SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 226 OF 1990

BETWEEN:

PETER FREUND

Plaintiff

and

(1) WILLIAM EDGECOMBE
(2) BONAIRE RESORTS LIMITED

Defendants

Appearances:

Mr. Hilford Deterville for the Plaintiff.
Mr. James Bristol, Ms Joan B. Slack and Ms Isabella O. Shillingford for the Defendants.

1999: October 11, 12
November 01
2000: January 10

JUDGMENT

[1] HARIPRASHAD-CHARLES J. [Ag.]: On 23rd day of July 1990, the Plaintiff caused a writ of summons indorsed with an amended statement of claim dated 19th day of September 1990 to be filed against the Defendants claiming payment of US$58,824.29 for work done, materials supplied and expenses incurred, interest, damages for breach and repudiation of contract and costs.

THE BACKGROUND FACTS

[2] The chronology of events in this matter is pertinent. The Defendant entered an appearance and filed a Defence on 19th day of October 1990. On 22nd day of October 1990, the Plaintiff not having been served with a copy of the Defence wrote to the Defendants demanding a filing and service of a defence within seven days. A defence was promptly served on the Plaintiff. On 3rd day of December 1990, the Plaintiff filed a Request for Particulars. When such Request for Particulars was not forthcoming, the Plaintiff, on 18th day of December 1990 filed a Summons on Application for Particulars. This Summons was heard on 16th day of January 1991. D'auvergne J. ordered that the Defendants do within seven [7] days serve on the Plaintiff the further and better Particulars set out in the Request for Particulars filed herein on 3rd day of December 1990. On the said day, the Defendants complied with the Order of the Court. On 24th day of January 1991 the Plaintiff once again sought further and better Particulars. The Defendants filed same on 5th day of February 1991.

[3] A request for hearing was filed on 21st day of June 1991. The record reflected that the matter was fixed for hearing on 13th and 15th day of January 1992.The matter was not heard on those days. Indeed, it was not heard until 25th day of November 1996. A scrutiny of the record of the Court reflected that this matter was fixed for hearing on at least eight previous occasions before it eventually commenced on 25th day of November 1996 before Matthew J. [as he then was]. The reasons for the numerous adjournments are not explicit on the record of the court. However, a careful scrutiny revealed that most of the adjournments sought were at the instance of the Defendants. In the interim, Mrs. Shirley Lewis, Solicitor on record for the Defendants had withdrawn. On 6th day of June 1994, Ms. Joan Slack, the new Solicitor for the Defendants, filed a Notice of Change of Solicitor. Prior to the hearing of this matter on 25th day of November 1996, several Summonses were filed including a Summons for Trial of a Preliminary Point of Law.

[4] Matthew J. heard the Preliminary point issue as to whether, upon the facts appearing in the contract dated 3rd day of October 1989 in the matter and agreed between the parties herein the proper law governing the agreement between the parties is Swiss Law. He dismissed the application and made the following pronouncements:

> " Ever since July 23, 1990, the Plaintiff has begun to pursue his case. The Defendants have had at least 2 solicitors on the record since then. They have never taken the point as to forum till this morning after a late amendment when the matter was set down and ready to go. The application is dismissed The matter will proceed."

[5] Matthew J. commenced the matter. The evidence revealed that the Plaintiff as well as his only expert witness, Mr. White testified under oath. The Plaintiff closed his case. The Defendants took the witness stand. Their expert witness, George Oliver O' Shaughnessy was examined in chief, cross-examined and re-examined. The matter was subsequently adjourned to 2nd day of December 1996. On that day, the notes of evidence of the Learned Trial Judge reflected that an adjournment was requested by the Defendants because Mr. William Edgecombe, one of the Defendants had left the state for Puerto Rico due to illness. The matter was adjourned to the Next Call-Over List for a date to be fixed. The matter was thus part heard before Matthew J.

[6] Matthew J. was subsequently appointed to act as a Justice of Appeal on the Court of Appeal. As a consequence, he could not complete the matter. Several adjournments followed. On 13th day of May 1999, d'Auvergne J. during a Call-over, fixed the matter for hearing on 11th and 12th day of October 1999.

[7] On 11th day of October 1999, the Defendants fortified its legal team to three with the new additions of Mr. James Bristol and Ms. Isabella Shillingford. The Court was ready to proceed when Learned Counsel for the Defendants, Mr. James Bristol referred the Court to Order 4 Rule 2. It is appropriate for me to state that

both Counsel had agreed to a re-hearing of the matter. While the Court was of the view that Order 4 Rule 2 had no applicability since the matter was to start afresh, the necessary directive from the Honourable Chief Justice was sought and obtained at approximately 2.30 p.m. on the said day.

LEAVE TO CALL NEW EXPERT WITNESS

[8] The substantive matter was again about to commence when Learned Counsel for the Defendants, Mr. James Bristol sought leave of the Court to call another Expert in lieu of Mr. O'Shaughnessy. His reason for so doing was that Mr. O'Shaughnessy now resides in Dominica and he would be unable to be in Saint Lucia when the Plaintiff would have closed his case. He stated that the evidence of Mr. Pettigrew, the proposed new Expert was really an amplification of Mr. O'Shaughnessy's evidence. He contended that if the Defendants were not allowed to call Mr. Pettigrew, their case would be seriously prejudiced.

[9] Learned Counsel for the Plaintiff vehemently challenged the Defendants' oral application and submitted that Order 38 of the Rules of the Supreme Court do not allow Learned Counsel for the Defendants to make the application. He stated that the grant of such leave is discretionary and if such application is made, it should be made within a reasonable time before trial. [my emphasis]. Learned Counsel for the Plaintiff cited the case of Caribbean Home Insurance Company Limited v Webbs National Ice Cream [Civil Appeal No. 4 of 1993] on expert evidence which decision is still binding on our courts. Mr. Deterville submitted that the whole thrust of this application of the Defendants was to take the Plaintiff by surprise.

[10] The application was refused. The matter eventually commenced and continued to the following day when the Plaintiff once again closed his case. At the request of the Defendants, the matter was adjourned to 1st day of November 1999 to facilitate

the presence of Mr.O'Shaughnessy. Mr. Bristol had previously indicated that Mr. O'Shaughnessy would be the only witness for the Defendants.

LEAVE TO AMEND DEFENCE FILED ON 19TH DAY OF OCTOBER 1990

[11] On 25th day of October 1999 the Defendants filed a summons seeking an Order that the Defendants be at liberty to amend paragraph 3 of the Defence filed on 19th day of October 1990. This Summons was heard on 1st day of November 1999.

[12] I pause to remark that the application by the Defendants to amend the Defence is sought more than nine years after the Defence was filed and after the six- year statutory period of limitation had expired.

THE DEFENDANTS' SUBMISSIONS

[13] Learned Counsel for the Defendants, Mr. James Bristol submitted that by virtue of Order 20 Rule 5 (1) of the Rules of the Supreme Court, the Court has a very broad discretion to amend. Order 20 Rule 5(1) states as follows:

> " An amendment may be allowed under paragraph (2) notwithstanding that the effect will be *to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action* in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

Paragraph (2) reads thus:

> " *Where an application to the Court for leave to make an amendment* mentioned in paragraph (3), (4) or (5) *is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave* in the circumstances

mentioned in that paragraph *if it thinks it is just to do so."*[my emphasis]

[14] Learned Counsel for the Defendants submitted that due to an oversight, the pleadings were not particularized. He contended that what had emerged even before Matthew J. was queries about the suitability of a drawing for Planning Approval. According to Mr. Bristol, the Defendants erroneously failed to plead what is really the issue between the parties. Learned Counsel asserted that the amendment to the Defence that is being sought is not a new cause of action. He further stated that the Particulars sought to be adduced are in relation to the unfitness for purpose, which was already pleaded. He asserted that the drawings were not fit for the purpose that it was required.

[15] Learned Counsel submitted that the object of pleadings is to put truly all matters before the Court. He iterated that the Court would allow an amendment that enhances the justice of the case. And according to him, if the amendment is not granted then " justice of the case will never be fully met because the true issue would not be adjudicated upon."

[16] Learned Counsel for the Defendants referred the Court to the judgment of Jenkins L.J. in G.L.Baker Ltd v Medway Building and Supplies Ltd [1958] 3 All E.R. 540. At page 546, Jenkins J. proclaimed that it is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made *" for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings"*

[17] Jenkins L.J. delivering the main judgment in Baker's case [supra] at page 548 - 549 continued:

> " Then a case where the decision went the other way, to which we were very properly referred by Counsel for the Plaintiffs, is Tildesley v Harper (1878) 10 Ch.D.393 which in a way is the locus classicus because it

contains the oft-quoted judgment of Bramwell L.J. on the question of the amendment of pleadings.

Bramwell L.J. said in the third line of his judgment:

> ' I have had much to do in chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.'"

[18] Learned Counsel also made reference to the judgment of Sir William Brett, M.R. in Clarapede v Commercial Union Association (1883) 32 W.R. 262 at page 263 which is as follows:

> " However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

[19] In support of his application for leave to amend, Mr. Bristol quoted extensively from the Supreme Court Practice, 1995, Volume 1, pages 371 - 372 and pages 375 - 376. He further asserted that an amendment ought to be allowed if thereby " the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided: Kurtz v Spence (1888) 36 Ch.D.774.

[20] Counsel cited the case of Loutfi v C.Czarnikow, Ltd.[1952] 2 All E.R. 823 where leave to amend was granted even after the close of the case.

[21] It was further submitted on behalf of the Defendants that the cases of Daw v Eley [1865] L.R.38 Vol.1 Equity Cas. and Renard v Levenstein[1864] 13 W.R.229; though dealing with patents bore similarity to the present case. In Renard v Levenstein, Sir W. Page Wood, V.C. said:

> " But the Court is bound to look at the substance of the case. It seems that to refuse this application may be an injury to the plaintiff for the only result would be a motion for a new trial before the court itself, or an appeal to a higher jurisdiction; while to grant a perpetual injunction would be most burdensome on the defendant, if it should turn out afterwards that there is now a document in existence which makes the patent invalid upon the face of it. Therefore, notwithstanding the view which I take of the defendant's conduct, holding that the less of two evils is to admit the evidence now tendered, I shall allow the amendment of the particulars of objection in the terms stated at bar."

[22] One year later, Sir W. Page Wood, V.C. delivering the judgment in Daw v Eley [supra] reiterated the statements that he made in Renard v Levenstein. He said:

> "In Renard v Levenstein I gave the Defendant leave, on payment of the costs occasioned by the application, to amend his particulars of objection, as the lesser of two evils: being of opinion that I might do the Plaintiffs themselves considerable injury if I were to refuse the application to amend, and thus occasion the expense and inconvenience of an application for a new trial."

[23] Learned Counsel for the Defendants, in his closing remarks urged the Court to exercise its discretionary jurisdiction under Order 20 Rules 5 (2) (3) and (5) and to grant the amendment sought so that the true issues could be properly adjudicated upon and the truth would not be shut out. He succinctly submitted that the Plaintiff could be adequately compensated by the payment of all costs incurred up to the date, and any costs thrown away by reason of the amendment. In support of this assertion, Counsel relied on the cases of King v Corke [1875] 1 Ch.D.57 and Bowden's Patents Syndicate Ltd. v Herbert Smith & Co. [1904] 2 Ch.86.

THE PLAINTIFF"S SUBMISSIONS

[24] Learned Counsel for the Plaintiff, Mr. Hilford Deterville vehemently objected to the Defendants' application for leave to amend the Defence. He commenced his

arguments by stating that the decision of the Court to grant leave is the same as the decision to refuse leave and cited the case of G.L. Baker, Ltd v Medway Building and Supplies, Ltd. [supra] to support his contention.

[25] Learned Counsel submitted that the Writ of Summons in this action was filed on 23rd day of July 1990 with an amended Statement of Claim on 19th day of September 1990. The Defence was filed on 19th day of October 1990 and on 3rd day of December 1990 there was a Request for Particulars. When such Request for Particulars was not forthcoming, the coercive power of the Court was sought and obtained.

[26] The Defendants responded to the Request for Particulars on 16th day of January 1991. The crucial paragraph reads as follows:

> 2. "After consultation with the Plaintiff on the architectural requirements of the Hotel the ultimate design as submitted by the Plaintiff fells short of the original objective as per the said consultation."

[27] On 24th day of January 1991, the Plaintiff again wrote to the Defendants requesting further and better Particulars of the Defence as contained in "Particulars as Requested" filed herein on the 16th day of January 1991.

[28] On 5th day of February 1991, the Defendants replied as follows:

> "The design objective to provide 308 hotel rooms with 308 individual keys was not satisfied."

[29] Mr. Deterville contended that since 19th day of September 1990, the Defendants knew what was the issue. According to him, in paragraph 2 of the Defendants' Defence filed on 19th day of October 1990 they denied that any contract existed. In paragraph 3, the Defendants averred that they have no knowledge of the alleged labour and materials expended. Learned Counsel stated that the Defendants on the one hand denied the existence of any contract yet on the other hand, stated that the work produced by the Plaintiff was of such an unsuitable and

unsatisfactory nature that it was thereby rendered unacceptable and incapable of being used for the purpose for which it was intended by the Defendants.

[30] According to Learned Counsel, the Plaintiff has closed its case. This is the second attempt by the Plaintiff to do so. The witnesses have been excused. The Plaintiff lives in Switzerland. The expert witness, Mr. White lives in Barbados. Mr. Deterville submitted that it is a fact that Mr. Gorman had travelled from Switzerland to Saint Lucia on at least ten occasions to prosecute this matter. He further stated that this matter had been fixed for hearing at least eight times before it had commenced by Matthew J. on 25th day of November 1996. Subsequent to that hearing, it had been adjourned a further four times. Mr. Deterville declared that most of the applications for adjournment were at the instance on the Defendants.

[31] Mr. Deterville challenged Mr. Bristol's submissions in Clarapede v Commercial Union Association [supra] stating that this was not a first omission. Learned Counsel recounted the number of times that the Defendants were requested to give further and better Particulars. According to him," only when an attempt was made at this trial to cross-examine the expert witness for the Plaintiff outside of the pleadings and this was disallowed that the summons to amend Defence surfaced."

[32] Mr. Deterville vociferously stated that a Defendant in Saint Lucia ought not to be allowed to amend his Defence to introduce additional and new particulars after the time when the cause of action, which would support those particulars, would have become prescribed. Learned Counsel submitted that the amendment sought was not permissible under the Laws of Saint Lucia because the period of limitation had already set in, namely six years.

[33] In support of his assertion, he referred to the Judgment of Peterkin L.J. in Norman Walcott v Moses Serieux [Civil Appeal No.2 of 1975]. He also referred to Articles 2121 and 2129 of the Civil Code and submitted that whereas in English

Law the Limitation Acts are procedural, in Saint Lucia the right as well as the remedy is extinguished. Article 2129 reads as follows:

> " In all the cases mentioned in Articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them."

[34] According to Learned Counsel, the action in the instant case falls under Article 2121.

[35] Learned Counsel also contended that while Order 20 Rule 5 (2) specifically provides that where an application for leave to make an amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current to the date of issue of the writ has expired, the Court may nevertheless grant such leave if it thinks just to do [my emphasis], the decision in Walcott's case was in 1975 and must be carefully considered as it was subsequent to the coming into force of the Rules of the Supreme Court, 1970.

[36] Mr. Deterville submitted that the nature of the amendment sought is a new Defence. According to him, it wipes out all of the particulars pleaded before and notwithstanding Order 20 Rule 5 (5), he declared " where is the justice of this case" as required in Order 20 Rule 5 (2)? He stated that the instant case is almost similar to the case of Collette v Goode [1876] 7 Ch.D.842. At page 847, Fry J. made this pronouncement:

> "The rule says that ' the Court or Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence, or reply….and all such amendment shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.'…It is quite true that the point which the Defendant now desires to raise has come out for the first time in the Plaintiff's evidence. But I do not think that I ought to allow an amendment for the mere purpose of enabling the Defendant to raise a purely technical

objection which the Defendant never intended to raise, but of which he now adroitly seeks to avail himself."

[37] Learned Counsel also cited the case of Moss v Mailings [1886] 33 Ch.D.603 where the application to amend was refused. However, Learned Counsel for the Defendants submitted that in Moss v Mailings, the Court rightly refused to consider the application to amend because there was no evidence.

[38] Counsel for the Plaintiff also referred the Court to the case of Edevain v Cohen [1889] 61 Ch.D. 563. At pages 566 - 567 of his judgment, North J. declared:

> " But I think the tendency of the later cases, some of which have been referred to, is to show that amendments must be made for the purpose of doing justice....The same principle was expressed I think perhaps somewhat more clearly by Lord Justice Bowen, who says that an amendment is to be allowed ' whenever you can put the parties in the same position for the purposes of justice that they were in at the time the slip was made...but it is clear from the authority that has been referred to that I ought not to allow the amendment now if the other side would be prejudiced by it, and prejudiced by it I mean in other ways than in matters of costs, which I could deal with now."

[39] It was submitted on behalf of the Plaintiff that to allow the amendment would immediately raise questions of pleadings, interrogatories and the recalling of both witnesses. Learned Counsel declared that there could be no justice if the amendment is granted since the Defendants knew what was the issue since 1990.

[40] Learned Counsel made reference to the case of Ketteman v Hansel Properties Ltd. [1987] 2 W.L.R. 312. At pages 323 - 324, Lord Keith of Kinkel said;

> "Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles....The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved,

and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs."

[41] In concluding, Mr. Deterville submitted that the sort of injury which is here in contemplation is something which places the Plaintiff in a worse position from the point of view of presentation of his case than he would have been in if the Defendants had pleaded the subject-matter of the proposed amendment at the proper time. He therefore urged the Court to refuse the application to amend the Defence.

MY OPINION

[42] In order to determine whether to grant the proposed amendment, it is necessary to analyze the pleadings, the evidence and the guiding principles for grant of leave to amend. The general principles for the grant or refusal of leave to amend have been most adequately dealt with by both Mr. Bristol and Mr. Deterville. For brevity, I shall gratefully adopt them.

[43] The proposed amendment, in my mind raises a new cause of action. I disagree totally with Learned Counsel for the Defendants when he argued that the particulars sought to be adduced are in relation to the unfitness for purpose, which was already pleaded. In the same breadth, Learned Counsel submitted that due to an oversight, the Defendants failed to plead what is really the real issue between the parties. And only in October 1999, when the Plaintiff closed his case for a second time did it occur to the Defendants that the real issue was never pleaded.

[44] It is also abundantly clear that the period of limitation had already set in. According to Peterkin L.J. in Norman Walcott v Moses Serieux [supra]:

" In Article 2129 quoted above, both the right and the remedy are extinguished, and therefore there is no question of the party being called

> upon to choose whether he would plead the defence of limitation. As long as the evidence in the case discloses that the period of limitation has expired, the judge has no discretion in the matter. In the instant case to have allowed an amendment would have meant that the substituted plaintiff would have been instituting proceedings out of time."

[45] It is evident that Peterkin L.J. considered Order 20 Rule 5 (2) when he delivered his judgment in Walcott's case: see page 4.

[46] Turning to the facts of the present case. The Plaintiff instituted this action more than nine years ago. Despite the submissions of Learned Counsel for the Defendants, it is quite clear that if I allow the amendment, I would have to allow the Plaintiff to amend his pleadings. It is also quite clear to me that Mr. Gorman, who had already travelled ten times to prosecute the matter may have to be recalled. With utmost certainty, Mr. White, the expert who lives in Barbados will have to be recalled as a witness. Therefore, I cannot simply allow the amendment now without either putting the Plaintiff in a position in which I ought not to allow him to be put by such amendment being made at the last moment; two times after the Plaintiff has closed his case and almost ten years after the writ of summons had been filed and after prescription has stepped in. Further, I may have to direct the matter to stand over in order that the Plaintiff may amend his pleadings and go into further evidence which would have to be taken before the Court for the purpose of getting definite information on definite points, with the knowledge that this amendment would be asked for and without going into the evidence it would be impossible to do justice to the Plaintiff.

[47] I am also guided by the dictum of Lord Griffiths in Ketteman v Hansel Properties [supra] in which the Learned Law Lord at pages 339 - 340 of the judgment stated:

> "This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably

> to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.
>
> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that a trail will determine the issues one way or the other. Furthermore, to allow an amendment before the trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. [My emphasis] There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings."

[48] If, for instance, I thought that by allowing this amendment would merely cause certain costs to be thrown away, I should feel bound to allow the amendment, taking care that the Plaintiff was not prejudiced.

[49] In my considered opinion, to allow an amendment at so late a stage in the trial is tantamount to giving the apparently unsuccessful Defendants an opportunity to renew the fight on an entirely different Defence, bearing in mind that the statutory period of limitation had already set in. It is also my opinion that the Defendants have already resorted to almost every means possible to prolong, delay and or

stagnate the prosecution of this matter. I emphasized that we can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps more possible in a more leisured age.

CONCLUSION

[50] Under these circumstances, I could not in fairness to the parties allow the amendment proposed at the present time. Although I could have granted it, if I thought it should be allowed, even at this last moment, putting the parties right as to costs, I find that I cannot, by any order I might make as to costs, put the Plaintiff in his right position. I therefore refuse the Defendants leave to amend.

Indra Hariprashad-Charles
High Court Judge [ag.]