ST. VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 211 of 1997

BETWEEN

ORMISTON KEN BOYEA	Plaintiff
AND	
EASTERN CARIBBEAN FLOUR MILLS LIMITED	Defendant

SUIT NO. 212 OF 1997

BETWEEN

HUDSON WILLIAMS	Plaintiff
AND	
EASTERN CARIBBEAN FLOUR MILLS LIMITED	Defendant

Appearances:

Sir Henry Forde, QC for the Defendant/Applicant

Mr. Stanley John for the Plaintiffs/Respondents

2003: October 8; 22

2004: March 22

DECISION

BLENMAN J: CHAMBERS:

[1] This is an application by the Eastern Caribbean Flour Mills Ltd. to amend its Statement of Defence and Counterclaim. The application is vigorously opposed.

[2] Mr. Ormiston Ken Boyea and Mr. Hudson Williams (Boyea and Williams) sued the Eastern Caribbean Flour Mills Ltd. (Flour Mill) for wrongful dismal from its employment. The Flour Mill counterclaimed against them alleging that they were in breach of their contractual and equitable duties to it and that they committed several torts during the course of their duties.

[3] After the pleadings were filed, Case Management Conferences were held and preliminary issues were ruled upon. There were other proceedings in the matter in which Orders were made. On 3rd April, 2003 Master Cottle ordered among other things "that a Pre-trial Review be done on a date to be arranged by the clerk at which the Court will hear any further applications for Directions, except for urgent matters in the meantime, the Court will hear any further applications for Directions on Orders."

[4] Pursuant to a Notice of Application dated 30th September, 2003, Flour Mill sought leave of the Court to amend its Statements of Defence and Counterclaims. This Application was vigorously opposed by Counsel for Boyea and Williams. The application was made before Pre Trial Review and is supported by an affidavit sworn to by L.A.D. Williams Esq., the Defendant's solicitor, together with a draft of the proposed amendments three pieces of correspondence exchanged between Queen's Counsel for the parties are exhibited.

[5] Sir Henry Forde, Queen's Counsel for Flour Mill stated that the court in the exercise of its jurisdiction and in furtherance of the overriding objective of the Civil Procedure Rules 2000 (CPR 2000) can properly grant the proposed amendments after Case Management but before Pre Trial Review. His main arguments in support of the application were stated as follows:

(1) The amendments are substantially a reformulation and/or clarification and/or narrowing of the issues raised by the Statement of Defence;

(2) The amendments clarify the issues before the Court while at the same time they present no prejudice or disadvantage to the Plaintiffs nor do they add unmanageably to the Plaintiffs' preparation for trial;

(3) The amendments allow the court to deal with the issues and the case justly and shall assist the court in arriving at a fair and final resolution of the real issues between the parties.

(4) They do not place the parties on any unequal footing or add any excessive burden to the Plaintiffs preparing for trial or cause any postponement of the trial or jeopardize the trial date.

[6] Learned Counsel Mr. Stanley John opposed the application on the grounds that:

(1) The court does not have jurisdiction to entertain this application since the Defendant seeks to amend its Statements of Defence and counterclaim two years after the first Case Management Conference and it has not satisfied the court that the change is necessary because of some change in the circumstances, which became known after the date of the Case Management Conference. In addition, some of the proposed amendments would involve the defendant being able additions on substitution of new claims in respect of which the Plaintiffs have a reasonably arguable case on limitation.

(2) Even if the court has jurisdiction, which is denied, to permit the Defendant to make the proposed amendments, this will in all the circumstances result in injustice to the claimants, since it will unduly increase costs, delay the expeditious disposal of the case, give the Defendant an unfair relative advantage and subject the Claimants to inordinate strain.

(3) The Claimant will be prejudiced by the new claims and they do not arise out of the same or substantially the same facts in respect of which the defendant has already claimed a remedy.

[7] Three issues arise for determination:

[a] Whether the court has jurisdiction in view of CPR 2000 R 20.1(3) to entertain the application?

[b] If so, whether the court should properly exercise its discretion to grant leave before Pre Trial Review since there is no change of circumstance and the limitation period was expired?

[c] Should the Court exercise its discretion to allow the amendments if this would result in an injustice to the Claimants?

[8] **JURISDICTION**

Sir. Henry Forde QC has argued that CPR 20.1 (3) should not be given such a restrictive approach. Any breach of the section can be remedied by the Court merely utilizing CPR 2000 Rule (1) namely the overriding objective in order to entertain the application for leave to amend. The Court has jurisdiction to grant the amendment. CPR Rule 20.1 (3) he argued confers on the Court discretion to grant the defendant the requisite leave. This is reinforced by the use of "may" in the rule. In support of his argument, Queen's Counsel relied on section 3 (6) of the Interpretation and General Provision Act Chapter 10 of the Laws of St. Vincent and the Grenadines that provides as follows:

> "In every written law the word "shall" shall be read as imperative and the word 'may' as permissive and empowering". Section 20(3) is permissive and not mandatory.

[9] Mr. Stanley John, Learned Counsel argued that the Court has no jurisdiction to entertain the application and that in any event the CPR 20.1(3) prohibits the Court from exercising its jurisdiction at this stage of the proceedings to permit the amendment, in the absence of evidence of the change being necessary due to a charge of circumstance which became known after the Case Management Conference.

[10] The Civil Procedure Rule 2000 Part 20.1 provides for the changes to the Statement of Case. Under Part 2.4 "Statement of Case" refers as will to Defences. Part 20 refers to the situations in which the parties to the action can apply to effect changes to the Statement of Case.

[11] In ascertaining whether the Court should entertain the application for leave to amend, at this stage, it is imperative that a determination is made of the true meaning of CPR 20.1 (3) while at the same time taking into account the overriding objective of CPR 2000 as set out under Part 1. I find out useful to briefly look at the court's old approach to amendment of pleadings.

[12] The old Civil Procedure Rules as a general rule enabled the Court to allow pleadings to be amended once they are made for the purpose of determining the real controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. It would be strange if the CPR 2000 were to be interpreted in a restrictive manner to deny leave to amend pleadings without ascertaining whether the justice of the matter necessitated it.

[13] In ascertaining the interpretation of Rule 20.1(3) the word "may" in rule 20.1 (3) must be looked at. The natural and plain meaning of the word "may" is discretionary, permissive and empowering in nature. The rule is merely permissive in nature and sets out one of the circumstances which the Court can utilize in the exercise of its discretion. It does not deprive the Court of jurisdiction. The Court is obliged to entertain any application the effect of which is to do justice between the parties. The Court cannot be held rigorously to any rule which would require the party seeking an amendment to show that there has been a charge of circumstances which became known after the first Case Management Conference in order to be able to obtain leave to amend its pleadings. To do so may work an injustice to the party applying for leave to amend its pleadings in addition to frustrating the attempt of the Court, to determine the real issues between the parties.

[14] CPR 2000 takes a very liberal approach to amendment of pleadings and the pre-CPR position in which amendment of pleadings were only granted in certain circumstances is not the approach the Court should take. For what it is worth, even under the old dispensation the Court's approach to amendment was very liberal. CPR 2000 provides a wider discretion and the court must always bear in mind the overriding objective in its determination of whether or not leave should be granted to amend pleadings. As a general

rule, amendments should be allowed if their primary effect is to do justice. Shalton v Surrey Country Council (1999) CLPR 525, in this case, the Court of Appeal allowed the Claimant to rely on a revised Statement of past and future loss and expenses quantifying the claim at a substantially higher figure rather than the original statement.

[15] Even where an application to amend is made during the trial the Court has a discretion to grant the application provided that the proposed amendment will not unfairly prejudice the other party Charlesworth v Relay Roads Ltd. [2000] 1 W.L.R 230.
In Smith v Baron The Times, 1 Feb 1991 after the completion of the evidence the judge drew the attention of both counsels to what he thought was the correct issue and gave permission to both sides to re-amend their statement of case in open Court. The Court of Appeal held that the judge had acted quite properly as the purpose of the rules on an amendment was to permit a judge to allow the formation of the real issues between the parties if they did not appear from the original statement of case. In Clarapede and Co. v Commercial Union Association (1833) 3WR262 the Court held that 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 in costs.

[16] There can be no doubt that the Rule 20. 1 (3) allows the Court to exercise its discretion as to whether or not it will grant permission to amend a Statement of Case. Rule 20 (1) (3) is not a mandatory provision, prohibiting the Court from ever exercising its jurisdiction except in circumstances that become known after the date of the first Case Management. In order to achieve justice, the Court is of the opinion that it has jurisdiction to entertain the application.

[17] **LIMITATION**

Mr. Stanley John argued there are circumstances in which the Court should not exercise its discretion to allow the amendment, even if it has the jurisdiction to entertain the application. He argued that even if the Court has the jurisdiction to grant the amendment it

retains the discretion whether or not to allow the amendment Welsh Development v Redpath Doman Lon [1991} 4 All ER 10 at Page 17 in support of his contention. The Court should not exercise its discretion to allow the amendments, by adding or substituting a new claim (which is defined under the Limitation Act as a new set off or Counterclaim or a new cause of action) to be made after the expiry of a limitation period which affects a new action to enforce such a claim under the new claim, unless it arises out of substantially the same facts as those already in issue in the action. The Court cannot grant the Flour Mill leave to amend some of the paragraphs of its pleadings, since several of them raise new claims and because six years have elapsed since the last transaction occurred, therefore any action based on those transactions is statute barred. Flour Mill in its proposed amendments is seeking to change its case and rely on new facts.

[18] Queen's Counsel posited that the Court should exercise its discretion and grant leave to Flour Mill in order for it to amend its Defence and Counterclaim, since the amendments involved the same or substantially the same facts as those already pleaded. He relied on Doode v Martin [2002] 1 All ER 620 in support for this contention, where it was decided that the Court can allow a post limitation amendment whose effect will be to add or substitute a new claim if that new claim arises out of the same facts as a claim in respect of which the party seeking permission to amend has already claimed a remedy.

[19] Section 35 of the Limitation Act Chapter 90 of the Laws of St. Vincent and the Grenadines provides that

> "a new cause of action may be added to existing proceedings after the expiry of the limitation period only if either it is an original set off or Counterclaim made by a party who has not previously made any claim in the action or if it arises out of the same or substantially the same facts as are already an issue."

The Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings.

[20] In Darlington Building Society v O. Rouke James Scourfield [1991] PNLR 365 it was held dismissing the appeal that the Limitation Act 1980 section 35 (2) (a) together with the Rules of the Supreme Court Ord. 20 r 5, meant that a statement of claim could be amended after the expiry of the limitation period where the amendment sought to add or substitute a new cause of action which arose out of facts which were not substantially the same as those originally pleaded. Further in Darlington Building Society v. O. Rouke it was held that where the claim was based on breach of duty, determining whether a new cause of action had been pleaded required a comparison with the original statement of claim to ascertain (1) whether a different duty was pleaded (2) whether there was a substantial difference between the breaches pleaded and (3) Where appropriate, the nature and extent of the damage.

[21] The Court has to examine the new allegations that are sought to be raised in order to determine whether they are founded on factual bases which can be described as substantially the same as the factual upon which the original allegations were founded. If the Court concludes that the new allegations are founded on a factual basis which cannot be described as substantially the same it cannot exercise its discretion to grant leave to amend. See Goode v Martin Colman J page 565-letter f – h where the Court stated:-

> "whether one factual basis is substantially the same as another factual basis obviously involves a value judgment, but the Court must clearly have regard to the main purpose for which this qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in a position where if the amendment is allowed he will be obliged after the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."

[22] Civil Procedure 2003 Vol. 1 3.5 states:

> *"The overriding objective (of the CPR) is that the Court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendments can be compensated for in costs, and the public interest in the efficient administration of* justice is not significantly harmed" *per* Peter Gibson LJ. In Cobbold v. London Borough of Greenwich, August 9, 1999, CA."

[23] In exercising its discretion, the Court must be ever mindful of the overriding objective of CPR 2000 and in determining whether or not to grant leave to amend placing, that the public interest is taken into account. Cook v News Group Newspaper Ltd. [2002] EWHC 1070 QB amendments were permitted to be made close to the date of trial in order to allow the defendants to deploy the defences they wish provided they were relevant and had a realistic prospect of success. In Cook v News Group Newspapers Limited, Mr. Justice Eady stated that "where late amendments are extensive and bound to result in costly diversions from the existing issues in the litigation, one is bound to scrutinize such application with case to see whether they could and should have been made earlier, and whether they can be categorized as "more of the same" (merely adding an unnecessary and rather luxurious pair of braces to a perfectly adequate belt). It seems to me that in such circumstances the Court is bound to be less accommodating than where a viable plea of justification has only emerged at a late stage".

[24] Blackstone's Civil Practice 2003 31.12-31.13 states:-

Amendment of causes of action after expiry of limitation

> "*A new cause of action (as opposed to a new party) may be added to an existing claim after the relevant period of limitation has expired in three situations;*

(a) Where the new cause of action arises out of the same facts or substantially the same facts as are already in issue in the original claim (LA 1980, s. (5) (a); see 31.13).

The LA 1980, s. 35 (5) (a), permits rules of court to allow a claimant to add, after a limitation period has ended, a new claim which arises out of the same facts as are already in issue on any claim previously made in the original claims. This included facts which are put in issue in the defence to the original claim (Goode v Martin [2001] EWCA Civ 1899, [2002] 1 WLR 1828). Rule 17.4 (2) of the CPR is expressed to allow a new claim to be added only if it arises out of the same facts as the original claim, but it must read as also allowing a new claim which arises out of the same facts as are already in issue on the original claim, because otherwise the rule would impede a claimant's access to a court for determination of civil rights, contrary to the European Convention on Human Rights, art. 6. In Goode v Martin the claimant has originally alleged that the defendant had negligently caused personal injuries to the claimant in the factual circumstances set out in the claim. The defendant served a defence asserting that the personal injuries happened in different circumstances. After the limitation period had expired the claimant was allowed to add a claim that, even if the defendant's version of events was true, the injuries were caused by the defendant's negligence."

[25] Several cases indicate that the Court takes a very liberal approach to the issue of what are same or substantially the same facts Blackstone is instructive and I will gratefully adopt its learning namely -

> *" Whether amendments involve the same or substantially the same facts as those already in issue is largely a matter of impression (Darlington Building Society v O'Rourke James Scourfield [1999] PNLR 365). Spanish fishermen were refused permission to amend their claim to add further claims for compensation for breach of Community Law (in being*

prevented from fishing by unlawful UK legislation) in respect of additional vessels. This was because the facts they needed to prove were largely specific to each boat, and so the additional claims did not arise out of substantially the same facts as were already in issue (R v Secretary of State for Transport, ex parte Factortame Ltd. (No. 7) [2001] 1 WLR 942). In Senior v Pearsons and Ward (2001) LTL 26/1/2001 the claim originally alleged that the defendant's solicitors had acted contrary to their instructions. The claimant was permitted to amend the particulars of claim after the expiry of limitation to add allegations of failing to advise fully, as the additional allegations arose out of the same facts, or substantially the same facts, as those originally pleaded."

[26] Master Cottle's order appears to have contemplated that the parties may need to make other urgent applications to the Court before pre trial, that this is so very clear. Having concluded that the Court has jurisdiction to entertain the application for an leave to amend under CPR 20.1(3) (at this stage of the proceedings) before Pre-trial Review, I am of the view that the Court could exercise its discretion to grant the application even if the limitation period has expired provided that the new claim arises from substantially or the same facts and it would not unfairly prejudice the party against whom the application is made.

[27] Gwemble Valley Development In. Co. Ltd. (In receivership) v. Koshy [No. 3} [2003] EWCA Civ 1048 the Court of Appeal held that the 6 year limitation period would apply to breaches of fiduciary duties unless the breaches constitute a fraud or the fraudulent breach of trust by a fiduciary then the period of limitation does not apply.

[28] Kerr on the Law of Fraud and Mistake Seventh Edition at Page 1 states:-

"Fraud in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are infurious to

another, or by which an undue or unscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered fraud"

[29] Having applied principles above, it is clear that the Flour Mill is also alleging that Boyea and Williams breached their fiduciary duties to in manners that were fraudulent. Hence I am of the view that on this basis, I can also properly exercise my discretion and permit it to amend its pleadings in order to plead what amounts to pleas of fraudulent breaches of trust by the claimants who were fiduciaries.

[30] **UNDUE HARDSHIP AND DELAY**

Mr. Stanley John learned counsel asserted if the court were to grant leave to Flour Mill to amend its pleadings, Boyea and Williams witness statements would have to be substantially modified at great expense them, just a few days before the trial fixture. The Court must take into account the relative effects of the inconvenience and burden which further expenses and delays will place on them far out weigh the effects on the Flour Mill which is a very substantial business. Flour Mill is in a far more favourable position than Boyea and Williams organizationally and financially and has retained the services of international lawyers and engage forensic expects in the preparation of its case.

[31] Queens' Counsel asserted that Boyea and Williams have not been disadvantaged since they too have retained international lawyers. They are independent businessmen and shareholders of several companies. He submitted that Boyea and Williams will not be unduly prejudiced since the proposed amendments are for the most part a reformulation or clarification of the issues, and are relevant and central to the issues in the case and will contribute to a just and fair determination of the matters in dispute. They therefore fall within the overriding objective of the Rules in order to enable the Court to deal with the cases justly. Both parties agreed that the witness statements that are filed on behalf of the Flour Mill have addressed the proposed amendments. Queen's Counsel asserted that they should be granted since it is the law that an amendment can be made to pleadings even as late as after the pronouncement of judgment. In addition he stated that both parties

statements of facts that were filed in December, 2001 have dealt with the facts in the proposed amendments. The only issue that the Flour Company conceded that was not previously dealt with is the outstanding debt or the loan which Messrs Boyea and Williams have strong objected to leave being granted to amend in order to include.

[32] The Court must bear in mind that one of the overriding objective of CPR 2000 to save expense between the parties and to ensure that the parties are placed on equal footing as far as possible. Amendments will be allowed even if it would require an adjournment of the trial so long as the costs thrown away as a consequence of the adjournment are paid by the party seeking the adjournment. Most of the amendments proposed, seek to introduce detail, which if granted would clarify the issues. They have been identified and dealt with in the Flour Mill's witness statement. The court can properly grant the Flour Mill leave to its amend pleadings provided that if the amendments do any prejudice Boyea and Williams they would be compensated by an award of costs. Throughout the matter, the court retains the power to manage the case in order to ensure that the real questions are ventilated and that the interests of justice are served. The court must ensure that the amendments if granted would not add significantly nor inappropriately to the case.

[33] Issues will not reasonably be permitted to be canvassed in particular if they are raised late in the day merely because they are strictly speaking relevant because a Court needs always to keep in mind the overriding principle of doing justice between the parties and the need for proportionality. The Court must weigh on the one hand the prejudice of dealing with new and time consuming matters as the trial draws close (and the additional personal stress likely to be caused to Boyea and Williams) and, on the other hand the possibility that if the Court is too exclusive in its approach to the new material they might proceed to a vindication (they may not deserve). The Court should bear in mind also that the nature of some of the new allegations has been apparent to them several months ago. Learned Counsel, Mr. John pointed out that some of the new allegations have been incorporated in the Flour Mill witness statements. The Court should not assume therefore, that their response to most of the proposed amendments have to be thought out from scratch. There have been many months during which to prepare for the contingency, at least in outline.

[34] In ascertaining whether leave should be granted to amend any of the paragraphs of the pleadings would necessitate my examination/comparison of the original paragraphs with the proposed amendments. Queen's Counsel has provided the Court with a draft of the proposed amendments to the statement of defence and counterclaim. Having perused the amendments and applying the relevant principles of law, I am satisfied that the majority of the proposed amendments all speak to the same or substantially of facts as originally pleaded by the Flour Mill namely the alleged breaches by Boyea and Williams of their contractual, fiduciary and equitable duties together with tortious allegations. The majority of the proposed amendments merely seek to correct or clarify the dates or names of persons, companies who are alleged to be connected with the alleged breaches by them. Others of the proposed amendments are merely other instances of the breaches that have been pleaded by the Flour Mill. Boyea and Williams will suffer no injustice if the Court were to grant the Flour Mill leave to amend its pleadings in relation to those instances provided that they are compensated for the resultant inconvenience. There is a common thread running through the proposed amendments namely the claimants alleged breaches of their contractual, fiduciary and equitable duties.

[35] **CONCLUSION**

The principle enunciated in Goode v Martin is applicable and where the facts have already been put in issue by both parties I will grant permission to amend the claim after the expiry of the limitation period so that Flour Mill can plead a revised version of the same facts. I will exercise my discretion to allow proposed amendments that are further particularlisations of the claims already pleaded by the Flour Company. There is one major proposed amendment which is entirely new and does not arise from the facts as pleaded that is the alleged loan to the Boyea and Williams. Accordingly, in the exercise of my discretion I will not grant the defendant leave for it to amend its pleadings to introduce this new claim. This proposed amendment will be a new and quite a different way of putting its case, and I would not allow it to do so since it was not pleaded in the original claim. There was no allegation in the Flour Company's original claim and counterclaim in

relation to the loan; it would be unjust to permit Flour Mill to amend its pleadings at this stage to incorporate the debt in the nature of the loan.

[36] The matter is fixed for trial from the 6th day of June 2004 – 18th June, 2004. The parties have agreed that the Flour Mill's witness statements address the proposed amendments. Boyea and Williams will need to amend their witness statements. The trial fixture could still be met if the amended witness statements are filed and Boyea and Williams will be compensated for the inconvenience the amendments would occasion.

[37] In the premises, I will make the following orders:

[1] That leave be and is hereby granted to East Caribbean Flour Mills Limited to amend its pleading in terms of the Draft Amendment attached to the Affidavit of LORENZ DOUGLAS WILLIAMS and filed in this matter same and except those proposed amendments listed below-:

[a] **Suit No. 211 of 1997** – ORMISTON KEN BOYEA

V.

EASTERN CARIBBEAN FLOUR MILLS LIMITED

a. Paragraph 48 B i ii
b. Paragraph 53 B
c. Paragraph 54 (30)
d. Paragraph 59 (b) (c) (e) (h)

[b] **Suit No. 212 of 1997** – HUDSON WILLIAMS

V.

EASTERN CARIBBEAN FLOUR MILLS LIMITED

e. Paragraph 42 B i ii
f. Paragraph 46 C

g. Paragraph 47 (e) (e)

h. Paragraph 51 (b) (c) (e) (h)

[2] That East Caribbean Flour Mills do file and serve its amended Defence and counterclaim on or before the 29th day of March, 2004.

[3] That Mr. Ormiston Ken Boyea and Mr. Hudson Williams do file and serve their amended Replies on or before 30th day of April, 2000.

[4] That leave be and is hereby granted to Mr. Ormiston Ken Boyea and Mr. Hudson Williams to file and serve further witness statements, addressing those matters that have been reformulated in the amended Defences and Counterclaim, pursuant to this order, on or before the 21st day May, 2004.

[5] That East Caribbean Flour Mills do pay to Mr. Ormiston Ken Boyea and Mr. Hudson Williams costs in the sum of $20,000 EC on or before 1st day of May, 2004.

[6] The trial fixture of the 6th June – 18th June, 2004 is maintained.

[38] I thank both learned counsel for their oral and written submissions which were of tremendous assistance to the court.

Louise Esther Blenman
High Court Judge