THE REPUBLIC OF TRINIDAD AND TOBAGO

Claim No. CV 2017-01127

IN THE HIGH COURT OF JUSTICE

San Fernando Sub-Registry

Between

Margaret Gooding

Victor Henry

Claimants

And

Jaigobin Ramdass

Defendant

Before the Honourable Madam Justice Eleanor J Donaldson-Honeywell

Delivered on: August 15, 2019

Appearances

Mr. Navindra Ramnanan, Attorney at Law for the Claimants

Mr. Prem Persad Maharaj and Ms. Andell Arnold, Attorneys at Law for the Defendant

Reasons

A] **Introduction**

1. On July 30, 2019, at a Pre-trial Review ["PTR"] before the October Trial date, an Oral Ruling was delivered partially granting orders sought by the Claimants in a Notice of Application ["NOA"] filed on May 31, 2019. I now set out in writing the Reasons then given for not granting one aspect of the orders sought, namely the order sought at paragraph (1) of the NOA as follows:

"Pursuant to Part 33 of the Civil Proceedings Rules 1998 ["CPR"] that the Honourable Court do give directions with a view to the Claimant retaining an expert valuer [sic] or alternatively for the parties retaining [sic] a joint expert to estimate the diminution in value of the Claimant's property by reason of the matters complained about i.e. the waterlogging/flooding of the said lands"

B] **Background**

2. The substantive Claim was commenced over two years ago on April 3, 2017. The Claimants sought relief against the Defendant, who owns neighbouring lands, for alleged trespass and/or nuisance and/or negligence in developing his lands so as to cause flooding of the Claimants' property. The Claim was expressly based on expert evidence contained in a Report of Mr Bill Ramrattan dated June 28, 2016, which spoke to the impact of back filling and/or engineering works on the Defendant's lands which adversely affected the Claimants property.

3. Certain particulars of Special Damage were set out in the Statement of Case. However, two items were left blank with an indication in brackets "to be supplied". Those un-particularised items were "repair structural damage to building" which was to have been provided based on a Structural Engineer's Report and "loss of fruit trees".

4. The matter proceeded through several Case Management Conferences which addressed the engagement of an expert, identification of the issues to be determined and possibilities for settlement, disclosure of documents, procedural applications, the joining of and discontinuation against a Second Defendant, several changes in the Claimants' representation and enforcement proceedings for the Claimant to pay costs of an Application.

5. A comprehensive history of the involvement of experts in this matter is set out in a prior NOA and Affidavit filed by the Defendant on March 22, 2019. That prior NOA also sought to adduce expert evidence. The Defendant referred therein to the November 9, 2017 expert report commissioned by both parties in compliance with a Case Management direction given on June 6, 2017.

6. The jointly commissioned drainage assessment report addressed alleged damage caused to the Claimants' property as a result of topography and drainage patterns within the parties respective properties, brought about by development on the Defendant's lands without construction of drains. It was prepared by Mr. Vijai Ragbir.

7. The Defendant also explained that another expert Mr. Roger Rajan was hired to assess issues of boundary encroachments raised in the pleadings. The appointment of this expert was not based on a direction of the Court. However, at paragraph 11 of the Defendant's Affidavit dated March 22, 2019 there was a sworn statement that the Claimants joined in hiring Mr. Rajan. This has not been denied to date by the Claimants.

8. These two expert reports were being used by the Parties for a lengthy period of time when CMCs were adjourned for settlement discussions. The approach then was that based on the expert opinions the parties would work on correcting any drainage problems that may have affected the Claimants' property. The talks eventually fell through due to unresolved boundary issues as to where the required drainage should be placed.

9. Although the experts had been agreed to by the parties, the Claimants, according to the Defendant, now no longer wish to rely on them. Accordingly, the Defendant applied unilaterally by his prior NOA to rely on the said experts. The application was unopposed.

10. By an Order granted on April 9, 2019 permission was granted to the Defendant to call and adduce evidence from the two experts mentioned above. The Order was made based on the NOA which was expressly pursuant to **CPR 33.5** which deals with a party seeking to rely on its own expert to address issues on the pleadings.

11. It was clear from inception that the Claimants also had additional issues on the pleadings in relation to which expert evidence was required. As aforementioned the Statement of Case, which was amended and then re-amended, indicated that

particulars of special damages for repairs to the property were to be supplied. According to current Counsel for the Claimants in his Oral submissions made at the PTR in support of the Claimants NOA, it was always clear that an expert assessment as to the quantum of damage sustained would be required. However, it was only at the PTR long after the Case Management of the matter concluded that an application was made to adduce same.

12. The Claimants' NOA did not indicate that any such expert Assessment had ever been done as foreshadowed in the Statement of Case filed early in 2017. Instead the NOA sought directions regarding a yet to be appointed expert who would supply evidence on the quantum not only of Special Damages but also General Damages for nuisance. The Claimant's NOA does not indicate what part of **CPR 33** is relied on. It instead speaks in the alternative to either the Claimants retaining an expert (unnamed) or the parties retaining a joint expert. Thus it seems that the Claimants seek to rely on either **CPR 33.5** to appoint their own unnamed expert or **CPR 33.6(1) (a)** for a single expert to be appointed jointly by the parties.

C] The Defendant's Response to the NOA

13. The Defendant, by paragraphs 4 to 13 of his Affidavit filed on July 22, 2019, raised a number of points based on which the grant of the NOA for the Order set out at paragraph 1 above was opposed. The points in summary were
    - No specific expert was named, thus the competence or availability of the expert cannot be assessed.
    - No report has been disclosed on the diminution in value of the property of the Claimants.
    - The NOA was filed after the filing of the Defendant's Witness Statements instead of at a CMC. This lack of expedition is consistent with the Claimant's poor conduct in the litigation commenced by them.
    - The parties agreed on the appointment of two experts. Admittedly, these did not address the quantum of damages. However, the Claimants now

seek at a late stage to appoint an unnamed person who will present an undisclosed report which will amount to a fishing expedition.

- If the expert is to be appointed by the Court, any such person would be "hamstrung" in providing any helpful assistance on diminution in value caused by the Defendant because three years have elapsed since the alleged nuisance complained of took place.
- It is clear from the proceedings and the way the parties dealt with the matter to date that this NOA is an afterthought and was not made at the earliest opportunity.
- The Trial date was fixed for October 2, 2019 and the filing and potential grant of the NOA will delay the trial of the matter or cause it to be adjourned and significantly prejudice the Defendant.

14. It is to be noted that from the first date that this matter was before the Court for an interim injunction on April 11, 2017 the Defendant undertook not to continue to back fill his lands and not to damage the property of the Claimants. There has been no allegation of breach of this undertaking since then. The prejudice to the Defendant sworn to in his Affidavit is therefore cogent and compelling as with every delay in this matter he is prevented from developing his own lands.

D] Authorities relied on by the Claimants

15. Counsel for the Claimants filed a bundle of authorities in support of the NOA. Five of the Judgments were in support of aspects of the NOA that were granted in the Claimants favour. Only the Judgement in **Civ Appeal No. P 277 of 2012 Christianne Kelsick v Dr. Ajit Kuruvilla et al** was relied on by Counsel as it relates to the Order set out above at paragraph 1. He placed reliance on the Judgement specifically as precedent that the late timing of the NOA, after the end of all CMCs, is not of itself a valid reason for refusing permission to adduce an Expert's evidence.

16. However, at the hearing, prior to delivery of my oral Ruling I indicated to the parties that the lateness of the filing of the NOA would not be the reason for my denial of the

order sought. In all respects I was guided by the comprehensive explanation provided in **Kelsick** by Jamadar JA, as he then was, as to the considerations to be taken into account by Judges making decisions on admission of expert evidence. In particular, the following was considered:

> 8. *"In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):*
>
> *(i) how cogent the proposed expert evidence will be; and*
>
> *(ii) how useful or helpful it will be to resolving the issues that arise for determination.*
>
> 9. *Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. ……..*
>
> 10. *……..*
>
> 11. *In summary, for expert evidence to be appropriate in light of the CPR, 1998, and for permission to be granted to use it, that evidence ought to be relevant to matters in dispute, reasonably required to resolve the proceedings* ***and the proposed expert must be impartial and independent and have expertise and experience which is relevant to the issues to be decided****. In addition, the use of expert evidence must also be proportionate in light of the factors set out in Part 1.1, CPR, 1998.* ***Economic considerations, fairness, prejudice, bona fides and the due administration of justice*** *are always matters that may have to be considered depending on the circumstances of each case. ……*
>
> *……..*
>
> ***Timing***

36. *On the issue of the timing of the application, it is clear that the general rule is that a court ought to consider whether to use expert evidence and reports at the stage of case management. However, this is not an absolute rule. Flexibility must be applied by the court because an expert is there primarily to assist the court. In this case, the fact that the application was made in October, 2012, five months before the date scheduled for trial, was in and of itself of little consequence.* ***What mattered were the considerations of cogency, usefulness and proportionality, applied to the circumstances of the case,*** *as have been discussed above. Always, an underlying consideration for the trial judge ought to be: Can this expert evidence and report help in determining the issues I am called upon to resolve? The question must be posed and held in a neutral way and considered from the court's perspective and responsibilities – not solely from the parties."* [emphasis added]

D] **Reasons**

17. In considering whether the evidence to be adduced by an expert based on this NOA would be useful or helpful I referred to the pleadings. It was clear on the case as pleaded by the Claimants that the particulars of Special Damages in relation to which the expert evidence was sought had been omitted. Instead the Claimants pleaded that these particulars would be supplied. This was never done by way of amendment of the pleadings and there was no document disclosed during the discovery stage of the CMCs that addressed the missing particulars. It appeared to me that the belated attempt to adduce the evidence of an expert could not be helpful in determining the Special Damages that should have been pleaded.

18. Counsel for the Claimants contended however, that expert evidence ought to be permitted as to general damages for nuisance since there was no requirement for specific pleading of general damages. The Trial of the Claimants' case would, he argued, be an act of futility if general damages could not be proven. I expressed the view that this would not necessarily be so as the Claimants had also sought injunctive

relief for the damage caused to be remedied. This, if granted, could serve as well as an award of damages in relieving the Claimants from the effects of the alleged nuisance.

19. When asked to respond to the Claimants' oral submission that there was no need to plead general damages for nuisance and therefore they ought to be permitted to call an expert, there was no substantive comment from Counsel for the Defendant. Instead the focus of the oral submissions by the Defendant was on the imprecise nature of the NOA, the lack of any information on the expert to be relied on by the Claimants and the fact that the late attempt to introduce this evidence would prejudice the Defendant.

20. Counsel for the Claimants sought to persuade the Court that the procedure for approval of an application to adduce expert evidence had to be a two stage one. Firstly, the Court must consider whether the parties can agree to an expert and then consider whether to allow one party to call their own expert. According to Counsel for the Claimants there was no need therefore to name an expert or file an Affidavit with a proposed expert report attached and proof of the expert's credentials.

21. This contention was found to be without merit as in my view it is clear that **CPR 33** provides for different routes to the appointment of an Expert. One of those is the application by one party for the appointment of an expert unilaterally, to support their own case. That Application is made under **CPR 33.5** in the same manner as the application made in **Kelsick.**

22. It is clear from **CPR 33.4** and the guidance thereon given by Jamadar JA in **Kelsick** that when faced with such an Application[or even when deciding without an application as provided for at CPR 33.5(3)], the Court must determine whether or not to grant it, based primarily on how cogent the expert evidence will be. It is therefore necessary that at least the expert's name and credentials must be available to the Court to make a decision. In the instant case there was no information whatsoever based on which an assessment of likely cogency could be made. This was a major consideration in my

decision not to grant this aspect of the NOA. On the other hand, I considered the submission of the Defendant that the length of time would likely affect the cogency of any expert evidence as diminution in value would be much more difficult to assess at this stage.

23. I further took into account economic considerations, fairness, prejudice and the bona fides of the parties in making and opposing the Application. My overall impression was that the aspect of the NOA that seeks permission to adduce expert evidence on damages was an afterthought aimed at plugging an overlooked aspect of the pleadings. This was being attempted years after the Claim was filed and on the last day of the Court term before the Trial was due to start.

24. The filing of this NOA is not in keeping with the overriding objective of the CPR as stated at **Part 1.1** as it unfairly delays the proceedings in a manner prejudicial to the Defendant who has complied with all Court Directions. The Defendant has also cooperated with the Claimants by giving an undertaking and has engaged in genuine settlement negotiations from inception.

25. Counsel for the Defendant emphasised in oral submissions that the Claimants' changes in representation was one of the reasons for the application being made at this stage. Furthermore, it appears that the claim for special damages to be supplied was abandoned.

26. This Application unduly adds to the expense to be incurred by the parties in the proceedings. There is potential for delays due to the application that will also adversely impact the Administration of Justice as a Trial date fixed may be vacated.

27. For these reasons it was in my view inappropriate to grant the application.

Order

28. The Claimants application for the following order was dismissed:

> "Pursuant to Part 33 of the Civil Proceedings Rules 1998 ["CPR"] that the Honourable Court do give directions with a view to the Claimant retaining an expert valuer [sic] or alternatively for the parties retaining [sic] a joint expert to estimate the diminution in value of the Claimant's property by reason of the matters complained about i.e. the waterlogging/flooding of the said lands."

29. It was ordered that the issue of costs of the Application will be dealt with at the Trial.

…….

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by : Christie Borely JRC I