SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV 2009/343

BETWEEN:

PERCIVAL STEWART

Claimant

and

[1] HARLEQUIN PROPERTIES (CARIBBEAN) LIMITED
[2] HARLEQUIN PROPERTIES (SVG) LIMITED
[3] RIDGEVIEW CONSTRUCTION (SVG) LIMITED

Defendants

Appearances:

Mrs. Kay R. A. Bacchus-Browne for the claimant
Mr. Samuel E. Commissiong for the 1st & 2nd defendants

2012: May 29.

On Written Submissions

[1] **ACTIE M [AG.]:** This is an application for striking out the statement of claim; changes to statement of case.

[2] The claimant by statement of claim filed on 20th October 2009 claimed special damages, general damages, further and other reliefs against the first and second named defendants. The claimant alleges that he was employed by the first and second defendants as a painter in 2007 on the defendants' construction site. The claimant alleges that sometime in March 2008 he lost his footing, fell and suffered damages, during his employment on the site, as a result of a discarded cement bag left on the ground which covered a piece of steel. The claimant gave particulars of the injury and claimed special damages totaling the sum of $689,777.41.

[3] On 24th November 2009, the first and second defendants filed a defence disputing the claimant's claim. The defence avers that the 1st named defendant never carried on business in St. Vincent and the Grenadines and did not know in what circumstances it had been made a party to the claim. The defence admits that the 2nd defendant does business in St. Vincent & Grenadines but in 2006 contracted Ridgeview as an independent contractor with complete possession, management and control of the construction site in 2007 when the claimant suffered his damages. The second defendant states that the claimant was at all material times an employee of Ridgeview.

[4] The claimant by way of an amended statement of claim filed on 10th August 2010 added Ridgeview as a third defendant. In the amended claim the total sum for special damages was amended to $153,867.41 instead of the sum of $689,777.41 initially claimed.

[5] The first and second defendants by an amended defence filed on 5th October 2010 restated that they were not proper parties to the claim.

[6] On 26th October 2010 in a reply to the defence the claimant states that Ridgeview was an agent of the first and second defendants and at all material times was responsible for the damages suffered by the claimant, the first and second defendants having taken over and settled outstanding debts owed by Ridgeview.

[7] By a defence filed on 26th October 2010, the third defendant (Ridgeview) admits that it was engaged as a construction company on the site and terminated the claimant's employment when it became apparent that the claimant was unfit to work. Ridgeview states that it has since ceased to be connected to the construction site. Ridgeview neither admitted nor denied that that it was an agent or an independent contractor of the first and second defendants. Ridgeview at Paragraph 12 of the defence states **that if and to the extent it is held liable to the claimant, which it denies, it is entitled and shall claim an indemnity and/or contribution from the first and/or second defendant pursuant to CPR Part 18.3.** (My emphasis)

Striking out

[8] By application filed on 2nd June 2011 the first and second defendants apply to the court to strike out the claimant's claim with costs, on the ground that the pleadings disclose no reasonable cause of action against the first and second defendants. The application was supported by an affidavit of Simon John Terry, a solicitor for Harlequin Management Services (South West) Limited.

[9] By affidavit filed on 30th June 2011, the claimant opposes the application to strike out the claim.

The Test for Striking Out

[10] It is well settled law that the Court may strike out a statement of case under **CPR 2000** Rule 26.3 (1) if it appears to the Court that:

> "(a) ...
> (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim."

Additionally, Rule 26.1(2)(1) empowers the Court to dismiss or give judgment on a claim after a decision on a preliminary issue."

[11] The seminal test on an application to strike out was stated by Sir Dennis Byron CJ [Ag.], as he then was, in **Baldwin Spencer v the Attorney General of Antigua & Barbuda** Civil Appeal No. 20 A of 1977 when he said:

> "This summary procedure should only be used in clear obvious cases when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court". Striking out has been described as "the nuclear power in the court's arsenal and should not be the first and primary response of the Court... ." The Court must be satisfied that a party or that the statement of case 'or Defence" is unable to prove or defend allegations made against another party or that the statement of case or defence is incurably bad or that it discloses no reasonable ground for bringing or defending a case, and has no real prospect of succeeding at trial. The operative issue is whether there is even a scintilla of a defence',

[12] In this present claim the claimant was seriously injured on a construction site and suffered damages as a result. Liability and or indemnity are live issues that are to be determined between the parties. The first and second defendants allege that

the third defendant, Ridgeview, was at all material times an independent contractor employed to construct a tourist development for the defendants.

[13] Rigdeview in its defence filed on October 2010 admits that it terminated the claimant's employment when it became apparent that the claimant was unfit to work. Ridgeview neither admits nor deny that it was an agent or independent contractor of the first and second defendants. Ridgeview states at paragraph 12 of its defence that if and to the extent it is held liable to the claimant, which it denies, it is entitled and shall claim an indemnity and/or contribution from the first and/or second defendant pursuant to CPR Part 18.3. The issue of indemnity is claimed against another when there is a sufficient nexus.

[14] The claimant in his claim referred to statements made by CEO of the first and second defendants in the print media about settlement of debts owing by Ridgeview, the third defendant, which had been settled by the second defendant. The claimant made reference to undertakings given by the first and second defendants for payment of unsettled debts of Ridgeview. These are live issues to be ventilated and determined at the trial where further evidence will be provided in witness statement or otherwise.

[15] A statement of claim is not suitable for striking out if it raises a serious issue of fact or law which can only be properly determined by submissions or hearing oral evidence. I am of the view that the interest of justice requires that the matter proceed to trial. The claimant should not be stultified at this preliminary stage.

[16] Applying the seminal test for striking out and having regard to the issues to be determined between the parties, the application to strike out the claim or in the alternative summary judgment for the first and second defendants is dismissed.

Changes in the statement of Case

[17] The matter came up for case management before the Master on 30th May 2011 whereby standard case management directions were given.

[18] The claimant by notice of application with an accompanying further amended statement of claim filed on 6th July 2011 applies for leave to further amend the amended claim form and to add further particulars pursuant to CPR Rule 20.1. The application is supported by the claimants' affidavit dated 30th June 2011 in opposition to the first and second defendant's application to strike out the claim.

[19] The material terms of the propose further amendments are summarized below:

> "A correction of the name of the second defendant to read Harlequin Property (SVG) limited instead Harlequin Properties (SVG) limited
>
> "Paragraph 1 was amended to read "that the claimant was employed with the **third** defendant ..."
>
> Paragraph 4 was amended to read the **second** defendant at first transported the claimant ..."
>
> Paragraph 6 – the third defendant was the agent at all material times working for the other defendants in that at the end of the contract period between the third defendant and the other defendants, an agreement was signed whereby the second defendant agreed to take over and pay all the liabilities of the third defendant. A copy of this agreement was promised to the claimant and is still awaiting it and will make it available to the Honorable court as soon as the claimant receives same.
>
> Paragraphs 7-13 merely gives particulars of public statements made in the print media and elsewhere by the director and owner of the second defendant and particulars of transportation of the claimant to hospital after injury and follow ups.
>
> Paragraph 15- deals with the termination of the claimant by the third defendant and proposed arrangements for the transportation of claimant for medical attention and payment of medical bills.
>
> Paragraphs 16-21 give particulars of the companies standing at the companies registry and the relationship between the companies.
>
> In the Particulars of special damage the claim for 'loss of earnings with your company in the sum of $24,000.00 which was particularized in the amended claim form filed on 10th August 2010 was omitted."

The Law

[20] **CPR 2000** Part 8.7(1) provides the starting point for the court's determination of the issues relating to the claimant. Part 8.7(1) provides that the claimant must include in the claim form or in the statement of claim all the facts on which the claimant relies.

[21] **CPR 2000** Part 20.1(3) provides that:

> "the Court may not give permission to change a statement of claim 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 circumstances that became known after the Case Management Conference".

[22] Learned counsel for the first and second defendants by application filed on 21st July 2011 urge the court to strike out the claimant's application for leave to amend after the case management on the grounds that the application (i) discloses no reasonable ground for amending the statement of claim; (ii) case management having been held no change of circumstances of the claim has occurred since the date of the case management conference in which he did know or ought to have known and (iii) nothing in the accompanying further amended claim is new or was unknown at the said conference by the claimant and (iv) that the first and second defendants have no interest in the Buccament Bay Resort Ltd. In support of his argument counsel referred the Court to the case of **Bernard v Seebalack [2010] UKPC 15.**

[23] In **Ormiston Ken Boyea and Hudson Williams v East Caribbean Flour Mills** Barrow J states:

> "Part 20.1(3) of CPR 2000 is clear and unambiguous. The court has no discretion to allow an amendment to a statement of case after the conclusion of the Case Management Conference unless the claimant can bring its claim within the parameters of the rule".

[24] In determining whether the court should grant leave to amend after the case management conference consideration is to be given to the circumstances of the application by the claimant. The claimant in his application has not identified any change in circumstances which has occurred since the conclusion of the case

management conference which he did not know. The claimant relies on the affidavit filed on 30th June 2011 in opposition to an application by the first and second defendants to strike out the claim form. The affidavit in my considered view merely gave particulars to amplify the claimant's claim. The particulars did not provide any information which cannot be provided in witness statements.

[25] The Privy Council in **Bernard v Seebalack (Trinidad & Tobago) UKPC 15** referred to a passage of Barrow JA in **East Caribbean Flour Mills Ltd. V Boyea (St. Vincent and the Grenadines**, Civil Appeal No. 12 of 2006) in relation to CPR Part 20.1 (3) where he states;

> "45. However, I am firmly of the view that additional instances or particulars of a sufficiently made allegation do not constitute a change in the circumstances of the case.
>
> 46. If a party alleges misconduct of a certain nature, say misappropriating funds by making false entries in an accounting record, and gives 5 instances of false entries, and a closer look at the documents reveals a 6th false entry **I see no reason why the party should be prevented from giving particulars of it in his witness statement**, provided the requirements of fairness have been established and there has been no abuse of process or other disentitling conduct. I emphasise the distinction between changing a statement of case and supplying particulars to say that I expect the courts will be keen to ensure that one does not masquerade as the other. Decision will be made on a case by case basis".

Should the re-amendment of the statement of case be permitted?

[26] The first proposed amendment by claimant is to correct the name of the second defendant from Harlequin Properties (SVG) Limited to Harlequin Property (SVG) Limited. The claimant states that it was a genuine mistake which would not cause reasonable doubt as to the identity of the second defendant.

[27] Paragraph 4 of the proposed amended claim identifies the "second" defendant as the person who transported the claimant to the hospital after the injury.

[28] The total sum of legal fees and expenses of $153,867.41 is amended to reflect the total sum of special damages being claimed.

[29] In **Bernard v Seebalack**, the Privy Council held that:

> "The language of Part 20.1(3) is plain. It refers to a change to the statement of case (the pleadings) not a change on the nature of the case being advanced. It directs attention to the text of the statement of case. On a literal reading of the rule, *any* change to the text (however minor) is caught by it. But such an unreasonable interpretation cannot have been intended and is not necessary to give effect to the overriding objective. Thus, for example, the rule should be interpreted in such a way as to exclude from the meaning of "change" the correction of a typographical error..."

[30] Applying the statement of the Privy Council in **Bernard v Seebalack** (ibid), I am of the opinion that the proposed amendments outlined above are permitted under Part 20.1(3) as they do not constitute any fundamental change to the statement of case.

[31] I am of the view however that the other proposed amendments to the claim for which the claimant seeks the leave of the court to amend the statement of claim are not changes in circumstances that are within the parameters of CPR 20.1(3). The claimant has not advanced any proper reason for the further amendments after the case management conference. If the statement of case contains allegations which are sufficiently made so that it satisfies the requirement of Rule 8 there is no need to amend the statement of claim in order to provide particulars. Those particulars can be provided by way of further information or in the form of a witness statement.

[32] Lord Woolf MR in **McPhilemy v Times newspapers Ltd (1993) 3 All ER 775, 792J-793A:**

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is

that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rule."

[32] Upon review of the application it is clear that the claimant 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. No evidence has been shown by the claimant of any change of circumstances which has occurred since the date of the case management conference in which he did know or ought to have known.

[33] The proposed amendments in paragraphs 6-13 and 15-21 are in my view details of evidence in support of the claimant's pleadings. The documents identified in the exhibits are to be used, if permitted, by the court in support of the claimant's case. The statements and permitted documents upon which the claimant wishes to rely on can be provided for in witness statements in accordance with CPR part 29.4. A detailed witness statement and a list of documents can be used by the claimant to particularize its case.

[34] In my humble opinion the application to amend the statement of case after the Case Management Conference does not satisfy the requirements of **CPR 2000** Rule 20(1)(3) in relation to paragraphs 6-13 and Paragraphs 15-21. In passing, I note the amendment of CPR 2000 Part 20(1) which came into effect on 1st October 2011 subsequent to the application of the claimant and as a result does not apply.

Costs

[34] In **C.O. Williams Construction (Antigua) Ltd v Jennings Building Products Ltd.** Mitchell JA [Ag] states that **CPR 2000** Rule 65.11(3) makes it mandatory on an application to amend a statement of case that costs be awarded in favor of the respondent to the application unless there are special circumstances. The court has no discretion on whether or not to award costs following the application to

amend the statement of claim. The application before the court is threefold. The respondent was unsuccessful in the application to strike out the claim against the second and third defendants. The claimant partially fails on the application to amend the statement of claim. It is to be noted that the second and third defendants strenuously resist the claim. It was always alleged that the claimant was employed by Ridgeview, the third defendant, who was eventually made a party to the claim. The court is of the view that the claimant was dilatory in making the necessary changes in statement of claim. Case Management Conference having been conducted, the details in the claimant's application could have all been made in witness statements. Having regard to the mandatory provision of **CPR 2000** Rule 65.11 (3), costs in the sum of $500.00 are awarded to the first and second defendants to be paid by the claimant.

Order

[35] For the foregoing reasons:

(i) The application by the first and second defendants to strike out the claim against the first and second defendants is refused;

(ii) The corrections in the paragraphs (1), (2), (3) and the total sum of legal fees and expenses to read $153,867.41 are permitted as they do not offend **CPR 2000** Rule 20(1) (3).

(iii) The application of the second and third defendants to strike out the claimant's application for leave to further amend the amended claim form is granted to the extent of paragraphs 6-13 and 15-21 of the further amended claim with costs in the sum of $500.00 to be paid by claimant to the first and second defendant.

(iv) The heading of the statement of claim and all further documents relating to this claim are to be headed as in the further amended claim filed on 6th July 2011.

(v) The matter is to be listed for further case management directions.

Agnes Actie
Master [Ag.]