THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A. D. 2014

CLAIM NO. SKBHCV 2011/0391

BETWEEN:

PETER PROCOPE
Claimant

and

GAIL FLEMMING
Defendant/Counterclaimant

and

THE ATTORNEY GENERAL OF
SAINT CHRISTOPHER & NEVIS
Applicant/Defendant to Counterclaim

Appearances:-

Mrs. Angela J. Inniss - Hodge for the Claimant
Mr. Sylvester Anthony and Ms. Angelina Gracy Sookoo for Defendant/Counterclaimant
Mrs. Simone Bullen – Thompson Solicitor General and Ms. Nisharma Rattan-Mack for the Applicant/Defendant to Counterclaim

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2014: July 21

DECISION

[1] CARTER J. This is an application to the court by the defendant to the counterclaim seeking leave to amend the Statement of Case of the defendant to the counterclaim. The application was made orally on the first of three days set down for trial of the matter, no written application for such

amendment having been filed by the applicant. The application was made pursuant to Rule 20:1 (2) of the Civil Procedures Rules 2000 (CPR) whereby "the Court may give permission to amend a statement of case at a case management conference or *at any time on an application to the Court."* [emphasis supplied]

[2] Counsel for the applicant/defendant to the counterclaim submitted to the court that this sub-rule allowed the court, to hear an application to amend a Statement of Case even on the date of trial. In aid of her application, Counsel referred the court to the case of Bertha Francis v First Caribbean International Bank (B'dos) Ltd formerly CIBC Caribbean Ltd.[1]

[3] Counsel sought to amend two paragraphs of the defence of the defendant to the counterclaim. The first proposed amendment was to allow the deletion of a sentence, the second proposed amendment to allow a change from an 'admission of liability' to a 'denial of liability', in defence to the defendant's counterclaim.

[4] Counsel for the applicant/defendant to the counterclaim, outlined to the court that the late oral application was necessitated, as the discrepancy in the pleadings which she sought to amend, did not come to her attention until the morning of the trial. She went further to state that the amendment sought, was crucial to the case of the defendant to the counterclaim and for this reason, asked the court to dispense with the requirement for the defendant to the counterclaim to make the application to amend, in writing.

[5] With regard to the substantive application to amend, Counsel asked the court to accede to her application, specifically with regard to the matters to which the court must have regard on the hearing of such an application as set out in paragraph 4 of Practice Direction 20. Counsel reiterated that the applicant had made the application to the court promptly, after first becoming aware of the necessity to do so, on the morning of the trial.

[1] SLUHCV1998/0583

[6] She submitted that there would be no prejudice to the defendant if the amendments were allowed, as the witness statements for the defendant to the counterclaim and the Pre-trial Memorandum, filed on behalf of the defendant to the counterclaim both clearly indicated that party's position on the issues and matters touching the proposed amendments; that the matter upon which the admission had been made was a live issue in the mind of the defendant to the counterclaim notwithstanding what was set out in the original pleading. Further she submitted, the defendant would have had Notice of how the defendant to the counterclaim put his case and that the pleadings for which the amendments were now being sought were inconsistent with the case of the defendant to the counterclaim.

[7] Counsel also argued that this was a matter in which the defendant could be compensated in costs, while admitting that the trial date in the matter would have to be vacated. She further went on to state that there would be prejudice caused to the applicant/defendant to the counterclaim if the amendments were not allowed, as this would cause the truth of the case not to be dealt with and the true issues in the matter would not be ventilated at trial.

[8] Counsel for the Defendant, Mr. Anthony, objected strenuously to the application being heard orally. He pointed to the fact that Rule 20:1 (2) in referring to an application to amend a statement of case, must be taken to mean a written application. He drew the court's attention to the provisions of Practice Direction 20, specifically at paragraph 2.2. Paragraph 2 of the Practice Direction is in the following terms:

> *" 2. Applications to Change The Statement Of Case Where The Permission Of The Court Is Required*
>
> *2.1 The application may be dealt with at a hearing or, if Rule 11.14 applies, without a hearing.*
>
> *2.2 When making an application to change a statement of case, the applicant should file with the court:*
>
> *(1) the application and affidavit in support, together with*
>
> *(2) a copy of the statement of case with the proposed changes.*
>
> *2.3 Where permission to change has been given, the applicant should within 14 days of the date of the order, or within such other period as the court may direct, file with the court the amended statement of case.*
>
> *2.4 A copy of the order and the amended statement of case should be served on every party to the proceedings, unless the court orders otherwise."*

[9] In further support of his submission, that the court should only entertain the instant application if it was made in writing, Counsel also referred the court to CPR sub-rule 20:1 (5) pointing to the necessity for an amended statement of case to include a certificate of truth. Sub-rule 20:1(5) states that: "An amended statement of case must include a certificate of truth in accordance to rule 3:12."

[10] Counsel for the defendant invited the court to consider the cases of Kenrick Thomas v RBTT Bank Caribbean Limited[2] and Beacon Insurance Co Ltd v Liberty Club Limited[3]. In the case of Kenrick Thomas, Barrow JA dealt with an appeal from the decision of the master not to set aside a default judgment. In that case, the learned judge emphasized that the discretion to set aside in CPR 2000 was severely limited and could only be exercised if the conditions specified by CPR 13:3 were met in their entirety.

[11] Counsel for the defendant invited the court to find that it should only exercise its discretion to hear an oral application if the applicant had satisfied the provisions of the Rules. The applicant not having done so, with regard to the manner in which such an application was to be made as per paragraph 2:2 of Practice Direction 20, the applicant should be precluded making the application. Counsel's refrain was that "the court can only exercise discretion after Counsel has satisfied the Rules."

[12] Counsel for the defendant also dealt with the factors to which the court must have regard, pursuant to Rule 20:1(5) and Practice Direction 20, Paragraph 4, on an application to amend a statement of case. He submitted that the application had not been made promptly, that the defence to the counterclaim had been filed just shy of two years before the instant trial date. With regard to the prejudice to the applicant, he invited the court to take the position that the applicant should be unable to claim prejudice if the applications were not granted, as the applicant had not complied with the Rules; the applicant not having made a proper written application under Rule 20:1 (2).

[2] Civil Appeal No. 3 of 2005 (Saint Vincent and the Grenadines)
[3] Civil Appeal No. 29 of 2010 (Grenada); Civil Appeal No. 30 of 2010 (Grenada)

[13] Counsel for the defendant related to the court, the prejudice that would be caused to the defendant's case if the proposed changes were permitted. Mr. Anthony outlined that the defendant's entire case had been based on a certain footing, because of how the pleadings were set. He complained that, to allow the amendments, would deny the defendant the opportunity to have judgment on admissions or indeed summary judgment with regard to that aspect of the defendant's claim.

[14] Counsel was clear that the defendant could not be compensated in costs, as the amendments would affect the very core of the defendant's case; the admission, which it was sought to change by the amendment, was one of the pillars on which the defendant's case rested. He concluded that the trial could not proceed if the application for amendment was granted, as the defendant would have to consider whether different disclosure would now be requested of the other parties. Counsel also addressed the court on the matter of the administration of justice.

[15] Rule 11:6 of the Civil Procedure Rules 2007 states that:

> *"(1) The general rule is that an application must be in writing in form 6.*
> *(2) An application may be orally if –*
> *(a) the court dispenses with the requirement for the application to be made in writing; or*
> *(b) this is permitted by a rule or practice direction."*

[16] In the case referred to by Counsel for the defendant, Barrow JA was clear and strict in his interpretation of Rule 13:3. That rule states that "a court may set aside a judgment entered under Part 12 ***only if*** the defendant" satisfied the three conjunctive pre-conditions stated in the Rule. In the instant case, there are no pre-conditions for the exercise of the court's discretion to hear an application orally. The court considered all the circumstances of the case, having regard to the reasons advanced by Counsel for the defendant to the counterclaim for the oral application and especially given that the matter was set for a three day trial, that the court should dispense with the requirement for the application to be in writing and allow the Applicant to make the oral application to amend the statement of case.

In the case of Bertha Francis referred to above, Mason J. stated as the general proposition that :

> *"It is established that the court has a general discretion to permit amendments to a statement of case "however negligent or careless may have been the first omission or however late the proposed amendment" if it is considered that this is necessary to dispose of all the true issues arising between the parties and provided that it does not work in injustice to the other side."*

[17] The learned judge referred to the dicta of Gibson LJ in the case of Cobbold v London Borough of Greenwich 1999 CA that: "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 amendment can be compensated for in costs and the public interest in the efficient administration of justice is not significantly harmed." Mason J. concluded that: "at first blush permission to amend the basis of case at trial ought to be granted to the Claimant "as refusing may be an unduly harsh penalty and represent a windfall to the other side."[4]

[18] Having heard Counsel for the defendant and Counsel for the defendant to the counterclaim, and their submissions relating to the factors to which the court must have regard in considering an application to amend a statement of case, the court has also considered the fact that to deny the application, would not bring to an end the issues between the parties in this matter, it would not have the effect of deciding the main issues of fact which fall to be determined at trial.

[19] The court has considered especially, that the defendant would have had the benefit of the witness statements for the defendant to the counterclaim as well as the pre-trial memorandum of the defendant to the counterclaim, which would have alerted the defendant that on the matters that the defendant to the Counterclaim seeks to amend, that there was still a live issue to be determined.

[20] The court is also of the view that this is a matter in which the defendant can be compensated in costs.

[21] For these reasons, the court will accede to the application to amend. The trial date will be vacated. The applicant will file an amended statement of case within seven days hereof. The defendant will

[4] Blackstone's (op cit) p.315

be at liberty to file any reply within 14 days of being served with the amended statement of case of the defendant to the counterclaim.

[22] The court will allow costs of and arising on this application to the defendant.

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Marlene I. Carter
Resident Judge