ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 39 OF 1994

BETWEEN:

CHESTER CLARKE

Substituted Plaintiff

MARTHE CLARKE

Added Plaintiff

and

BANK OF NOVA SCOTIA
JULIAN COMPTON

Defendants

And

BERTRAM ARTHUR

Third Party

Appearances:

Samuel E Commissiong Esq and Ms Mira Commissiong with him for the Plaintiffs
Ms Agnes Cato, StA Cato Esq with her, for the 1st Defendant
Emery Robertson Esq for the 2nd Defendant
Ms Nicole Sylvester for the 3rd Party

2000: April 14, 18

DECISION

[1] **MITCHELL, J**: This is a ruling on costs in two interlocutory applications heard in Chambers in this case. The dispute centred on the form of the order for costs consequent on two applications made by the Plaintiff. To understand the dispute over the question of costs, it will be necessary to set out briefly the Plaintiffs' claim and the history of the proceedings and of the applications in question.

[2] The suit in this case commenced on 28 January 1994 with the issue of a specially endorsed writ. The parties at that time were Leon Clarke (hereinafter the "Original Plaintiff") vs Bank of Nova Scotia (hereinafter the "1st Defendant") and Julian Compton (hereinafter the "2nd Defendant"). The Original Plaintiff's action was for specific performance of a contract of sale of land dated 1 November 1989. The facts as pleaded by the Original Plaintiff may be summarized this way. The Original Plaintiff claimed that he had attended an auction sale at which the 1st Defendant was selling 2 parcels of land of the 2nd Defendant. The Original Plaintiff had purchased the 2 parcels of land and gone into occupation of the 2 parcels. Subsequently, the Original Plaintiff sent a conveyance to the 1st Defendant, only to be told that the 1st Defendant had sold only one of the parcels to the Plaintiff. On 21 February 1994 the 1st Defendant filed its defence. The substance of the defence was that the Original Plaintiff had made a successful bid on only one parcel of land. The defence was further that the Original Plaintiff was estopped from alleging that he bought two parcels as, since 13 February 1990, the 1st Defendant had executed a deed prepared by the solicitor for the Original Plaintiff which deed is registered in the Registry. On 18 March 1994 the Original Plaintiff filed his reply to the defence. He asserted that the deed of 13 February 1990, as the Defendants were aware, had been executed and registered under protest. On 4 May 1994, the summons for directions was filed. We can count this as the first interlocutory summons in these proceedings. On 13 May 1994 Joseph J made the usual order for discovery, etc, on the summons for directions. That disposed of the first summons. On 13 July 1994 the Original Plaintiff's list of documents and affidavit verifying were filed. On 2 August 1994 the Original Plaintiff filed the request for hearing.

[3] On 25 November 1997, Chester Clarke (hereinafter "the Substituted Plaintiff") applied to be substituted as Plaintiff, the Original Plaintiff having died. This was the second summons. In the affidavit in support, the Substituted Plaintiff deposed that the Original Plaintiff, his father, had bought the land in dispute on his behalf

as he was residing in Canada at the time. On 28 November 1997, the appropriate order disposing of the second summons was made substituting Chester Clarke, with costs to be costs in the cause. On 12 January 1998, the 1st Defendant applied by summons, the third summons, for an order setting aside the order of substitution on a number of grounds that are not relevant here. On 29 January 1998, the 1st Defendant filed another and duplicate summons, the fourth summons, for leave to apply to set aside the order of 27 November 1997. On 10 March 1998, the 1st Defendant filed a summons, the fifth summons, to add a further ground why the order of 28 November should be set aside. On 13 March 1998, Baptiste J heard the 1st Defendant's application for leave to apply to set aside his order of 29 January 1998 and refused leave. That order of Baptiste J effectively disposed of the third, fourth, and fifth summonses. That order was not appealed. On 14 October 1999, the 1st Defendant filed another summons, the sixth summons, to the same effect as the third and fourth summonses. On 19 October 1999 the 2nd Defendant applied by summons, the seventh summons, for leave to file a defence out of time. On 21 October 1999 the court heard argument on the applications in the sixth and seventh summonses together. On 29 October 1999 the court by a written decision with reasons made the following orders:

> 1. The 2nd Defendant was given leave to serve and file his defence within 7 days, costs to be costs in the cause.
>
> 2. The court had no authority to set aside the order made by Baptiste J on 28 November 1997, and the applications of the 1st Defendant were dismissed. Costs of the application were ordered to be costs in the cause.

These orders have not been appealed against. That disposed of the 6th and 7th summonses.

[4] On 15 November 1999, the 1st Defendant applied by summons, the eighth summons, pursuant to Order 20 for leave to amend its defence. On 16 November 1999 the 1st Defendant applied pursuant to Order 26, the ninth summons, for leave to serve interrogatories on the Plaintiff. Before these applications could be heard, Chester Clarke, the Substituted Plaintiff, applied by way of a summons filed on 26 November 1999, the tenth summons, for an order that Marthe Clarke be added as a Plaintiff and for costs of the application to be costs in the cause. The affidavit in support of this tenth summons claimed that Marthe Clarke was the wife of the Substituted Plaintiff and held an equitable interest in the property in question in the suit. Meanwhile, on 30 November 1999, the 1st Defendant applied by summons, the eleventh summons, for leave to substitute its amended defence with another amended defence. On 30 November 1999, the 1st Defendant filed a supplemental summons, the twelfth summons, for leave to serve interrogatories. On the same 30 November 1999, the 1st Defendant applied by way of summons, the thirteenth summons, for leave to issue and serve a 3rd Party Notice upon Bertram Arthur and that costs be costs in the cause. On 3rd December 1999, the pending applications came up before Adams J. Adams J ordered that the application of the 1st Defendant for the 3rd Party Notice was granted. That order was not appealed, and effectively disposed of the thirteenth summons. The Plaintiff's application on the tenth summons to join Marthe Clarke as an Additional Plaintiff was granted at the same time by Adams J. The order on the costs of the application to join Marthe Clarke was highly disputed, and the question of costs was deferred for argument. That disposed of the tenth summons, other than the question of the appropriate form of the order for costs to be made on it. The 3rd Party Notice was duly filed and served. On 6 January 2000, the 3rd Party entered an appearance.

[5] Meanwhile, the 1st Defendant on 10 January 2000 applied by way of summons, the fourteenth summons, for the order filed on 23 December 1999 to be set aside due to errors and inaccuracies in it. On the same date, the Plaintiffs filed a summons, the fifteenth summons, pursuant to O.20 r. 5 of the Rules of the

Supreme Court for leave to amend their statement of claim. The pending applications came up in Chambers on 4 February 2000. The Defendants and 3rd Party indicated that they had no objection to the Plaintiff's application in the fifteenth summons to amend the statement of claim, provided the usual order as to costs was made. Leave was given to amend the statement of claim, subject to determination of the order as to costs. The Plaintiffs had objected to the application by the Defendants for the "usual order" for costs and urged that the court order the Plaintiffs to pay only the "costs of the application." As the earlier provision for costs in the application in the tenth summons dealt with by Adams J had not yet been made, argument on the question of costs in the fifteenth summons was adjourned. Adams J subsequently indicated that he would prefer the question of costs on these two applications to be determined once and for all in one argument. Adams J authorized me to deal with the outstanding question of costs on the Plaintiff's application before him in the tenth summons to join Marthe Clarke. All counsel were informed accordingly. All counsel were asked to reduce to writing their submissions as to costs on the two applications for the assistance of the court and to appear in Chambers ready to argue both matters together. After various further adjournments, the matters came up finally for argument on 14 April 2000, when all counsel made their submissions and replied to each other's submissions. I am grateful to all counsel for the care they took in preparing and presenting their submissions on the matter. The question was, should the order of the court on either or both applications be the "usual order" as to costs or be limited to "costs of the application."

[6] It was agreed by all counsel that the principles to be applied in both applications made by the Plaintiffs by the tenth and fifteenth summonses were nearly identical. The difference of opinion between the counsel was that the Defendants and 3rd Party urged that this was a case where the "usual order" should be made by the court on both of the applications by the Plaintiff. The "usual order," they submitted, was an order that the Plaintiffs pay in any event all the costs incurred and thrown away by the amendment and the costs of any consequential

amendment. It was the submission of counsel for the Defendants and 3rd Party that all costs of the proceedings to date have been thrown away, from before the addition of the Substituted Plaintiff and up to the grant of leave to serve and file the amended statement of claim, and the costs of any consequential amendments to the Defendants' and 3rd Parties defences. The Plaintiff's objection was that these were two cases where the form of the orders should be that the costs only of the applications were to be paid in any event by the Plaintiff. That, in a nutshell, was the dispute between the parties. Although there had been two applications by the Plaintiff in which the Defendants and the 3rd Party sought the "usual order" as to costs, counsel confirmed in her submissions that the Defendants and 3rd Party were not seeking duplicate costs.

[7] What then is the law and practice on the question of costs in these two applications? The first application by way of the tenth summons was the application to join Marthe Clarke as an additional Plaintiff. This application had been made pursuant to **O.15 r.4 of the Rules of Court**. By O.15 r.6(2) the court has a wide discretion to allow a party to be added on such terms as it thinks just. The practice of the court on the award of costs as one of the terms for allowing leave to add a party is set out in various editions of the White Book. The White Book 1970 Edition is the last edition to deal with the UK Rules of Court when the UK Rules were virtually identical with the present Eastern Caribbean Supreme Court Rules. Later editions of the White Book on the award of costs in an application under O.15 r.4 do not show any change in the law and practice in the UK from what is set out in the 1970 edition. The 1970 edition of the White Book at paragraph 15/6/16 under the rubric **Terms as to Amendment of Parties** deals with the question of costs thus:

> On giving leave to amend as to parties, the Court may impose such terms as may be just having regard to all the circumstances. Amendment is an indulgence, and the applicant will generally have to pay the costs of and occasioned by the amendment. But in cases of adding a plaintiff, the

plaintiff may be ordered to bear all the costs of the action up to the time of the joinder of the added plaintiff. Thus in *Ayscough v Bullar, 41 Ch.D. 341*, the terms were that if at the trial it appeared that the first plaintiff was not entitled to maintain the action, and that the added plaintiff was so entitled, the first plaintiff must pay the costs of the action up to the time of the joinder of the added plaintiff, and further that the added plaintiff should only be entitled to such relief as he could have claimed if the action had commenced at the time of his joinder as plaintiff. Similar terms were imposed in *A-G v Pontypridd Waterwords, [1908] 1 Ch 388*. See also *Ives v Brown [1919] 2 Ch 314; Lowndes v Hadfields Ltd [1939] Ch 569* as to costs.

[8] Due to the unavailability of relevant law reports in the Chambers of the court, the court was entirely reliant on counsel to produce copies of the cited cases. The only case that was copied and produced to the court was the case of *Ayscough [supra]* and which was produced by the Plaintiff. This was a decision of the UK Court of Appeal under an earlier and quite different version of the rule in question. Counsel for the Plaintiff relied on this decision. The decision in that case was that the Plaintiff should pay the costs of the application in any event, while the costs of the action up to the joinder of the additional party were to await the outcome of the trial. There is, thus, authority for the proposition put forward by the Plaintiff that while it may be normal to order the Plaintiff to pay the costs of the application in any event, ie, the costs of and occasioned by the amendment, the other costs of the action up to the time of the joinder may be ordered to be costs in the cause and await the outcome of the trial. That was the order in the *Ayscough case,* both at first instance and confirmed by the Court of Appeal. I am satisfied that that is the appropriate order that ought to be made on this application. If the Added Plaintiff fails in the suit, she will with the Substituted Plaintiff face the possibility of having to bear all the costs of the suit. If she succeeds in the action, she must bear the costs of and occasioned by the amendment.

[9] However, the matter does not rest there. There remains the question of costs on the application of the Plaintiffs by way of the fifteenth summons to amend the statement of claim. Assuming that the red underlining in the draft amended statement of claim exhibited by the Plaintiffs highlights the proposed amendments, then it is clear that the amendments proposed are extensive. By the affidavit in support of the summons (sworn to by counsel!) the basis of the application is stated to be that the Defendants had now produced to the Substituted Plaintiff a copy of the conditions of sale entered into by the Original Plaintiff. Counsel deposed that these conditions of sale shewed that the Original Plaintiff had signed the contract for sale for the property in dispute on behalf of the Substituted Plaintiff and the Added Plaintiff. Counsel for the Plaintiffs deposed in his affidavit that the pleadings needed to be amended to reflect that fact. Counsel argued that, in that circumstance, the Plaintiffs were not to blame or to be penalized for the need to amend the statement of claim. The allegation being made by counsel in his affidavit was that the Defendants were blameworthy in that they had concealed from the Substituted Plaintiff and the Added Plaintiff the conditions of sale signed by the now deceased Original Plaintiff. Counsel for the Plaintiff argued strenuously that the concealment from the Substituted Plaintiff and the Added Plaintiff by the Defendants of the terms and conditions of sale signed by the Original Plaintiff, and which document was solely in the possession at all material times of the 1st Defendant, was the cause of the amendment being requested at this late stage. He urged that the Defendants were entitled to the costs of the application but not of the entire action so far.

[10] Both counsel for the Defendants argued equally strenuously that a discretion to allow a Plaintiff to amend his pleadings must be exercised judicially. Plaintiffs bringing actions must know the facts on which they base their claims. They submitted that it was for the Plaintiffs to know their case from the outset. If they discovered new evidence that caused them to shift their case, then they must pay in the usual way for applying for the indulgence of amendment. Counsel for the 1st Defendant urged that the Plaintiff's List filed since 13 July 1994 included the

document described as the conditions of sale. Counsel denied that any other conditions of sale existed or had been disclosed to the Plaintiffs, and that from the Plaintiff's List the Plaintiffs had had the document since at least mid-1994. Counsel argued that serious allegations of fraud and misrepresentation were now raised by the proposed amended statement of claim. All of the pleadings and applications previously prepared by the Defendants were rendered futile. They would all have to be redone. In the circumstances, counsel applied for the court to grant the application for leave to serve and file the amended statement of claim, but on terms that the Substituted Plaintiff and the Added Plaintiff pay, in any event, all the costs thrown away up to the amendment and the costs of any amendments to be made as a consequence of the amendments.

[11] What, then, is the law and practice on the granting of leave to a plaintiff to serve and file an amended statement of claim? The application for leave to amend was made under **O.20 r.5 of the Rules of Court**. O.20 r.5(1) gives the court a discretion to allow a plaintiff to amend his pleading on such terms as to costs or otherwise as may be just. The practice as to costs is to be gleaned from the White Book. The White Book 1970 Edition at paragraph 20/5-8/24 under the rubric **Costs** provides as follows:

> The usual penalty imposed as a term for giving leave to amend is that the party seeking the amendment should pay in any event all the costs incurred and thrown away by the amendment and the costs of any consequent amendment. This is what is meant by the phrase "on the usual terms as to costs", see (n) to O.62, r.3(3) *infra*. (Chitty and Jacob, Form 1557.) If any wider or different order as to costs is desired, the Court should be asked to make a special order as to costs. If the amendment is occasioned by an allegation made by the opposite party which could not reasonably have been anticipated, the costs of and occasioned by the amendment may be ordered to be costs in the cause.

Later editions of the White Book, copies of the relevant provisions of which were submitted by counsel for the 1st Defendant, do not show the learning to have altered in the UK in later years. The law on the correct order for costs in these cases appears to be quite settled. The usual order is what it describes itself to be. The phrase "the usual order" does not mean the same thing as the phrase "the invariable order." The court has a discretion. The court may make a wider order. The court may make a narrower order. The court may make a different order. If the amendment is proved to have been occasioned by an allegation made by the opposite party which could not reasonably have been anticipated, then the order, even of the costs of and occasioned by the amendment, may be ordered to be costs in the cause. In this case, there is no evidence before the court to show why the usual order should not be made. It was the duty of the Plaintiffs from the commencement of the proceedings to know what their interest was that they were suing to protect, and to bring their claim expeditiously and fully before the court. If they later discovered that they had omitted something from their claim, that they could or should have known about from the inception of their case, as I find was the case here, they may be permitted to amend their claim, but on terms that they pay all the costs incurred and thrown away by the amendment and the costs of any subsequent amendment. This is the appropriate order to be made on the fifteenth summons, and it is ordered accordingly. This order, it is accepted by the Defendants and the 3rd Party, does not mean that they are entitled on the order above on the tenth summons to duplicate costs. The remaining eighth, ninth, eleventh, twelfth, and fourteenth summonses will come up in Chambers in due course.

I D MITCHELL, QC
High Court Judge