

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **BVIHCV2015/0143**

Between

Chiverton Construction Company Limited

Claimant

and

- 1. James Douglas Turnbull**
- 2. Marcus Welch**
- 3. ONB Ridge Villa One LLC**

Defendants

APPEARANCES:

Ms. Ayodeji Bernard of counsel for the claimant

Ms Dancia Penn Q.C of counsel for the defendants

**2019: April 10
June 11**

Judgment

1. **ACTIE M:** This is an application filed by the claimant for leave to amend its statement of claim pursuant to CPR 20.1. For the following reasons, I will allow the amendment with costs to the defendants.

History

2. The claimant, a construction company, entered into a contract with the defendants on November 12, 2012 for construction works on the Oil Nut Bay, Ridge Villa 1. The claimant avers that the defendants unilaterally terminated the contract on or about February 21, 2014 and took control and custody of its tools left on the work site. The claimant filed a claim on 28th May 2015 seeking special damages in the sum of \$19,180.00, general damages for detinue and conversion and future loss arising for the conversion of its tools and equipment.

3. The defendants filed a defence with a counterclaim on 7th December 2015 and amended on 24th December 2015, seeking damages in the sum of \$388,000.00 for poor workmanship and fraudulent billings by the claimant. On January 27, 2016, the claimant filed a reply with a defence to the counterclaim stating that significant sums of money still remained unpaid by the defendants but this would be the subject of a further suit as the sums owed exceeded the high court's civil ceiling.
4. The matter came on for the first case management conference on 16th March 2016 and was referred to mediation. The parties failed to settle after several attempts at mediation and on 9th November 2016, case management directions for trial were issued. Both parties failed to comply with the timelines to file witness statements as they engaged in further discussions with a view to an amicable settlement. The attempts to settle failed and on 22nd March 2018, the Court varied the case management order, extended the time for the parties to file and exchange witness statements to 22nd May 2018 with a pre-trial review date of 23rd July 2018. The parties were given up to 30th May, 2018 to apply for further directions.
5. On 30th May 2018, the claimant filed an application to amend the statement of claim to include a sum of \$910,300.00 for unpaid invoices with damages for breach of contract and aggravated damages. The application is naturally opposed by the defendants.
6. The application for the amendment came on for hearing on June 25, 2018; October 2, 2018; December 3, 2018 and February 11, 2019, respectively. The matter was adjourned on each occasion to facilitate settlement discussions and for the filing of a consent order, if settled sooner. The parties failed to settle and the application for the leave to amend came on for hearing on the 19th April 2019.

Law and analysis

7. 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. The applicable principles guiding the court when exercising its discretion in an application to amend a statement of case after the first case

management conference are to be found in CPR 20.1, Practice Direction 5 of 2011 and in authorities¹.

8. Rule 20.1(2) gives the factors to which the court must have regard when considering an application to amend a statement of case and I outline and deal with each head seriatim.

a. How promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make.

The claimant avers that the application was made promptly where it became apparent to current counsel on record during the preparation of the witness statement that all the relevant matters that can be dealt with by the high court civil jurisdiction had not been specifically pleaded.

The defendants in response state that the claimant had from 2016 mentioned the possible new claim for damages and should have then acted promptly to seek to amend the claim.

b. The prejudice to the applicant if the application were refused.

The claimant avers that it would be severely prejudiced since a substantial aspect of its claim will not be placed before the court and the claimant may run the risk that the claim may be statute barred if not litigated upon at this stage. The claimant also says that the issue of res judicata may arise since the proposed amendments form part and parcel of the matters in dispute in this claim.

The defendants state that the claimant will not be prejudiced as it had always been open to it to file the amended claim but failed to so do.

c. The prejudice to the other parties if the change were permitted.

The claimant avers that there is no obvious prejudice to the defendants who can be compensated by the payment of costs.

Counsel for the defendants aver that they will be severely prejudiced by the late amendment as it would be costly to file an amended defence due to logistical problems as all the defendants reside outside the jurisdiction.

¹ Mark Brantley v Dwight Cozier SKBHCVAP 2014/0027 delivered on August 27,2015

d. Whether the trial date or any likely trial date can still be met if the application is granted.

The claimant avers that the pre-trial review date has been vacated and no trial date has been set for the hearing of the matter.

Counsel for the defendants states that granting the amendment will substantially prolong the proceedings and adversely impact other litigants in lost judicial time.

e. The administration of justice.

The claimant avers that it is necessary to have all the issues in the case dealt with by the court and to preserve the resources of the court.

Analysis

9. Permission to amend a statement of case requires an exercise of the court's discretion taking into account the particular facts of the case in hand. The discretion whether or not to allow an amendment is always a question of striking a balance. The court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties along with the administration of justice.
10. Promptitude is one of the considerations when considering an application for leave to file an amended statement of case. However, lateness of an application for leave to amend a statement of case is a relative concept. A very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. The history of the amendment, together with an explanation for its lateness is also an important factor in the balancing exercise.
11. The matter before the court has had a protracted history since filing, with several adjournments on account of the parties wishing to pursue an amicable resolution of their dispute. The pre-trial review date was vacated due to the ongoing settlement discussions and also due to the disruptions caused by Hurricane Irma. At present a trial date has not been set.

12. The claimant has been represented by various legal practitioners since the commencement of the claim for detinue and conversion. The claimant's then attorney-at-law who filed the defence to the counterclaim was of the view that a separate claim was to be filed since the claimant would be seeking damages for a sum in excess of the civil jurisdiction. This in my view was misconceived as the high court civil division has unlimited jurisdiction unless otherwise expressly stated by statute. The Commercial Court Division Rules provide for commercial claims with a value of \$500,000.00 or over to be filed in the commercial division. However, the Commercial Division judge even with a claim for that value may refer any claim filed within the division back to the civil division and also parties in a civil claim may apply for the claim to be transferred to the commercial division².
13. The Court must always bear in mind the principles inherent in the Overriding Objective when attempting to strike a fair balance. The court when interpreting Part 20.1 must give effect to the overriding objective of enabling it to deal with cases justly, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and to avoid multiplicity of proceedings.
14. It would be more in keeping with the overriding objective and proper administration of justice to allow the amendment to the statement of case so that all the issues arising in the dispute between the parties can be distilled in this one proceeding. This would save time and expense and would utilize the court limited resources in a most efficient way as the issues arising and damages claimed by both sides arose from similar facts.
15. In my judgment and striking the relevant balance, I am of the view that the prejudice to the claimant if the amendments are not allowed outweighs the prospect of injustice to the defendants as the claimant would be deprived of its inability to advance its amended case. I am of the view that a measure of costs would be appropriate to compensate the defendants.

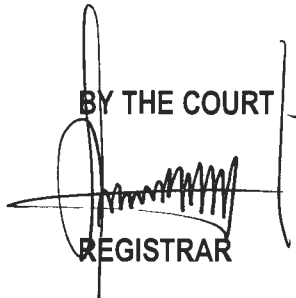
ORDER

16. For these reasons, I will allow the amendment with costs to the defendants and order and direct as follows:

² Rule 69A 4 (3) (4)

1. The claimant's application for leave to file an amended statement of claim is granted.
2. The claimant shall file and serve the amended statement of claim within 7 days of this order granting leave.
3. The defendant may file and serve an amended defence and counter claim within twenty eight days (28) of service by the claimant.
4. The claimant may file an amended reply and defence to the counter claim within fourteen (14) days of service by the defendants.
5. Thereafter the matter shall be listed for further case management conference.
6. Costs to the defendants in the sum of \$2,000.00 to be paid prior to the next case management conference.
7. The parties are further encouraged to engage in discussions for an amicable settlement and inform the court if settled prior to the next case management conference.

AGNES ACTIE
MASTER , HIGH COURT

BY THE COURT

REGISTRAR