



[2021] JMSC Civ. 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2003HCV01838

BETWEEN	GEORGE CLIFTON NEWELL	CLAIMANT
AND	ESMERILDA MULLINGS	1ST DEFENDANT
AND	JERMAINE MULLINGS	2ND DEFENDANT
AND	TRACEY MULLINGS	3RD DEFENDANT
AND	CAROLYN MULLINGS	4TH DEFENDANT
AND	FAYLON MULLINGS	5TH DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV00319

BETWEEN	GEORGE NEWELL	CLAIMANT
AND	BOBETT NEIL	DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2020CV02198

BETWEEN	MELVERTON NEWELL	CLAIMANT
	(AS ADMINISTRATOR FOR THE ESTATES OF ADELAIDE NEWELL & NEVILLE NEWELL)	
AND	GEORGE NEWELL	DEFENDANT

Georgia Hamilton instructed by Mesdames Georgia Hamilton & Company for the Claimant

Gillian Mullings instructed by Mesdames Naylor & Mullings for the Defendants in Claim No. 2003HCV 01838

Mikhail Williams instructed by JNWTaylor & Associates for the Defendant in Claim No. 2013HCV00319

Jennifer Housen instructed by Caribbean Legal Practice for the Claimant in Claim No. SU2020CV02198

Expert Evidence - Part 32 of the Civil Procedure Rules (CPR) - Whether questions posed to expert clarifies a report- Part 26 of the CPR- Case Management Powers

Heard: February 11 and 22, 2021

P. MASON J. (AG)

BACKGROUND

[1] The case at bar involves three (3) consolidated claims. In the first matter, George Clifton Newell v Esmerilda Mullings et al 2003HCV 01838, the claimant alleges an equitable interest over land for which the Defendants possessed a Certificate of Title. The second matter, George Newell v Bobett Neil 2013HCV00319, concerns claims for adverse possession and trespass. The most recent claim, Melverton Newell v George Newell SU2020CV02198, is in regard to the Estate of Adelaide Newell and Neville Newell and it was agreed that the Estate should be joined to the proceedings.

- [2] On February 27, 2020, Master T. Mott Tulloch-Reid ordered that Mr. Grantley Kindness, Commissioned Land Surveyor, be appointed as an expert and that a surveyor's report be prepared. After a number of extensions, the report, dated November 24, 2020, was submitted. Ms. Georgia Hamilton, counsel for George Newell (claimant), submitted thirteen (13) questions to Mr. Kindness as permitted by the order of Smith J. (Ag) on November 25, 2020.
- [3] Presently, there are several applications for court orders. The first was filed by the Mullings on January 26, 2021, requesting that questions 2 and 3 posed by the claimant to the expert Mr. Grantley Kindness be struck out. The second was filed by the claimant on February 3, 2021, requesting that the court accept Mr. Andrew St. Aubyn Gordon, Commissioned Land Surveyor, as an expert witness. Bobett Neil filed the third application on 4th February 2021 seeking to have questions posed by the claimant to the expert witness struck out along with the expert's answers. Melverton Newell agrees with the Mullings' and Neil's applications and opposes George Newell's application.
- [4] The Terms of Reference (TOR) dated March 10, 2020 given to Mr. Kindness on behalf of the claimant are as follows-
1. Each party shall present to Mr. Grantley Kindness (the surveyor) copies of all documents, if any, evidencing his/her interest in the respective portions of land to which they are claiming an interest.
 2. Each party shall present to the Surveyor a copy of any diagram or appropriate written description evidencing the purported boundaries of the respective parcels of land to which they are claiming an interest.
 3. Each party shall attend the survey personally and shall point out the area of the portion of land to which she/he claims an interest by reference to any such diagram or written description aforesaid.

4. The surveyor shall prepare a written report addressed to the Supreme Court of Judicature of Jamaica indicating:
 - A. That notice was served on the parties and the date of such notice;
 - B. Whether each party attended and was able to point out the boundaries of the area of the land to which she/he is claiming an interest by reference to such diagram or written description aforesaid;
 - C. Whether the Surveyor could properly, with the assistance of each party, identify the boundaries of the land to which she/he is claiming an interest;
 - D. Whether the land as pointed out by each party is supported by any documentation, written description and/or diagram presented by him/her in support of the portion of the land to which she/he is making a claim and the boundaries thereof; and
 - E. State definitively whether the lands being claimed by the Mullings and Bobett Neil form part of the land being claimed by George Newell.
- 5.
6. The surveyor shall do a survey and prepare a diagram indicating thereon, where possible, the correct boundaries of the portion of land to which each party makes a claim and any and all marks or fences or other information which would be of assistance to the court in determining whether the parties can identify the respective portions of land to which they make a claim.
7. The surveyor shall give his opinion and findings for the guidance of the court and whenever necessary:-
 - A. Issue such further notices, as he may require, for the parties to attend on the land once more for the purposes set out herein; and

B. Request from any party such additional information as he may require for the purposes set out herein.

[5] In a report dated November 24, 2020, Mr. Kindness concluded that:

It is our expert opinion that the lands being claimed by Mrs. Esmerilda Mullings and the lands being claimed by Ms. Bobett Neil form part of the lands being claimed by Mr. George Newell

[6] This conclusion was supposedly supported by:

- i) Esmerilda Mullings et al.: Certificate of Title registered at volume 1295 folio 949 of the Register Book of Title and interviews on site
- ii) Bobett Nelson: Diagram #372788, subdivision plan for adjoining lands #204036 and old iron pegs found on site which support the aforementioned documents
- iii) George Newell: Diagram #263587 which was not supported by any physical marks on ground

[7] Ms. Hamilton by way of letter dated November 27, 2020 asked the following questions-

1. Confirmation that neither Georgia Hamilton nor George Newell attended for a survey on 7 July 2020 as indicated in your report;
2. Confirmation that the land measuring 1027 square metres in your report that you have identified as being claimed by the Mullings, you have also depicted as being;
 - A. Bounded to the west by the Junction Main road;
 - B. Bounded to the north by land you have also identified on the said diagram as being claimed by Bobett Neil;

- C. Bounded to the east by land being claimed by Mr. George Newell and comprised in survey diagram bearing survey department number 263587; and
 - D. Bounded to the south by land now comprised in strata plan no 2429.
3. Confirmation that the land described as Airy Hill in the lease annexed to the defence for the Mullings filed 24 November 2003 and which was delivered to you ahead of the survey was previously comprised in a Certificate of Title registered at Volume 1396 Folio 997 which is now registered in Strata Plan No 2429.

In relation to Bobett Neil and survey #372788-

1. How did Miss Bobett Neil come to present you with survey diagram bearing Survey Department Number 372788?
2. At whose instance was this survey done?
3. When was this survey done and by whom?
4. Was notice of the survey served on Mr. George Newell?
5. If no such notice was served and having regard to the dispute between Miss Bobett Neil and Mr. George Newell, would this survey resulting in survey diagram bearing Survey Department Number 372788 have been done in breach of applicable land surveying laws and regulations?
6. If yes, should you have properly had regard to survey diagram bearing Survey Department Number 372788 in arriving at your conclusion?
7. If you are aware that survey diagram bearing Survey Department Number 372788 does not form part of Miss Bobett Neil's defence?

8. Whether the lands pointed out to you by Miss Neil form part of the Subdivision Plan;
9. Since Miss Neil's defence identifies her land as being part of the land comprised in the Subdivision Plan, whether Ms. Neil was asked to point out her land by reference to the said Subdivision Plan; and
10. Please also say what is the relationship between the land comprised in the said Subdivision Plan and that comprised in survey plan bearing Survey Department Examination No. 263587. We would appreciate a complete diagram depicting both parcels.

SUBMISSIONS

Claimant

- [8]** By way of submissions and affidavits, counsel for George Newell argued that the questions she posed to Mr. Kindness are permissible as he failed to account for several issues. The first issue is that Mr. Kindness did not indicate in his report or diagram the land that adjoins the property claimed by the Mullings to the North. It was alleged that if a proper investigation was done by Mr. Kindness, he would have discovered Strata Plan # 2429 which is related to the cancelled Title registered at Volume 1396 Folio 997 of the Register Book of Titles. Additionally, survey diagram # 372788 should not have been considered by Mr. Kindness as it did not go through the proper channels and Mr. George Newell objected to or did not get notice of this survey. It is also unclear how Mr. Kindness obtained the names 'Joy Newell' and 'Joan Reid'. Finally, Mr. Kindness did not account for the lease agreement from Naomi Newell.
- [9]** In regard to the application to have Mr. Aubyn Gordon accepted as an expert, Ms. Hamilton made several submissions. The primary argument seems to be that Mr. Grantley Kindness failed to show that he read and considered documents presented to him and had not shown that he understands the role of an expert.

Rather, his report caused more confusion. For example, Mr. Kindness did not take into consideration strata plan #2429 which can be traced from the parent title registered at Volume 1396 Folio 997. To make matters worse, questions posed to Mr. Kindness were not answered or not answered in a fulsome manner. Furthermore, Mr. Kindness took an inordinately long time to prepare his report and answer questions. This delay prejudiced the Claimant.

Defendants

Bobett Neil

[10] Ms. Neil claims that she would be prejudiced should the orders sought by the claimant be granted. Also, the questions posed by the claimant are not for clarification.

[11] Counsel argues that Mr. Kindness was not bound by documents in the pleadings as parties could have brought any documents they wished to the survey. Also, Mr. Kindness had complied with the Terms of Reference and no clarification is needed. The Claimant's questions are in the nature of cross examination and are therefore inadmissible, prejudicial or irrelevant.

[12] Furthermore, if the claimant obtains an order for Mr. Aubyn Gordon to be accepted as an expert, this will necessitate the trial date being vacated. Such an order will obstruct the just determination of the matter as the issue of the 'identification of the land' is trivial. The primary issue is whether the claimant can show that he dispossessed the previous owners of the land.

[13] Counsel concluded that the claimant's application is made solely because he is not pleased with the surveyor's report. Cost will not be a sufficient remedy.

Esmerilda Mullings et al

[14] The Defendants believe that the claimant's application is an abuse of process. They argue that the application was made as a result of the claimant being

dissatisfied with the expert's report. Additionally, questions 2 and 3 posed to the expert should be struck out as inadmissible and an abuse of process of the court.

[15] They rebut the claimant's allegation by stating that Mr. Kindness answered all questions, strata plan 2429 did not form a part of the instructions for the expert, the expert would be at a disadvantage if he should consider strata plan 2429 and the defendants had always relied on survey department examination #263587.

[16] Counsel for the Mullings summarized her arguments as a matter of prejudice. The claimant is trying to put forward a new case theory as survey plan 2429 was never mentioned in the last 18 years. The trial is to begin soon and there is no time to rebut any findings of a new expert. This will give the claimant an unfair advantage.

Melverton Newell

[17] Mr. Newell believes that he will be prejudiced should the claimant's application be granted. He argues that Mr. Kindness' report is in accordance with the Terms of Reference, the claimant had never expressed opposition to the expert or his delay, the questions put are not clarifications but a 'trial within a trial' and the trial date will be lost. Allowing the application would make a mockery of the overriding objective.

ISSUES

[18] The issues are-

- i) Whether questions posed by the claimant seek to clarify the report of Grantley Kindness dated November 24, 2020 in accordance with rule 32.8 (2) (b) of the Civil Procedure Rules, 2002 (CPR);
- ii) Whether it is in the best interest of the overriding objective for the court to exercise its discretion to accept Mr. Andrew St. Aubyn Gordon, Commissioned Land Surveyor, as an expert witness; and
- iii) Whether the overriding objective will be attained by allowing the claimant to call Anthony Newell as an ordinary witness.

LAW

[19] Rules 32.2, 32.4, 32.8 and 32.18 of the CPR are relevant to the matter at bar.

32.2-

Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly

32.4-

(1) Expert evidence presented to the court must be and should be seen to be the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation

(2) An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise.

(3) An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to consider material facts which could detract from his or her concluded view.

32.8-

(1) A party may put written questions to an expert witness instructed by another party or jointly about his or her report.

(2) Written questions under paragraph (1)-

(b) must only be in order to clarify the report; and

(4)Where-

(a) a party has put a written question to an expert witness instructed by another party in accordance with this rule; and

(b) the expert witness does not answer the question, the court may make one or more of the following orders, namely that-

(i) the party who instructed the expert witness may not rely on the evidence of the expert witness;

(ii) that party may not recover the fees and expenses of the expert witness from any other party; or

(iii) the party asking the questions may seek to obtain answers from another expert witness.

32.18

An expert or an assessor appointed by the court who gives oral evidence may be cross-examined by any party.

- [20] In applying the above provisions, it is necessary to be mindful of the overriding objective outlined in rule 1.1 of the CPR, particularly the amount of money involved, complexity of the case, financial position of each party, saving expense, dealing with the matter expeditiously and fairly and allotting the appropriate share of the court's resources. Being mindful of the overriding objective means that the court will exercise its case management powers until the end of the trial (**Jamaica Redevelopment Foundation, INC v Clive Banton and Sadie Banton** [2019] JMCA Civ 12).
- [21] An expert witness provides independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise (**National Justice Compania Naviera S.A. v Prutential Assurance Company Limited ("The Iberian Reefer")** [1993] 2 Lloyds Report, 68). As such, an application to adduce expert evidence can be made at any time. **Allen (Joan) & another v Mullings (Rowan)** [2013] JMCA App 22 states at paragraph 48:

It must be stated, however, and it is important to this case, that the fact that evidence is late ought not to be the sole consideration in the exercise of the judge's discretion. In Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd and Another which concerned an application for the admission of further evidence by the claimant when the matter had already run the 10 days allotted to it, Peter Smith J granted the application. In doing so he was following the judgment of the Court of Appeal in Cobbold v London Borough of Greenwich. His decision was recorded as a Practice Note. A summary of the decision is taken from the headnote:

"The decision whether to allow late evidence to be adduced is a matter of discretion to be exercised by the trial judge in accordance with the principles sent [sic] out in CPR Pts 1 and 3, with the overriding backcloth of the duty of the courts to ensure that every party has the fullest opportunity fairly and fully to present their case, ensuring that a decision in favour of one party does not unfairly impact on other parties. If during the trial late evidence emerges which is important it is essential that that evidence is heard, provided that it will not cause a fatal prejudice to the other party. Where such late evidence cannot be properly dealt with by the other side, it is almost inevitable that the application to adduce the

evidence will be refused, but where it can be so dealt with, even on terms as to adjournment in costs, the evidence should ordinarily be allowed. A decision to exclude evidence should not be made merely because the evidence is late. A trial judge should consider all factors, including lateness and prejudice, when exercising his discretion but should not give lateness a greater significance. A party seeking to introduce the evidence does not have a heavy onus to justify it merely because it is late."

- [22] It should be noted that the findings and conclusions of an expert are never binding on a judge.
- [23] The CPR restricts questions that can be posed to an expert to those which 'clarify the report'. This restriction, however, has not been defined within the Rules. As such, the Court of Appeal in **Perrie Daley v Attorney General** [2015] JMCA Civ 11 sought to provide some clarity. McDonald-Bishop JA stated at paragraphs 20 and 27:

The CPR have not defined or explained what is meant by "to clarify". Learned counsel for the appellant, however, helpfully pointed out the meaning of the word "clarification" within the context of similar (but not identical) English rules as suggested by the learned authors of the Civil Procedure White Book 2007 at paragraph 35.6.1.

There it is stated:

"The meaning of "clarification" is not explained in the Rule or Practice Direction. However, it would seem that questions should not be used to require an expert to carry out new investigations or tests, to expand significantly on his/her report, or to conduct a form of cross-examination by post, including on the expert's credibility unless the court gives express permission. In Mutch v Allen [2001] All E.R. D 121, CA, a medical expert in a personal injury claim was asked by the defendant whether the claimant's injuries would have [been] less severe if he had been wearing a seat belt. At first instance it was accepted this was outside the scope of his instructions and report and was not therefore "clarification". The Court of Appeal said that the expert answering the question would assist "the just disposal of the dispute", but either the expert should be called to give evidence and be cross-examined by both parties at trial. Or [sic] the parties could apply to the court for permission to obtain further expert evidence on this point."

...This leads to the conclusion, then, that it is a mandatory requirement under rule 32.8(2) that the questions to be put to the experts must only be in order to clarify the report and there is no power in the court to waive that

requirement. Therefore, the learned Master could not properly have permitted the questions to be put for any other purpose than to clarify the expert reports in question.

[24] The conclusions from the above discussion are that:

1. The expert's sole duty is to independently assist the court in making a decision concerning his or her area of expertise.
2. An application to accept a person as an expert and to adduce his or her findings can be made at any time taking into consideration the overriding objective and the court's case management powers which last up to the end of the trial.
3. Questions posed to an expert concerning his report will not be in the nature of 'clarification' if they: require an expert to carry out new investigations or tests, expand significantly on his/her report, or conduct a form of cross-examination by post.
4. A judge retains the right to reject any finds or opinions of an accepted expert.

ANALYSIS

Issue #1: Whether questions posed by the Claimant seek to clarify the report of Grantley Kindness dated November 24, 2020 in accordance with rule 32.8 (2)(b) of the Civil Procedure Rules, 2002

[25] I propose to now analyze each question to determine whether they can properly be described as being in the nature of 'clarification' as explained in **Perrie Daley v Attorney General** (supra)-

- Question 1: I find that this is clearly an attempt at clarification. The date of July 7, 2020 was given by Mr. Kindness as being the date when all parties were present for the survey. This date is disputed by the claimant. It is permissible to correct any obvious errors.

- Question 2: The claimant seeks to introduce new information in subsection D. The claimant refers to strata plan no 2429 which has not been found in the Terms of Reference, Amended Claim Form, Amended Particulars of Claim, Defence, Counterclaim or the report itself.
- Question 3: The claimant seeks to elicit further investigation or conduct a cross-examination on post. There is no mention of the Certificate of Title registered at volume 1396 folio 997 (which is now registered in strata Plan No 2429) in the Terms of Reference, Amended Claim Form, Amended Particulars of Claim, Defence, Counterclaim or the report itself.

Second Part relating to Bobett Neil:

- Question 1-4: This is an attempt at clarification. Mr. Kindness' report mentions the document. On the face of this document, such questions may be answered without further investigation or expansion.
- Question 5-7: This is not an attempt at clarification. Rather, it is a clear attempt at cross-examination. It may also be seen as eliciting speculation and is not pertinent to the Terms of Reference.
- Question 8-9: This is not clarification but an attempt at cross-examination. The land pertaining to subdivision plan #204036 was clearly identified in words and highlighted in green on the sketch plan provided by Mr. Kindness. Furthermore, Mr. Kindness had stated 'with the assistance of parties present, and with the supporting documentation provided'. There is no clarification of the report in asking 'whether Ms. Neil was asked to point out her land by reference to the said Subdivision Plan...'
- Question 10: This is not an attempt at clarification. The claimant seeks to have the expert do further investigation and expand significantly on his report.

Issue #2: Whether it is in the best interest of the Overriding Objective for the court to exercise its discretion to accept Mr. Andrew St. Aubyn Gordon, Commissioned Land Surveyor, as an expert witness

[26] The defendants believe that Mr. Kindness' report is sufficient and there is nothing further to add. They argue that all parties will be severely prejudiced should the application by George Newell be granted, especially as the trial date would be vacated. Additionally, they all seem to agree that the sole reason George Newell seeks to obtain his own expert witness is that he is dissatisfied with the report and addendum of Mr. Kindness.

[27] An expert's sole duty is to assist the court in understanding his/her area of expertise. Having perused the statements of case as well as the applications, it is clear that one issue to be answered by the trial judge is whether the certificate of title and diagrams correspond with the portion of land each party claims. This is a sufficiently complex issue that will require the services of an expert.

[28] I have also observed the following:

1. This may be the second time that the dates for trial will be vacated.
2. This matter is of long standing- from 2003 and in fact started in the St. Elizabeth Resident Magistrate Court.
3. The parties seem to be of advanced age: the first defendant has died and the claimant is 81 years old.
4. There seems to be three expert who have been approached in these matters. Mr. R.E. Richards, Mr. Jerome Lofters, who (by consent) is no longer to be used in the matter and presently, Mr. Grantley Kindness. All parties had agreed on having Mr. Grantley Kindness as an expert.
5. There was much delay in obtaining Mr. Kindness' report and answers as he missed at least 3 extensions. The report was initially scheduled for March 27,

2020. On 25th June 2020, Master Mott-Tulloch Reid extended the time to 8th July 2020. On July 9, 2020, time was again extended to 27th July 2020. The report was submitted 24th November 2020.

[29] One has to now ask whether the current court appointed expert did not perform his duties to the degree that will enable the court to deal with the case justly.

[30] On the surface of the report, it seems that the Terms of Reference (TOR) was followed by Mr. Kindness:

- TOR 4 (A): Notice was given to the Court. All parties, attorneys and observers attended the second survey and information obtained in the first survey was not used. The exact date for the second survey is unclear as the claimant disputes attending the survey on 7th July 2020.
- TOR 4(B-E): Documents, diagrams or written descriptions were to be provided to Mr. Kindness. The TOR did not specify how or through whom Mr. Kindness should be presented with copies of documents. All parties identified boundaries of land to which she/he claims with the assistance of documentation, written description and/ or diagram. Mr. Kindness addressed this in his methodology as:

“With the assistance of the parties present, and with the supporting documentation provided, a thorough assessment was done and a survey was carried out to uncover any evidence in support of the claims made by each party”

Mr. Kindness was able to definitively state whether the lands being claimed by the defendants form part of the land being claimed by George Newell.

- TOR 5: A diagram was prepared highlighting the respective claims

[31] One is now able to determine whether Mr. Kindness answered questions posed by Claimant. There were twelve questions/ suggestions posed by the Claimant and one in the nature of an instruction. The expert answered all questions, however, the answers given for a number of questions are not comprehensive. Nonetheless,

as I have found that eight 'questions' are not clarifications, by virtue of rule 32.8(2)(b), the questions and answers cannot be allowed to stand.

[32] It seems that the claimant's contention primarily stems from Mr. Kindness' consideration of survey # 372788 which, through administrative errors, counsel had no prior knowledge and his ignorance of strata plan #2429.

[33] The survey #372788 was not adduced in the Defendant's defence but was disclosed by counsel in compliance with previous court orders. Should this document have been given to Mr. Kindness through counsel for the claimant? I see no such restrictions from the TOR. Furthermore, administrative errors leading to ignorance of a document may not be seen as a sufficient reason to prevent its consideration by an expert. I note, however, that whether this document should have been considered or adduced in evidence is a matter to be resolved at trial. The questions posed by counsel for the claimant can properly be asked in any cross-examination. As such, it seems that to properly resolve this issue, Mr. Kindness should be summoned to appear at the trial.

[34] Strata plan # 2429 has not appeared in any documents accessible to the court. Neither has the TOR mentioned it. Parties were to identify their respective boundaries and this seems to have been done without the use of strata plan # 2429. Is this information that the trial judge will need to consider with the assistance of the expert? Evidence can, at times, be adduced at a late stage. Once evidence is deemed relevant, it is best that the court is seized of it. Unfortunately, no statement of case mentioned this document nor showed its relevance.

[35] I am also mindful that 'the findings of the expert are never binding on the judge and he can accept or reject the expert's opinion' (**Joan Allen** (supra), paragraph 46). Counsel for the claimant wishes to obtain another expert to do the same/ or similar work that Mr. Kindness has done. Will acceding to such an application achieve the overriding objective while taking into consideration that-

- Expense will escalate;

- Trial will be further delayed;
- There is a possibility of opinions from opposing experts giving rise to further delay;
- The claimant suffers from health issues and is of advanced age which makes it imperative that the matter be resolved as soon as possible; and
- An order of costs for all defendants may not suffice to reduce any perceived prejudice.

[36] On the other hand, what is the possible outcome if the application is refused but the expert is allowed to be cross-examined?

- The trial judge can reject Mr. Kindness' opinion which will inure to the benefit of the claimant; however, proof still needs to be adduced of adverse possession; or
- The trial judge can accept the expert's opinion which will then lead to the issue of whether the claimant can prove an interest in land through adverse possession.

[37] I, therefore, find that a trial judge will not be limited in justly dealing with the matter without an additional expert. In balancing the scales of justice, it seems that providing the claimant the opportunity to cross-exam Mr. Grantley Kindness will assist him in achieving his objective without prejudicing the defendants and still allowing the court to deal with the matter justly.

Issue #3: Whether the overriding objective will be attained by allowing the claimant to call Anthony Newell as an ordinary witness

[38] I have observed from the defendants' submissions that there was no serious opposition to having the claimant call Anthony Newell as an ordinary witness. The reasons given by the claimant at this stage is that it was an oversight in not

disclosing Anthony Newell as a witness as he has knowledge of the matter and was present at the survey. I find the excuse given by the claimant of an oversight as being far-fetched because from as far as 2003 there has been no mention of him and the current trial date was known by the parties for more than a year. In allowing this witness, I may prejudice the defendants' case as they are unaware of what will be said by this witness and they may need the opportunity to gather refuting evidence. There is no time to balance these opposing interests as the trial commences in less than a month. I am aware that the limits of time should not be a significant factor in weighing discretion as the court should be seized of relevant evidence. Unfortunately, significant prejudice arises in this application. I am minded not to exercise the courts discretion in allowing the claimant to call Anthony Newell as an ordinary witness.

ORDERS

[39] Accordingly, I make the following orders:

1. The Urgent Notice of Application for Court Orders filed February 3, 2021 is refused.
2. Permission is granted to the Defendants to file the report of Mr. Grantley Kindness excluding the disallowed questions on or before February 25, 2021.
3. All bundles to be filed on or before March 10, 2021.
4. Index to the bundle to be filed and served on or before March 10, 2021.
5. Skeleton Arguments and list of authorities to be filed and served on or before March 12, 2021.
6. The Bundle with agreed documents to be filed and served by March 8, 2021.
7. Mr. Grantley Kindness, Commissioned Land Surveyor, is to attend trial fixed for March 16, 2021 to be cross examined.

8. Costs to be cost in the claim.
9. Leave to appeal is refused.
10. The Claimant's attorney-at-law to prepare, file and serve these orders.