

IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 575 of 2018

**OCTAVIO FLORES
AND**

CLAIMANT

**ARMIN PATT
ALBERTO PATT**

**1st DEFENDANT
2nd DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

2019

Written Submissions

16th May – Respondent

24th May Applicant

Oral Submissions

10th July

Decision

10th July

Mr. Kevin Arthurs for the Claimant.

Ms. Sheena Pitts for the 1st and 2nd Defendants

**Keywords: Civil Procedure – Amended Fixed Date Claim Form and Affidavit
in Support – Addition of a Defendant – Other Amendments – Whether
Amendment to the Defence is Mandatory – Effectiveness of Original Defence
– Consequences of Not Amending Where Necessary**

DECISION

1. In a matter for the recovery of possession of property, the Defendant Armin Patt applied for and was successful in joining Alberto Patt as a Second Defendant. The matter was adjourned for case management conference (first

hearing). On the adjourned date, it was discovered that the amendment had not been made by the Claimant, nor had service of the relevant documents been effected on the second Defendant. The Court therefore made orders consequential to the amendment; directions for the filing and service of the fixed date claim form and other documents on the second Defendant, the filing of a defence with liberty to file a reply by specified dates. Case management conference (first hearing) was once again adjourned. There was a further adjournment for the Claimant's proper compliance with the Court order.

2. During this period the Claimant complied with the ordered amendment but he also amended the affidavit in support by replacing "the Defendant" with "the 1st and 2nd Defendants" or "the 1st Defendant" or "the 2nd. Defendant" as he deemed appropriate.
3. He replaced the original paragraph 7 which read:

"That subsequent to this all occupants of the property vacated the premises and relocated within the village of Sartenaja save and except for the Defendant who has remained there and has been taunting the Claimant refusing to vacate the property."

with,

"That subsequent to this all occupants of the property vacated the premises and relocated within the village of Sartenaja including the 1st Defendant who has continued to visit and trespass on the property, using it when he is drunk and his friends who do drugs on the property. The 1st defendant has been taunting the Claimant refusing to stop his trespass of the property."

4. He added an entirely new paragraph (8) which reads:

"That as the date of the filing of this amended Claim, no one is in the property. Electricity has already been cut from the property and it is now abandoned. The police have advised me to get a final court order to allow them to keep the property from being trespassed and from having the first defendant conduct illegal activities on my property."

5. All else remained the same except that the numbering of the paragraphs which followed the new paragraph 8 changed chronologically.
6. The second Defendant was duly served and responded by the timely filing of a defence with a counterclaim, to which the Claimant appropriately responded by filing his own reply and defence. The first Defendant was also served but filed nothing further. At the case management conference the Claimant asked that the matter against the first Defendant be dealt with as if it were undefended. He relied on Rule 27.2(3).

“27.2 (3) The court may, however, treat the first hearing as the trial of the claim if it is not defended or if the court considers that the claim can be dealt with summarily.”
7. The very nature of this matter will not reasonably allow for the Court to treat the first hearing as the trial of the Claim. There is a defence filed by the second Defendant. Moreover, the defences of both defendants are bound together, *“inextricably linked”* according to Counsel for the Defendants. The first Defendant actually claims his right to possession through the second Defendant.
8. Proceeding to make a finding against only the first defendant will make no logical sense nor would it show faithfulness to the overriding objective. However, if the Claim is in fact undefended by the first defendant he would be unable to call his own witnesses or to cross examine those of any other party to the matter. The Court, therefore allowed both parties to make submissions.
9. The issue as the Court finds it is:

1. What effect does an amended claim form and statement of case have on an already filed defence - must an amended defence be filed and served to an amended claim form and statement of claim.

Submissions:

10. The Claimant submits that the original claim no longer has effect once an amended claim has been filed. If the party intends to dispute the issues in the amended claim then an amended defence must be filed. He relies on a purported quotation from The White Book – Civil Procedure Volume 1 at paragraph 17.3.4 and notes (but does not provide a copy or full citation for the Court) “...in the pleadings: “once pleadings are amended what stood before amendment is no longer before the court and no longer defines the issues to be tried.” (Per Hudson J in **Warner v Sampson [1954] 1 QB 297 at 321**).
11. He continues that the amended claim becomes the original commencement of the action. This court entirely agrees with the claimant in this regard. In fact, a case presented by counsel for the Defendant (**Lloyds Pommells and Toni Ann Pommells v Donald Kerr and Christopher Kerr [2015] JMCC COMM 26**) refers to a Jamaican Court of Appeal case **Vendryes v Keane [2011] JMCA Civ 15** which makes it very clear that for all purposes the amended statement of case stood in the place of the initial statement of case. It defines the Claimant’s issues. But what of the Defence which had been properly filed but remains unamended?
12. The Defendant’s respectful position “*is that where the Claimant’s amendment does not affect and/or materially and substantially change the cause of action or pleadings there is no need for the First Defendant to amend his defence.*” All the first

Defendant *“was required to do in the circumstances was indicate his intention to rely on the filed Defence, which he did.”*

13. Counsel first points to the consequential orders made by the court after leave was granted to join the second Defendant. They pertained to service on the second Defendant only and timelines for him to file a defence and for the Claimant to reply if he so desired. This she said *“properly and substantially placed before the Court a balanced view of the lis for determination.”* She then referred to the first Defendant’s defence as a *“holding defence”* which *“could take the Court proceedings no further in determining the claim.”*
14. This Court found the use of the term *“holding defence,”* even though Counsel placed it in quotation marks, to be contradictory. The defence filed for the first Defendant could not on the one hand be his entire defence to the Claimant’s case and still be a holding defence. As Counsel for the Claimant was swift to point out, a holding defence is usually a ploy to secure more time in which to prepare a proper defence. It was skeletal by nature and often consisted mainly of bare denials and was very likely to be struck out under the new procedure rules. He then urged that the first Defendant’s filing of a holding defence, compounded by the application to add a party and the failure to file an amended defence leads to the conclusion of an inability to dispute the issues.
15. Counsel for the first Defendant in her oral submissions informed that she really intended to say it was not a holding defence but through some inadvertence the word *“not”* had been left out. While counsel for the Claimant responded to this change as *“speaking against her own submissions.”* However, a consideration of the defence filed does not reveal it to be a

holding defence. The defence filed indicated that the Defendant's right to possession was through someone else. Armin Patt detailed his right and that of the third party and subsequently sought to have that third party joined. With that said, the Court moves on to a proper consideration of the effect of the consequential orders on the first Defendant.

16. Rule 19.3(6) regulates the procedure immediately after a party has been added to a claim. It is agreed that it speaks nothing of service on the original defendant. But this is not a situation where only a party has been added. The Claimant also availed himself of the opportunity to amend the body of the statement of claim and he was well within his right to do this, since the first hearing or case management conference had not yet been held. The order of the Court had nothing to do with the first Defendant's actions after the amended claim form had been served on him. The order directed certain things to be done by the added Defendant. It can not be used as a shield by the first Defendant.
17. Counsel for the first Defendant also relied on **Lloyds Pommells** (ibid). In that case a defence had been filed to the original claim. The claim was subsequently amended. The time for filing an amended defence had not yet expired when an application for summary judgment was made by the Claimant. The Court found that the same rules as are applicable to the original claim and defence were applicable to the amended claim and defence. Therefore, a summary application could in fact be dealt with before the new defence had been filed.
18. In his analysis Sykes J, as he then was, considered submissions by Counsel which sought to compare the circumstances of a court entering summary

judgment of its own initiative, before an amended defence had been filed, with that of a Court doing so on the consideration of a party's application. In distinguishing the two, the learned Judge stated at **paragraph 23** that where the court was seeking to do so of its own initiative, then "*(i)n those circumstances the court would not have the defence to any amended statement of case unless the defendant indicates that there is no need to amend his defence.*" It is this single sentence to which Counsel for the Defendant calls the Court's attention.

19. I am not of the view that this answers the question. The court was there dealing with summary judgment, a different procedure with very different rules. The court did not find that an amended defence need not be filed at all (and that was never in issue). What was in fact concluded, at the end of **paragraph 23** was that "*the amended statement of case did not require any new defence to be filed **before the summary judgment application can be dealt with.** Any response to the summary judgment application must be by way of affidavit evidence.*"(Emphasis mine).
20. She also sought the assistance of the overriding objective and invited the Court to use it when considering whether the amendment made by the Defendant was necessary. She insisted that there had been no material change in the statement of case; the cause of action remained the same as did the reliefs prayed, the amendments identified no new issues nor provided anything which could not comfortably have found room in a witness statement.
21. She found guidance on the contents of a claim or statement of claim from Rule 8.7(1) and (2) and the Defendant's identical obligation under Rule

10.5(1) to disclose all statements of facts to be relied on. She then quoted Sir John Dyson J in **Charmaine Bernard (Legal Representative of the estate of Reagan Nicky Bernard) v Ramesh Seebalack [2010]UKPC 15 at paragraph 15:**

“15. ... Part 8.6, which is headed “Claimant’s duty to set out his case”, provides that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that “Particulars of claim must include –(a) a concise statement of the facts on which the claimant relies”. In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at p 792J, Lord Woolf MR said:

“The need for extensive pleading including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous.

Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader ... No more than a concise statement of those facts is required.”

22. This segwayed into a discussion of a Court’s appropriate considerations on granting leave to amend a statement of case. Particularly Sir John Dyson’s discussion of the purpose of amendments at paragraph 26 of **Charmaine Bernard:**

“Fifthly, Mr. di Mambro relies on a passage in the judgment of Barrow JA in East Caribbean Flour Mills Ltd v Boyea (St Vincent and the Grenadines, Civil Appeal No 12 of 2006). Barrow JA said in relation to a rule which is in the same terms as Part 20.1(3) of the CPR:

*45. However, I am firmly of the view that **additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case.***

*46. If a party alleges misconduct of a certain nature, say misappropriating funds by making false entries in an accounting record, and gives 5 instances of false entries, and a closer look at documents reveals a 6th false entry I see no reason why the party should be prevented from giving particulars of it in his witness statement, provided the requirements of fairness have been satisfied and there has been no abuse of process or other disentitling conduct. **I emphasize the distinction between changing a statement of case and supplying particulars to***

say I expect the courts will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case-by-case basis.”

*The Board finds nothing in this passage which is inconsistent with what it considers to be the correct interpretations of Part 20.1(3). **If a statement of case contains allegations which are “sufficiently made” (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement.”***

23. Barrow J, as he then was, was seized to consider whether certain information which appeared in a witness statement did in fact constitute a change to the statement of case. While this gives a vivid picture of what may or may not necessitate an amendment to a statement of case, the issue here is not really whether the amendments were necessary. The statement of case was amended. Did those amendments mandate the Defendant to do something in response. Moreover, these considerations do not apply to the instant case since a party is free to amend their pleadings as many times as they like before the first hearing or case management conference. The weapon in the opposing party’s arsenal is the ability to apply to strike out, pursuant to Rule 26.3 and to seek summary judgment where appropriate.
24. Counsel for the Defendant recognized all this but asked the Court none the less to appreciate and apply the jurisprudence in the exercise of its discretion and the applicability of the overriding objective.

Consideration:

25. This Court has been provided with nothing which indicates even vaguely that once a claim is amended, the defence filed in rebuttal to the original claim loses its effect and somehow ceases to exist. What is understood and accepted from **Warner v Sampson (ibid)** is that the amended pleadings take the place of the original. This means that the claimant’s original statement of

case no longer has value for setting out the parameters of the claim. A fuller version of the quotation places it in context: *“I do not think that this amendment can be ignored. Once pleadings are amended, what stood before amendment is no longer material before the Court and no longer defines the issues to be tried. Here the Defendant has obtained leave to amend, and there has been no appeal against that order; and whatever may have taken place at the hearing of the application to amend, the Court must, I conceive, regard the pleadings as they stand, the purpose of the amendment being to determine the real question in controversy between the parties.”*

26. In the case at bar, the original claim is rendered useless after amendment but this does not affect the original defence filed. That remains a viable document. If there are new issues raised in the claim which the old defence does not address and the defence remains unamended, then the Defendant will not be able to refute any of the new issues at trial since he can only adduce the case he has pleaded. That is the consequence which he faces.
27. In **Dil v Commissioner of Police for the Metropolis [2014] EWHC 2184 (QB)** the court discussed the importance of making the real issues clear in a defence and the difference between a non – admission (I require you to prove this) and a denial (I will bring evidence to court to contradict this or prove it wrong). However, the judge rejected the argument that a failure to fully plead a case would result in a defence being struck out. Rather a Defendant who fails to fully particularize his case will be taken to admit those allegations.
28. This Court has considered the “new” allegations made by the Claimant in the amended statement of case. Much of which, if admissible at all, could well have been made in someone’s witness statement. The only change to which the first Defendant may have felt inclined to respond is whether or not

he has abandoned the property and in the grand scheme of things that is neither here nor there for him as he does not plead to have a right to the property which goes beyond a licence given to him by the second Defendant.

29. It must be reminded that the responses in a defence although most times made in reference to a paragraph is really a response to an allegation or issue raised by the Claimant. That the paragraphs may have changed numbers is of no great import. In this case, the Defendant says he has responded as he wishes and has nothing to add. He will stand or fall by it.
30. To my mind it is an affront to the overriding objectives to demand that pleadings be amended where there is no need and even less inclination to do so or to sanction by somehow automatically striking out those pleadings thereby rendering them ineffective. It must be understood that we operate under progressive rules today. The rules are designed and intended to deal with cases justly and efficiently while keeping resources at a minimum. This Court therefore finds no merit in the Claimant's submissions and answers the issue in the negative. The existing defence remains a viable statement of case until and unless amended or struck out by order of the Court.

Disposition:

31. The application to deal with the fixed date claim form as undefended by the first Defendant is dismissed.

Costs to the Respondent in the sum of \$500.00.

Case management is adjourned to the 18th July, 2019 at 9:30 a.m.

**SONYA YOUNG
SUPREME COURT JUDGE**