IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 513 of 2014

ROBERT'S GROVE LTD. CLAIMANT

AND

JEAN-MARC TASSE DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2016
22nd January
29th January

Mr. Eamon Courtenay, SC along with Ms. Iliana Swift for the Claimant.
Mr. Derek Courtenay, SC along with Mr. Philip Palacio for the Defendant.

Keywords: Civil Procedure – Amendment To Statement of Case after Case Management Conference – Strict Application of Rule 20.1(3) – No discretion to widen application of rule using the overriding objective – Interpretation of change in circumstances – Change in factual circumstances – Improper drafting of Statement of Case – A desire to redraft is not a change in circumstances' – Relevance of the agreed list of documents - Rule 39.1

DECISION

1. This is an application to amend the defence (which included a counterclaim) filed on the 14th October, 2014. The first case management conference (CMC) having been held on the 14th November, 2014.

2. On the day of trial, 14th January, 2016, the court enquired, by way of housekeeping, whether the agreed list of documents had been filed as directed by the case management order. I burden you now in some measure with the details of what transpired thereafter, as it becomes relevant to an issue raised by counsel for the Defendant during the hearing of the application. I have also attached the relevant transcript to this judgment.

3. In response to my query, Mr. Eamon Courtenay, SC indicated that although there had been no compliance *"the position is that the parties have agreed that all documents are to be treated as admitted except one."* When pressed, he explained that all disclosed documents, relevant or irrelevant, once disclosed, had been agreed between the parties as admitted, have one. The court voiced its displeasure and concern at what had plainly been hurriedly agreed. Mr. Eamon Courtenay SC then stated: *"My Lady, you can treat the list of the Defendant and the Claimant as agreed except for one document."*

4. The document was a memorandum prepared by Cindy Linares which was referred to in the defence as follows:

> *"5. In these various capacities, the Defendant has managed and supervised the day-to-day operations of Robert's Grove Beach Resort, as is attested to by the General Manager of Robert's Grove Beach Resort, Mrs. Cindy Linares, in a memorandum to the Board of Directors dated September 29, 2014. A copy of the Memorandum to the Board of Directors, by Mrs. Cindy Linares, is annexed to notice of application bundle and marked "Exhibit JMT1."*
> *"8. The Defendant strenuously denies both Paragraph 6 of the Statement of Claim, and the Particulars of Alleged Unauthorized Use of the Claimant's Funds by the Defendant contained in Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 in the Statement of Claim, and the Claimant shall be put to strict proof of the allegations contained therein, and in order to refute such allegations alluding to or imputing misappropriation of company funds, financial impropriety or financial mismanagement on the part of the Defendant, refers to the*

abovementioned Memorandum to the Board of Directors by Mrs. Cindy Linarez, which has already been referred to in paragraph 4 above."

5. The memorandum was not attached to the filed defence as stated and one could only access its contents by going to the supporting affidavit of the noted application. Moreover, the nature of the defence only became apparent on reading that memorandum. This was a most untidy and I dare say improper state of affairs. However, no previous applications had been made by either party in relation to that defence.

6. When the exclusion of the document was revealed, the court asked specifically:

> *"Let me just get you right before we move to that. This memo, both sides have agreed that it be excluded? Is that what it is?*

To which Mr. Derek Courtenay, SC responded: *"No, My Lady."*

7. He then went on to explain that he had not heard an objection as to why the document should not be included, especially since the Claimant had filed a witness statement which dealt almost exclusively with refuting the allegations outlined in the memorandum, which were echoed in Cindy Linares' witness summary filed by the defence.

8. Mr. Eamon Courtenay SC, immediately expressed his surprise at the remarks, whereupon Mr. Derek Courtenay SC hastily emphasized that he was not present when the documents had been agreed. It was his junior (who was not then present in court) who in fact dealt with that particular aspect of the process. The court felt it best to rise for discussions to be had

between senior and his junior as it simply did not wish to engage in or encourage a cross argument at the bar table.

9. On resumption, Mr. Derek Courtenay stated: *"May it please you, My Lady, I would withdraw the objection in relation with any agreement with regard to the document."* The court (with some hesitance) asked all counsel into chambers and there raised, as it thought fair to do in the circumstances, the possible inadequacy of the defence if the Linares memorandum were excluded.

10. On return to court, Mr. Derek Courtenay SC sought an adjournment of the trial to facilitate a written application to amend his defence. This request was strenuously objected to by counsel on the other side who maintained that although W.H. Courtenay & Co., was not the original attorney on record for the Defendant or the drafters of the defence, they had had more than ample time in which to amend the defence, (having come on record since April 2015). The court considered the application and granted a short adjournment in accordance with the overriding objective and based on the fact that had either party sought to comply with the case management order, events may not have unfolded as they did.

11. A few days later, the defence filed an application with a supporting affidavit signed by the Defendant. The application sought permission to amend the defence pursuant to Rule 20.1(3) and outlined the grounds as follows:

> *"1. The Defence was prepared on the mistaken assumption that the Memorandum of Cindy Linares setting out the mode of dealing with the defendant's Shareholder's Advance Account would be before the court.*
> *2. Objection was raised the week before the trial date to the memorandum and the Defendant acted promptly in making this application.*

3. *There was, therefore, a change of circumstance since the case management conference.*
4. *The evidence to support the proposed amendment is contained in the filed witness statement of Jean Marc Tasse and no delay is therefore anticipated."*

12. The affidavit explained that the memorandum had been disclosed and was only objected to by the Claimant a few days before trial. It referred to other admitted documents and parts of the Defendant's own witness statement that substantiated the intended amendments to the defence. It stated that a witness summary for Cindy Linares had also been prepared and signed by legal counsel for the Claimant just over one month after the defence had filed a witness summary for her. There is no property in a witness, that is not an issue.

13. The applicant also exhibited an amended defence and counterclaim. The draft defence contained three amended original paragraphs and twelve new paragraphs. The draft amended counterclaim deleted six paragraphs and added three new paragraphs all relating to the Defendant's shareholder's account with the claimant.

The issues for the court to determine are:

14. 1. Should the court grant permission to amend the defence.
2. What amendments, if any, ought to be permitted.

Should the court grant permission to amend:

The Law:

15. Part 20.1(3) states: *"the court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change*

can satisfy the court that the change is necessary because of some change in the circumstances which became unknown after the date of that case management conference."

16. There are clearly three hurdles, outlined, which must be surmounted:
    1. That the change is necessary.
    2. That there has been some change in the circumstances and;
    3. That the change in circumstances became known after the date of the CMC.

17. The Defendant states in his affidavit (which is his only evidence in this matter) at paragraph 23to 27:

> *"23. I have been informed and verily believe that the amendment is necessary in order to ensure that the real question in controversy between the parties is before the Court, and that such amendments can be made without causing injustice or prejudice to the Claimant who was at all times aware that I have always maintained that I had not misappropriated the monies as alleged in the Claim or at all. Further that the advances to the Company have for more than 2 years been shown in the Claimant's books of account and financial statements."*
> *"24. The matters now sought to be brought before the Court by amendment of the defence have consistently been advanced in both my Witness Statements and are the matters which are stated in detail in the proposed amendment to my Defence which if permitted I would place before the court."*
> *"25. I believe that if permission is not granted for these amendments to be made to my Defence I would suffer great prejudice as I would be denied the opportunity to contradict serious allegations concerning my conduct in relation to large sum (sic) of money.*
> *"26. If the Claimant should indicate that it would suffer any prejudice as a result of the proposed amendments that it could be compensated by an award of costs in its favour."*
> *"27. Apart from the amendments sought I do not believe that there is any other matter which would cause delay in proceeding with the trial of the Claim."*

18. He seems to rely on the wrong tests of acting promptly (in his application) and of either party suffering prejudice, the sufficiency of compensation through costs or the likelihood of a delay in the proceedings (in his

affidavit). All of which may be applied under the British rules, or even under Pre Civil Procedure Rules conditions. But for the application of our own current rule we consider the decision of Benjamin CJ in ***Shawn Sparks v Melissa Jude Luca Claim No. 372 of 2009 (Belize)*** which referenced the opinion of d'Auvergne JA in ***Orminston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd., Civil Appeal No. 3 of 2004 (St. Vincent and the Grenadines)***. They both speak to and accept the restrictiveness or narrowness of the parameters of the rule and the inability of the overriding objective to widen its application.

19. In a paper entitled **Amendments to Statement of Case Post Case Management Conference,** presented at a Seminar in 2005, attorney-at-law Ms. Suzanne Risden- Foster stated at paragraphs 11- 13:

> *"11. In Orminston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd.,… the Respondents in the court below successfully obtained an order after a CMC and prior to the pre-trial review, permitting it to amend its statements of defence on the basis so as to "clarify and/or narrow and/or reformulate the existing issues between the parties" and that the amendments were "relevant and central to the issues in the case" and would not prejudice or disadvantage the Appellants but would instead, "contribute to a just and fair determination of the matters in dispute." It was further argued by counsel for the respondent that the amendments fell within the Overriding Objective set by the Rules to deal with cases justly."*
>
> *"12. The order granting the amendments to the Respondent's statement of case was appealed … Her Ladyship allowed the appeal …"*
>
> *"13. Accordingly, it is submitted that the import of the East Caribbean Flour Mills case, is that the grounds advanced by counsel for the Respondent in the court below … are not to be considered as providing a valid basis for permitting amendments after a CMC given the limitations of that jurisdiction's equivalent to our Rule 20.4(2) and as the Respondent had not been able to satisfy the two test articulated … by establishing that there had been a change of circumstances which had become known after the CMC, the amendments were not permitted."*

20. She continued at paragraph 19:

> *"… the following passage from the dictum "D'Auvergne JA (Ag.) in the East Caribbean Flour Mills case as follows:*
>
> > *"The discretion of the court to permit changes to statement of case (sic) has to be considered with reference to CPR 20.1(3), changes to be made after the first case management conference. It is my view that the overriding objective cannot be used to widen or enlarge what the specific section forbids."*

21. The rigidity of the identical rule was accepted by the Privy Council in ***Bernard v Seebalack (Trinidad and Tobago) UKPC 15***. The court spent considerable time and effort outlining the differences between the English and the Trinidadian rules. Eventually, they concluded that the flexibility offered by the English rule did not exist in, but ought to be considered for, a redraft of the Trinidadian rule. Nonetheless, the court fully appreciated the reasons given from the apparent rigidity set against the backdrop of the litigation culture in Trinidad as expressed in ***Trincan Oil Ltd v Schnake (Civil Appeal No. 19 of 2009***.

22. The Privy Council found at paragraph 37 that the rules *"were drafted in an attempt to introduce more disciple into the conduct of civil litigation and defeat the endemic laizzez-faire attitude to it. The Board considers that it would be wrong for it to adopt an interpretation of the rules which would undermine the attempts made by the Rules Committee (supported by the Court of Appeal) to improve the efficiency of civil litigation in Trinidad and Tobago."*

23. This court ponders whether perhaps those were some of the same considerations given in the drafting of our rules. What is clear is that the requirements of the rules must be met in their entirety.

Is the amendment necessary:

24. Counsel for the applicant was heard clearly to say that the fact that the memorandum had not been agreed to by the Claimant did not preclude him from applying to have it admitted during the trial. He added that if it was admitted by the court then the amendment would not be necessary. I state early that the defence cannot have it both ways.

25. To make a proper determination of this argument the court considered the transcript of the 14th January, 2016.

26. Next, it considered its case management order which required that a list of agreed documents be filed. That order is rooted in Rule 39.1 of the Civil Procedure Rules which says that at least 21 days before the date fixed for trial all parties must inform the Claimant of the documents they wish to have included in the bundle to be used at trial. That bundle ought to separate those documents which are agreed and those which are not. This therefore necessitates consultation - a meeting of the parties, with the expectation that there would be serious scrutiny and proper consideration of each document disclosed. Its effect, if conscientiously attended, would be a speedier trial with less time spent on objections to the admissibility of exhibits.

27. The case management order sought to give effect to this rule long before the time for preparation of the trial bundle. It was primarily geared towards an efficient use of time and resources. Rather than copying all the documents disclosed and having both non-compliant sides come to court unaware of what documents were deemed relevant and or accepted as admissible by either side, the list would put all that into early perspective. It also allowed

the court to maintain control of the process rather than relying on the possibility of the trial bundle being properly prepared in accordance with the rules.

28. The parties were, therefore, directed to list the documents agreed and conclude with the documents not agreed. That order had not been complied with. Consideration was also given to the lateness of the information being relayed to the court and the fact that neither party sought to determine the relevance of any of the documents but simply accepted them all as admissible, save one.

29. Finally, the court considered that that one document had been objected to by the Claimant on the ground that Ms. Linares was not going to be called as a witness by either party. The decision not to call this witness must certainly also have been made by the defence in accordance with Rule 29.8:

> "(1) *If a party –*
> *(a) has served a witness statement or summary and*
> *(b) wishes to rely on the evidence of the witness who made the statement, that party must call the witness to give evidence unless the court orders otherwise.*
> *(2) If a party –*
> *(a) has served a witness statement or summary and*
> *(b) does not intend to call that witness at the trial,*
> *That party must give notice to that effect to the other parties not less than 28 days before the trial.*

30. It must not be forgotten that a witness summary for Cindy Linares had also been filed by the defence. Therefore, Mr. Tasse's statement at paragraph 17 of his affidavit (reproduced below exactly as filed) does not aid his application in anyway.

> *"17. I have been advised by my present attorneys that in or about _____ 2015 Attorneys for the Claimant indicated that they did not propose to call Cindy Linares as a witness at trial and inquired whether I proposed to call her as a witness. My overwhelming concern remained for her economic well-being and I did not wish her to lose her job on my account. In the circumstances I instructed my attorneys to decline to call her. At that time there was not _____ to her Memorandum which had previously featured in my Defence dated the 14th October 2014."*

31. Moreover, he added that he was aware that Ms. Linares had recently been terminated by the Claimant. His concerns ought no longer to exist. I cannot speak to what was agreed between the parties (they as gentlemen and brothers at the Bar ought to know) but I can speak to compliance with the order of the court. Having considered all I have stated above and particularly Senior Counsel, Mr. Eamon Courtenay's statement that the court can treat the list as agreed except for one. I find that the memorandum is excluded from the list of agreed documents only. This means, therefore, that an application could still be made to have the memorandum admitted when the time is right. Its exclusion or inclusion is a risk taken or a "*mistaken assumption"* made, by the defence when drafting their pleadings and it is the same risk which now exists. The defence has certainly not convinced me that an amendment is necessary. However, for the sake of completeness I will now consider the other two hurdles.

A change in circumstances:

32. In ***Gordon Lester Brathwaite and another v Anthony Potter and another Civil Appeal No. 18 of 2002 (ECSC Court of Appeal)*** Alleyne JA stated at paragraph 13:

> *"A change in circumstances in the context of these Rules is a change in the factual circumstances, not, as appears to be suggested by the Respondents, a*

change in the parties' awareness or understanding of their legal rights, or of the existence of possible defences to the claim made against them. I cannot agree with learned counsel for the respondent Mr. Delzin that instructions to Counsel may be a circumstance such as to trigger the rule."

33. When the court considers the affidavit filed by the Defendant and the amendments contemplated, it is easily recognizable that the change is not of factual circumstances. The facts remain unchanged as the defence has *"always maintained"* (paragraph 23 of the affidavit) and as *"have been consistently advanced" (*paragraph 24), but simply never pleaded. The change is merely a recognition by defence counsel of the way his statement of case had been badly pleaded. The number of amendments requested reflects this most clearly. So too does Mr. Tasse's desire to now *"ensure that the real question in controversy between the parties is before the court."* The very nature of the amendments, some of which go beyond things stated in that Linares Memorandum, is irrefutable proof.

34. Rule 10.5(1) states that:

"*the defence must set out all facts on which the Defendant relies to dispute the claim.*
(4) where the Defendant denies any of the allegations in the claim form or statement of claim -
(a) the Defendant must state the reason for doing so; and
(b) ***if the Defendant intends to prove a different version of events from that given by the Claimant, the Defendant's own version must be set out in the defence.***
(6) ***the Defendant must identify in or annex to the defence any document or a copy thereof which is considered to be necessary to the defence."***

35. In the present case the Defendant failed to properly state his reasons for denying the allegations levelled against him by the Claimant. Instead, he referred to and relied on some document which was not even attached to his

defence. That was a risk he chose to take and one which was contrary to the rules. The rules do not allow for the Defendant's version to be set out in any other document. The reasons ought to be in the defence but could be further developed in witness statements and though exhibits, not vice versa. Witness statements and exhibits cannot substitute for a brief statement of the facts on which the defence wishes to rely. To my mind the Defendant knew the facts he wished to allege prior to the CMC, he simply failed to set them out properly, if at all. The amendments seek to now place before the court information which was available before the very filing of the defence. Having just become aware of deficiencies in the pleadings, is not evidence of a change of factual circumstances and cannot take him over the second hurdle and I so hold.

36. I refer for support to the case of ***Alton Brown v The Jamaica Herald Ltd. et al Claim No. C 2000 (B249 (Jamaica)***, where the similarly worded rule was considered. In that case, defence counsel, after the first CMC, discovered an error in his pleadings concerning which entity was in fact the publisher of the Jamaican Herald Newspaper. The court accepted the interpretation given to changes in circumstances in ***Orminston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd., Civil Appeal No. 3 of 2004 (St. Vincent and the Grenadines)*** (ibid) and relied on ***Totty v Snowden (2001) 4 ALLER 577*** for the court's lack of discretion to alleviate the harsh results occasioned by the application of certain rules. Justice Brooks stated at page 8:

> *"This restriction applies even though it prevents the statement of case from achieving the purposes for which they were designed. It could potentially result in some very harsh and even unjust results.* In *Totty v Snowden (supra) their Lordships, in addressing such results said (at paragraph 18 on page 582):*

> *"The absence of a discretion in such matters can lead to very harsh consequences for those who act for Claimants and make relatively small mistakes in this regard in the conduct of the litigation, but the cases clearly establish that the court has no discretion to alleviate any such harshness which in any event arises from a failure to observe the rules."*
>
> *Their Lordships were, at the time, dealing with a different rule, but the principle of the restriction placed by the CPR is what I seek to highlight.*
>
> *The term "may not," as used in Rule 20.4(2) therefore deprives this court of any discretion unless the applicant fulfils the prerequisites of the rule."*

37. The judge continued at page 10-11:

> *"The discovery in his case could not qualify as a change in circumstances, it was merely an error uncovered …*
>
> *There has been no disclosure of a change in circumstances. What has occurred since the CMC is that Mr. Bhythe's Attorneys-At-Law have discovered, what he says is an error in the pleadings, which he wishes to have corrected …"*
>
> *There is no doubt that errors in preparing statements of case will be made from time to time. Some, such as is the instant one, will be relatively simple, others very serious, with potentially catastrophic results for the party pleading."*

38. Mrs. Risden-Foster at paragraph 41 of her paper (ibid) opined that the rule is *"draconian in its effect and is crying out for an amendment to give the court a wider discretion to allow amendments after Case Management Conference as the Rules current formulation can result in serious injustice to litigants where for example counsel has inadvertently not pleaded his client's case fully , or has accidentally omitted some crucial detail … and which the court ought to be given the opportunity to deal with so that all matters in dispute can be fully ventilated at the trial*

39. I wish to add that both the Eastern Caribbean Supreme Court and the Jamaican Supreme Court sought to amend this particular rule to alleviate some of its harshness. Its constitutionality has been tested and although it withstood, it was realized that there needed to be a more flexible approach akin, perhaps, the British position. Until such changes are made in Belize the strictness of the application of the rule remains.

After the Case Management Conference:

40. The inadequacies of the defence existed since its drafting and filing which undoubtedly occurred prior to the case management conference. Issue 2 also consequentially falls away.

Conclusion:

41. For these reasons the application to amend the defence is denied with costs to the Claimant to be assessed if not agreed.

42. Matter is adjourn for trial on a date to be set by the court.

SONYA YOUNG
JUDGE OF THE SUPREME COURT