ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HIGH COURT CIVIL APPEAL NO.3 OF 2004

BETWEEN:

[1] ORMISTON KEN BOYEA
of Prospect
[2] HUDSON WILLIAMS
of Villa

Appellants

and

EAST CARIBBEAN FLOUR MILLS LIMITED
of Camden Park

Respondent

Before:
Her Ladyship, the Hon. Madame Suzie d'Auvergne Justice of Appeal [Ag.]

Appearances:
Mr. Sydney Bennett, QC and Mr. Stanley John for the Appellants
Mr. Douglas Williams and Ms. Leodean Chrysostom for the Respondent

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2004: September 16.

JUDGMENT

[1] D'AUVERGNE, J.A.: This is an appeal which is concerned primarily with procedural law. The Court is being asked to interpret Part 20, Rules 20.1 and 20.2 of the Civil Procedure Rules (CPR) which deal with changes to statements of case.

Facts

[2] The facts of the case are as follows:

Both Appellants filed writs of summons accompanied by statements of claim on the 26th September 1997 for damages and wrongful dismissal from the

Respondent's employ as Managing Director and Financial Controller respectively and on the 18th of November the Respondent filed and served statements of Defence and Counter-claim. The actions were subsequently consolidated by consent.

[3] In accordance with the Transitional Provisions of CPR in particular Part 73.2(2) Case Management Conferences were held and preliminary issues were ruled upon.

[4] On the 3rd of April 2003 Master Cottle made extensive directions for the conduct of the matter and deadlines were set. The case was set for trial to commence on the 17th of November 2003. A period of two weeks was reserved for trial.

[5] On the 30th September 2003, eight days after the date set by the Master for the filing and exchange of witness statements, the Respondent applied for leave to make amendments to its statements of Defence and Counterclaim. The application was set down for hearing on the 2nd of October 2003. On that day the Court heard preliminary submissions from Counsel for all parties and set down the 22nd of October as the date when the substantial issues would be heard.

[6] The application was opposed by Counsel for the Appellants. It is to be noted that the application was made before Pre-trial Review. Counsel for the Respondent submitted that the proposed amendments were seeking to amend the statements of Defence so as to clarify and/or narrow and/or reformulate the existing issues between the parties, that the amendments were relevant and central to the issues in the case and that they were of such a nature that they did not require any further witness statements.

[7] Counsel further submitted that the proposed amendments in no way prejudiced or disadvantaged the Appellants. On the contrary, they would contribute to a just and fair determination of the matters in dispute. Moreover, the amendments fell

within the overriding objective set by the Rules in order to enable the Court to deal with cases justly.

[8] Counsel on behalf of the Appellants argued that the proposed amendments were alleging new issues and that several of them would fall after the limitation period and that the Appellants as Defendants to the counter-claim would be deprived of their entitlement to plead the statute of limitation.

[9] It is significant to note that prior to the making of the application the Respondent requested the Appellants consent to the amendments. Also, that Pemberton J. on the 4th October, 2002, upon hearing an application by the Appellants arising out of a case management conference, after previous case management conferences, gave the Appellants leave to amend their replies and defences to the counterclaims.

[10] On the 22nd March 2004 the learned Judge handed down the decision from which this appeal arises. The learned Judge granted leave to the Respondent to amend most of the proposed pleadings in terms of the draft amendment and listed those which she did not allow.

[11] The grounds of the appeal are as follows:

[1] the learned trial Judge erred in law in holding that the CPR 20 1(3) allows the court a discretion as to whether or not it will grant permission to amend a Statement of Case and that the Rule 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.

[2] The learned trial Judge erred in law in that she applied principles of law relevant to the Civil Procedure Rules of England and Wales and failed to

address the distinction inherent in Rule 20 1(3) of the CPR 2000 and the related provisions of the English CPR.

[3] The learned trial Judge erred in law in holding that it is clear that the Respondent is also alleging that the Appellants breached their fiduciary duties in ways that were that were fraudulent, hence she may exercise her discretion and permit the Respondent to amend its pleadings in order to plead what amounts to pleas of fraudulent breaches of trust by the Appellants.

[4] The learned trial Judge erred in law and in fact in holding that the subject amendments arise out of substantially the same facts as those pleaded in the original Statements of Cases and that it would not unfairly prejudice the Appellants cases to grant these amendments.

[5] The learned trial Judge erred in law in awarding the Appellants costs in the sum of $20,000.00 EC upon granting the Respondent leave to make the said amendments.

[12] The relief sought is that the order of the High Court be set aside with costs to the Appellants.

[13] Section 20.1 provides the following:

Changes to statements of case

20.1 (1) A party may change a statement of case at any time before the case management conference without the court's permission unless the change is one to which-

(a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or

(b) rule 20.2 (changes to statements of case after the end of a relevant limitation period);

applies.

(2) An application for permission to change a statement of case may be made at the case management conference.

(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference.
(4) The party amending a statement of case must forthwith –
    (a) File at the court office the amended statement of case endorsed with a certificate of service; and
    (b) Serve a copy on all other parties
(5) An amended statement of case must include a certificate of truth in accordance with rule 3.12.

Arguments

[14] Mr. Sydney Bennett Q.C., Counsel for the Appellants states in his written submissions that the meaning of the words of CPR 20.1(3) are clear, plain and free of any ambiguity and that the provision in the requirements laid down is mandatory and not permissive. He quoted from the case of Public Prosecutor v Koi[1] at page 852 where Lord Hadden said:

> "It seems that enactments regulating the procedure to be followed in Courts are usually imperative and not merely directory".

[15] Counsel's contention is that while "may" will in most contexts be merely permissive and empowering "may not" cannot be said to be so; that they were clearly intended to place the Court under a mandatory duty not to do so. He relied on the case of Vinos v Marks and Spencer plc (2001)[2].

[16] In that case the claimants' solicitors inadvertently failed to serve a claim form until 9 days after the expiration of the 4 month period prescribed by CPR, the limitation period having expired in the interim. The application for extension of time for service of the claim form was refused since the reason for failure to serve the claim form within the time limited was inadvertence. The appeal was also dismissed and the Judge pointed out that the circumstances specified in the

[1] (1968) A.C 829
[2] 3 ALL ER 784.

section and subsection are the sole relevant conditions for the discretion to be exercisable.

[17] Counsel states that the principle enunciated in Vinos' case is applicable in the context of CPR 20.1(3). He contends that if the interpretation placed on the provision by the learned Judge [in this case] is to be held correct then it would be difficult to imagine any circumstance where the prohibition contained in CPR 20.1(3) could have effect.

[18] He submits that if the Court was to hold that these provisions were directory only, then the effectiveness of the many provisions in CPR setting out guidelines for the exercise of the Courts discretion in specified circumstances would be undermined.

[19] Counsel agrees that the overriding objective must be borne in mind by the Court to determine whether or not leave should be granted to amend pleadings but also states that it must be borne in mind that the overriding objective could also mean curtailing the opportunity to make unnecessary applications to the Court, such as an application where the Applicants did not avail themselves of the opportunity to make changes to his statement of case which could and should have been made at an earlier stage of the proceedings without the necessity of recourse to the Courts.

[20] He quotes Peter Gibson J in Vinos' case where the learned Judge states:

> "…… the Court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the Court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case…"

[21] In conclusion he said that the words of CPR 20.1(3) is so clear and jussive that the Court was precluded from permitting the making of the amendments to the Defendants' statement of case that the Court would otherwise have been inclined to permit.

[22] Counsel for the Respondent submitted that CPR 20.1(3) should not be given a restrictive interpretation. He states that the Court has jurisdiction as given to it by CPR Part 1 Rule 1 which states:

"The overriding objective

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
(2) Dealing justly with the case includes -
(a) ensuring, so far as is practicable, that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to the –
(i) amount of money involved;
(ii) importance of the case;
(iii) complexity of the issues; and
(iv) financial position of each party;
(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application of overriding objective by the court

1.2. The court must seek to give effect to the overriding objective when it-
(a) exercises any discretion given to it by the Rules; or
(b) interprets any rule."

[23] He also stated that Part 2.3 of CPR is of much importance in the determination of the matter. The said rule provides as follows:

> "The Interpretation Act of the Member State or Territory where a claim proceeds applies to the interpretation of these Rules in those proceedings."

[24] Section 3(6) of the Interpretation Act of the Laws of St. Vincent and the Grenadines provides as follows:

> "In every written law the word "shall" shall be read as imperative and the word "may" as permissive and empowering."

[25] Counsel stated that the Court must balance two competing imperatives. The first being the desirability that every point which a party reasonably wants to put forward in the proceedings must be aired. The second imperative is that the other party must be compensated in financial terms.

[26] Counsel submitted that the CPR and the principles on amendments after the limitation period, and section 35 of the Limitation Act of St.Vincent and the Grenadines Cap.90, were explored in detail by both parties and the learned Judge gave a considered and reasoned decision therefore much weight should be given to her finding and quoted from the Manual of Civil Appeals. In particular section 4.26 at page 47 which notes the Function of Appeal Court namely "the function of the appeal court, when considering the exercise of a discretion by the lower court is not immediately to exercise a discretion of its own, but rather to first consider whether the exercise of the Judge's discretion in the lower court must be set aside. If it is to be set aside, only then is the appeal court entitled to exercise discretion of its own. Hadmor Productions Ltd. V Hamilton[3]. It was held that an appeal Court must not interfere with a Judge's exercise of his or her discretion merely upon the ground that the Members of the Appellate Court would have exercised the discretion differently.

[27] In conclusion, I have reviewed and considered the various cases and pronouncements by authors submitted by Counsel. While it is true that the court have a general discretion to permit amendments where it is just and appropriate,

[3] 1983 1 AC 191 H.L.

and the overriding objective empowers the court with the responsibility of dealing with cases justly, which includes ensuring as far as is practicable, that the parties are on an equal footing, I also bear in mind the general principles with regard to amendments, that amendments should be allowed as long as they do not affect the substance of the claim or the relief sought.

[28] In this case, the matter commenced before the CPR2000 but by Part 73.3(3) became subject to CPR. The Respondent should then have become aware that the CPR would apply. The first case management conference was held on the 17th October 2001 almost three years before this application was filed.

[29] I agree with Counsel for the Appellants that the overriding objective does not in or of itself empower the court to do anything or grant to it any discretion residual or otherwise. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision that is being implemented or interpreted.

[30] The discretion of the court to permit changes to Statement of Case has to be considered with reference to CPR 20 1(3), changes to be made after the first case management conference. It is my view that the overriding objective cannot be used to widen or enlarge what the specific section forbids.

[31] In Charlesworth v Felay Roads Ltd 2000[4] it was held that an amendment should be allowed as long as there is no injustice to the other side "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". Can it be said that the granting of the amendments would cause no injustice and the injustice could be compensated by $20,000 costs? I think not, since the court would have to grant permission to the Appellants to amend their statement of case and also to expand their witness statements in order to address the new issues.

[32] With regards to CPR 2.3 which deals with the application of the Interpretation Act and section 3(4) of the Interpretation and General Provisions Act of St. Vincent and the Grenadines, it is my view that they must be considered with CPR 20 1 (3) which specifically states "unless" meaning that the court should not comply with a request unless the two conditions stated are satisfied. The section constrains the court from exercising the power to permit amendments to statement of case as stated above except where certain conditions are satisfied.

[33] Counsel for the Respondent has pointed out that on October 4, 2002 the Appellants were granted leave to amend their replies and Defences to Counterclaims during a case management conference. Why then did the

[4] 1 WLR 230

Respondent not immediately file this present application? It is my view that it could then be said that there was some change in the circumstances.

[34] A review of the parts of the CPR will show that each rule states the condition and circumstance why and when a Judge may exercise his or her general discretion, e.g. consequence of failure to serve witness statements under Rule 29.11 (2) states that the Judge may grant permission provided that there is a good reason, while under Relief from Sanctions Rule 26.8(2) states that if "failure to comply was not intentional" and "there is a good explanation for the failure". In this case changes to Statement of Defence Rule 20 1(3) states there must be "some change in circumstances which became known after the date of case management conference".

[35] The Respondent has had much time to consider how to present its case and has not done so. Counsel for the Respondent has not shown any change in circumstances known after the date of the case management conference. Following the words of May LJ in Vinos' case at page 789 where he said:

> "Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored".

The Judgment

[36] I am unable to decide this case in any other way because the language of the rule is pellucid. In all the circumstances I would allow the appeal and set aside the Order of the High Court with costs to the Appellants in the sum of $10,000.00.

Suzie d'Auvergne
Justice of Appeal [Ag.]