deleterious effect of grey water and black water on the environment soil and plant life.
- [4] Part of the background to the matter was the fast approaching trial dates of 2nd and 3rd November 2011 which could be jeopardized if the expert witness situation was not sorted out in a timely fashion.
- [5] Mr. Prospere in presenting his application argued that the parties were given permission to make further applications in relation to varying the case management order. The applications were not a deliberate action taken to disrupt nor delay anything. It turns out that the defendant required two experts rather than one. He explained that the second expert would be giving evidence in relation to nuisance from a point of view of causation.
- [6] The Defendant had applied for leave to file one Expert's Report of Errol Frederick but needed the leave of the court to have a second expert to deal with causation; the issue being whether black water had any deleterious effects on plants. The issue of causation relates to nuisance which the Defendant always said it did not cause.
- [7] Counsel argued that the expert evidence was covered by the pleadings since the Defendant had pleaded that it disputed the Claimant's claim that there was any nuisance and another that it was not liable for any of the damage particularised in the Claimant's Statement of Claim. Since this issue was not adequately covered by the first expert the Defendant needed another expert to speak to this issue.
- [8] Counsel for the Defendant relied on the **Eastern Caribbean Flour Mills** case to support the argument that some of the rules in relation to the strict adherence to pleadings should not be taken too literally. Barrow JA had reflected in that case on the reduced need for extensive pleadings now that statements are required to be exchanged and he concluded:

"It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings."

- [9] As far as the Claimant's summonsed witnesses were concerned the Defendant did not know what they were going to say and they may be irrelevant and should not be allowed.
- [10] Mrs. Roheman prepared skeleton submissions in which she argued that the application for admission of a second Expert's Report was late and was not served. There had been no need for a response at case management and it would be prejudicial to admit the evidence now without vacating the trial date.
- [11] Mrs. Roheman argued that the new witness statement should not be allowed on the procedural grounds mentioned. But her second limb was that the witness statement refers to particulars which were not pleaded by the Defendant in the Defence.
- [12] Counsel submitted that the Case **East Caribbean Flour Mills Limited v Ormiston Ken Boyea** Civil Appeal No 12 of 2006 should not be misapplied. The defendant had a responsibility to set out its case. The Defendant has not referred to the part of the Defence that covers this material. To the best of her knowledge the Expert was to look at methods of containing water that causes damage. But the Defendant now wishes to address the defence by alluding to having a system to deal with black water which system eliminates the possibility of damage to the Claimant's property.
- [13] Part 10.7 of the CPR 2000 suggests that the Defendant may not rely on any argument which was not set out in the Defence. But an amendment could only be done with permission after the Case Management Conference. But we are now at Pre-Trial Review.
- [14] Julius Polius the proposed second Expert witness was being asked to comment on causation as to what is the deleterious effect of black water. This counsel argued, was an attempt to build a defence.

- [15] The **Eastern Caribbean Flour Mills** case speaks to a court not taking certain relevant rules too literally counsel submitted. But we should be cautious not to return to the past when new material was raised at trial.
- [16] Counsel submitted that this was a flagrant disregard of the rules by the Defendant. There was no excuse for failing to provide the particulars at the Case management conference. Had the Defence been properly drafted the Defendant would have been properly appraised of experts required.
- [17] If the court was inclined to allow the expert witness, costs should be awarded in light of likely vacation of the trial date. However the Claimant was asking that the expert witness not be allowed.
- [18] Mrs Kimberly Roheman counsel for the Claimant stated that she was opposing the applications to deem the first expert's statement properly filed even though, late and the second expert witness statement which was also out of time and adding to the problems created by the Defendant's first expert witness. Her second ground for opposing the application was that the expert witness' statement went outside of the Defendant's pleadings. There was no reference to the effect of treatment of effluent on the Defendant's property in the Defendant's defence, only that it was channelled away from the Claimant's property.
- [19] Defendant's counsel responded that in relation to the first objection raised by the Claimant's counsel, the application could be heard even after the deadline. The notice of application in relation to Errol Fredrick was not served. But in this instance a notice was given that the report was going to be late. The contents of the report were not known and could not be disclosed. All that is being asked is that the Defendant be permitted to address the issue of causation.
- [20] As far as the application to bifurcate the proceedings is concerned the Defendant was resisting this application on three grounds. Firstly, the application ought to have been made at the Case Management Conference. Secondly there must be substantial reasons given for bifurcation of the matter. In support of this submission counsel cited **Emmanuel Rock v Theresa Jolly** Civil Appeal No 10 of 2006.

- [21] Counsel argued that in reference to the pleadings Part 1 says special damages are to be assessed. But the Defendant does not know what damages to resist. No damages have been particularised and no evidence has been adduced to substantiate those damages. It appeared that this was an attempt to rehabilitate the Claimant's case.
- [22] By way of rebuttal Mrs. Roheman submitted that the loss and damages are particularised. Counsel pointed out that the more detailed references to damages are in the witness statements. That is where the facts are fleshed out.
- [23] Bifurcation is being prayed for because the damages are continuing and have continued at such an extent a penal clause was granted in the injunction which was granted.
- [24] The costs to be incurred in obtaining the evidence required would be better expended down the road than at this stage counsel submitted.
- [25] In order to determine the issues in the application for a new expert to give evidence the court will have to peruse the pleadings to see whether there was any discussion of the ability of black water or other effluent from the Defendant's compound to do harm to the Claimant's property. Its absence would mean that the application to adduce expert evidence on this point would fail.
- [26] A similar point would be made in relation to bifurcation. If there is no pleading of special damages then the court would have no need to pursue the issue of bifurcation because the assessment of special damages would not have been foreshadowed by any statement in the Defence nor counterclaim. However since this was a matter involving experts the court would have to consider whether the quantification of special damages was also a matter of expert evidence.
- [27] In the case of the Defendant's pleadings, the defendant relied on a defence to the effect that the effluent from its land was channelled away from the Claimant's land and therefore could not cause damage to the Claimant's property. Based on this defence

the Claimant prepared to meet a case which stipulated that no effluent from the Defendant's property flowed onto the Claimant's property.

[28] I refer to paragraphs 8, 12 and 14 of the Defendant's defence, as follows:

"8. In regard to Paragraph 8 (2) of the Statement of Claim the Defendant contends that the 'black effluent' to which the Claimant refers is water taken for the sulphur springs situate at Soufriere with no additives added and is used by the Defendant at its Spa. Once used the same is discharged through the Defendant's drainage pipes and finally is discharged into a public drain at the side of the road which was built by government over 50 years ago. The said culvert redirects that water and some of it flows across the street where the Claimant's Estate is situated. This said flow of water has been this way since the culvert was built, as far as the Defendant knows and in particular long before the Claimant acquired the Estate. The Defendant further contends that during the summer of 2009, the Claimant sought a self-help remedy of the situation by filling the under-road culvert with cement, which resulted in a great overflow of water unto the road, damaging the surface of the road. As a result, the Government eventually demanded of the Claimant that the Cement be removed and the Claimant did remove same"

12. In answer to paragraph 8(7) of the Statement of Claim, the Defendant reiterates that the water which flows off the Defendant's property flows through the drains situate on the property and into the culvert provided by the Government. The Defendant is unaware of its obligation to maintain the public drainage system.

14. The Defendant specifically denies any wilful act on its part to contaminate the Claimant's estate by discharging water from the premises which it occupies as alleged in Paragraph 8(9) of the Statement of Claim. The Defendant further denies that water was ever discharged from its premises onto that of the Claimant in any other manner than is specifically admitted herein."

[29] Based on this defence it is fair to conclude that a report which relates to the adequacy of the waste water treatment system at the Defendant's resort would take the Claimant by surprise especially coming as late as it does. In my view the Case Management Process, the provision of scope for mediation and negotiation of settlements provided every opportunity for the Defendant to adduce the evidence it now seeks to produce with a view to obtaining a possible settlement. But in the process of preparation for trial a party cannot be permitted to raise an issue, supported by two experts, which now forces the Claimant to restructure its arguments to meet a new defence in support of a new argument in relation to effluent flowing from its property to the Claimant's property. The Defendant will not therefore not be permitted to file the expert witness statement of

James Polius neither will it be permitted to rely on the Expert evidence of Errol Frederick in so far as it relates to scientific evidence about the effectiveness of the treatment of effluent at the Defendant's estate. Indeed apart from the surprise element both are out of time and would now cause undue delay and increased costs in the trial. In my view these were not the permissible circumstances contemplated by the decision in **The Eastern Caribbean Flour Mills** case.

[30] Consequently the Defendant is relieved from sanction and the Expert evidence of Errol Frederick is allowed with the limitation earlier imposed. But the application to produce the Expert Report of Julius Polius is denied.

[31] The Claimant would therefore not be required to file any additional expert evidence to respond to the Defendant's experts. The consequential application is therefore dismissed without prejudice to the Claimant.

[32] As far as the bifurcation of the matter is concerned, I acknowledge that it is the case that the higher courts have frowned upon this practice and that there should have been an application to pursue that course of action at Case Management but every case turns on its own facts. Indeed it is a Case Management Issue but it is also a practical issue. If damage is continuing then the Claimant should be permitted to speak to such damage at the appropriate time. In my view however the expert witness and other witnesses should be able to address the matter of damage up to the date of trial and estimate possible damage thereafter. It would not be reasonable for them to adduce evidence of damage until it stops. The Claimant could therefore argue for a lump sum to cover the future damage if that is pleaded. If it is not pleaded then so be it. Such damage would not be relevant to the case.

[33] I therefore do not think that it is necessary to extend the trial to assessment of special damages beyond the date of trial. Special damages should be assessable up to the date of trial and into the future with a reasonable cut off point.

[34] On the matter of summonsed witnesses, my view is that these witnesses can be controlled. They are being asked to comment on very specific things which are set out in the summonses. They would not be permitted to go beyond that point in their

evidence. The Claimant is permitted to lead the evidence of three summonsed witnesses only, to be in compliance with the Case Management Order. No good reason has been given to extend the witness list beyond the nine permitted for the Claimant in the case management order.

[35] In the circumstances I do not find it necessary to vacate the trial date in this matter. The trial therefore will proceed on 2nd and 3rd November 2011.

[36] The Court's Order therefore is:

1. The Defendant's Application for relief from sanction and extension of time to file the Expert Report of Errol Frederick is granted, Errol Frederick's evidence to be restricted to the scope of the pleadings.
2. The Defendant's Application for leave to file a second Expert Report of Julius Polius is denied.
3. The Claimant's Application to file expert evidence in response to that of the Defendant is also denied without prejudice to the Claimant.
4. The Claimant is permitted to summon three witnesses only to bring the Claimant's witness list to 9 witnesses.
5. The Claimant's application for the matter of damages to be assessed after trial is denied.
6. Costs in the cause.

Francis H V Belle
High Court Judge