

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2022/0290

BETWEEN:

ESTHER DEVELOPMENT LIMITED

Claimant/Applicant

AND

VILLA CORNUCOPIA LTD.

Defendant/Respondent

Appearances: John Carrington K.C. and Reisa L. Singh of Kendall Law, Counsel for the Applicant
Alex Hall Taylor K.C., Simon Hall & Christopher McCarthy of Carey Olsen (BVI) L.P.,
Counsel for the Respondent

**2024: November 20th
December 9th**

RULING

[1] **FELIX-EVANS J, (Ag.):** On 6th February 2023, the court issued an injunction order against the Defendant/Respondent (hereafter 'the Respondent') in the following terms:

"1. An interim injunction is granted restraining the Defendant whether acting by itself and/or its servants and/or agents and/or another person acting upon the Defendant's authority from using Parcel 15 Block 4739B Virgin Gorda South Registration Section located at Little Trunk Bay Estate, Virgin Gorda ('the Property') as an inn or for any commercial purpose except single booking rentals of the Property from March 01, 2023 until the hearing and determination of this claim or until further order."

- [2] The Claimant/Applicant (hereafter 'the Applicant') alleged breaches of paragraph 1 of the order by the Respondent and by application made on 2nd May 2023 pursuant to CPR 2000 Part 53.3, sought orders against the Respondent (to wit, sequestration of its assets and a fine) for its alleged breaches ('the Contempt Application'). The hearing of the Contempt Application was fixed for 3rd June 2024.
- [3] On 29th May 2024, almost one year after the filing of the Contempt Application and less than 7 days before the date fixed for its hearing, without applying for and/or obtaining the court's leave, the Applicant filed an amended and re-amended notice of application for contempt (hereafter 're-amended application notice'), after informing the Respondent on the same day that it intended to do so. The re-amended application notice stated that "the affidavits of Robert Merrick and Michael Dabrowski, filed in support of the Application...accompany this Application." No new affidavits were filed with the re-amended application notice and it is accepted that the affidavits referred to therein were the affidavits filed in support of the original application notice.
- [4] In its submissions filed on 31st May 2024 for the Contempt Application hearing, the Respondent addressed the re-amended application notice, objecting to same.
- [5] The Contempt Application was not heard on 3rd June 2024 as the parties were engaged in settlement discussions for most of that day and when these discussions proved futile, the Court fixed a date in July 2024 for the hearing of preliminary issues which the Respondent wished to address, including its opposition to the re-amended application notice.
- [6] On 12th June 2024, the Applicant filed this application for permission to amend and re-amend its application notice as amended and re-amended and filed on 29th May 2024 and for an order deeming the re-amended application notice properly filed and served on 29th May 2024.
- [7] At the July 2024 hearing, the court heard some of the preliminary matters and subsequently gave a ruling on them. The court adjourned the hearing of the other preliminary issues to 20th November 2024 and fixed the hearing of the Contempt Application for four days in May 2025.
- [8] The preliminary matters which this court is to determine are:

- a. whether the Applicant should be granted permission to re-amend its application notice as applied for; and
- b. whether the original or re-amended application notice are defective in that they have not adequately particularized the allegations of breach.

The Applicant's Submissions

[9] The Applicant relies on CPR Parts 11.13, 26.1(2)(k) and (y) and 26.9 and the court's inherent jurisdiction to support its application to re-amend its application notice and submits that the application should be granted for the following reasons:

- (i) the re-amendments are not substantive as they do not add any new grounds. Instead, they add particulars to existing grounds by way of clarification to ensure that the requirements of Part 53 are fully met;
- (ii) allowing the re-amendments would save time and costs as it would obviate the need for the filing of a completely new Contempt Application which the Claimant would be at liberty to do;
- (iii) the re-amendments are not prejudicial to the Respondent as the Respondent had sufficient time to file submissions addressing them before the hearing date of 3rd June 2024. Further, as it turns out, the hearing of the Contempt Application has been adjourned to dates in May 2025. This long adjournment allows the Respondent sufficient time to consider and respond to the re-amendments. In light of the new hearing date, the Respondent's argument concerning lateness of the application is now merely academic;
- (iv) Part 53.8(2) gives the court a discretion to hear a contempt application that is served less than 7 days before the hearing if in all the circumstances, the court considers that sufficient notice has been given. In light of this discretion, it would be inconsistent for the court to refuse an amendment to an application notice which simply clarifies existing grounds on the orders sought;
- (v) Part 11.13 carries no sanction and it is therefore open to the court put matters right where there is a failure to comply with procedure, as here, where the Applicant filed the re-amend application notice without the leave of the Court;
- (vi) The Applicant has generally complied with all other relevant rules, practice directions, orders and directions in the past; and
- (vii) in view of the overriding objective, the administration of justice demands that the application for re-amendment be granted.

[10] In response to the Respondent's argument that the application notice and re-amended application notice are defective on the ground of insufficiency of particulars of breach, the Applicant submits that the particulars in both application notices are sufficient to enable the Respondent to know the case that it has to meet. Further, the affidavits in support thereof provide evidence that makes the Respondent aware of the case it has to meet. The Applicant relied heavily on the statements of principle on the purpose and extent/scope of particulars in contempt proceedings in **Deutsche Bank v Sebastian Holdings**¹.

The Respondent's submissions

- [11] The Respondent opposes the re-amendment application on the following grounds:
- (i) The re-amended application notice was filed without the Court's leave 2 working days before the date fixed for the hearing of the Contempt Application, in breach of CPR 11.13;
 - (ii) In view of the quasi-criminal nature of contempt proceedings, the Court's discretion to permit amendments should be exercised sparingly;
 - (iii) the re-amendment application was made very late and without providing the court with any or any satisfactory explanation for the lateness;
 - (iv) the proposed re-amendments are substantive as they add to the grounds of contempt and they are wide-ranging;
 - (v) some of the proposed re-amendments are not done in accordance with the CPR and consequently, they are not easily identifiable;
 - (vi) the proposed re-amendments are under-particularized;
 - (vii) the proposed re-amendments rely upon facts and matters that cannot, as a matter of interpretation of the terms of the injunction order, amount to a breach;
 - (viii) the re-amendment is an attempt at circumventing the Respondent's right to silence and to make a case of no case to answer.

¹ [2020] EWHC 3556 (Comm)

- [12] The Respondent contends that both the original and re-amended application notices lack proper particularization of the exact nature of the alleged breaches. Specifically, the alleged breaches set out in the notices “*are vague and unparticularized allegations without reference or specificity to the restrictions imposed on [the Respondent]. They therefore require [the Respondent] to interpret the evidence and attempt to work out for itself exactly how it is said the breaches have occurred.*”

Discussion

- (a) *Whether the Applicant should be granted permission to re-amend its application notice as applied for.*

- [13] CPR 11.13(2) requires a party who intends to amend an application within 7 days of the date fixed for its hearing to obtain the permission of the court. CPR 26.1(2)(k) gives the court the power to extend or shorten the time for compliance with any rule even if an application for extension is made after the time for compliance has passed; CPR 26.1(2)(y) empowers the court to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective; CPR 26.9 empowers the court to put matters right where the consequences of failure to comply with a rule has not been specified.
- [14] In the case of **Agents Mutual Ltd v Moginnie James Ltd**², the court stated that an application notice is not a statement of case to which the English counterpart to CPR 20 applies. That notwithstanding, this court is of the view that the principles that guide its considerations for the amendment of pleadings would apply to its considerations for the amendment of application notices.
- [15] These principles were discussed in **Marinor Enterprises Limited et al v FCIB**³ where it was stated at [7]:
- “The grant or refusal of an application to amend calls for the exercise of the court’s discretion. In exercising that discretion, the overriding objective – with its emphasis on enabling the court to deal with cases justly – is of the utmost importance. Just disposal of a case is not, however, the preserve of one party. The court has to perform a balancing act as it seeks to strike a fair balance. The factors relevant to doing so depend on the facts of the case and as such cannot be exhaustively listed. However, they are likely to include the history as regards the amendment and an explanation as to why it is being made late, the prejudice*

² [2016] EWHC 3384 (Ch)

³ DOMHCVAP2013/0003

which will be caused to the applicant if the amendments is refused; the prejudice which will be caused to the opposing party if the amendment is allowed; and whether the text of the amendment is satisfactory in terms of clarity and particularity. There is a heavy burden on a party applying for a very late application to amend. An explanation for the lateness is called for and the court must consider the consequences for the opposing party. Where an amendment imperils a trial date which has been fixed, this is a significant factor to put into the scale. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission.”

[16] In **Quah Su-Ling v Goldman Sachs International**⁴, Mrs. Justice Carr stated that lateness of an application to amend “*is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of explanation for its timing and a fair appreciation of the consequence in terms of work wasted and consequential work to be done.*” She described a very late amendment as one made when the trial date has been set and where permitting the amendment would cause the trial date to be lost.

[17] Mr. Justice Stuart-Smith in **Vilca and others v Xstrata Ltd**⁵ accepted that the circumstances in which amendments are applied for are “infinitely variable” and that each application will require the exercise of the court’s discretion that takes into account the particular facts of the case at hand. Previous decisions are useful to the extent that they provide statements of principle; otherwise, they are merely illustrations of the court’s exercise of discretion in different circumstances.

[18] The main target of the Respondent’s opposition to the re-amended application notice is paragraph 5. Paragraph 5 of the original application notice reads:

“5. *Contrary to and in intentional breach of paragraph [1] of the Injunction Order, the Defendant has continued to conduct commercial activities on the Property after March 01, 2023 and in particular has carried the following acts which constitute breaches of the said order:*

- *Continuing to offer sale of breakfast to non-guests on 15th March 2023 thereby operating as a commercial restaurant;*
- *Continuing to operate the Property as an Inn with food and alcohol for sale which service is available to non-guests;*

⁴ [2015] EWHC759 (Comm) at [38]

⁵ [2017] EWHC 2096 (QB) at paragraph 22

- Continuing to promote the property as an Inn via social media marketing throughout March 2023;
- Continuing to operate profiles on travel sites like Expedia.com and TripAdvisor which allow booking of individual rooms of the Inn as recently as 25 March 2023;
- Advertising the Property on 27 March 2023 for commercial activities such as corporate retreats, weddings and photoshoots with the ability to host up to 20 persons along with its sister property;
- Renting individual rooms at the Inn for periods commencing 1 March 2023; 3 April 2023; 22 March 2023; 24 March 2023; 7 April 2023 and 8 April 2023.

[19] Paragraph 5 of the re-amended application notice reads:

“5. Contrary to and in intentional breach of paragraph [1] of the Injunction Order, the Defendant has continued 1) **‘using Parcel 15 as an Inn’** and 2) **‘using Parcel 15 for any commercial purpose except single booking rentals’** to ~~conduct commercial activities on the Property~~ after March 01, 2023 and in particular has carried the following acts which constitute breaches of the said order:

- Continuing to operate the Property as an Inn **by maintaining bookings for individual rooms and negotiating the booking of individual rooms with potential guests thereby using Parcel 15 as an Inn and for commercial purposes other than single booking rentals;**
- Renting individual rooms at the Inn for periods commencing 1 March 2023; **8 March 2023;** 3 April 2023; 22 March 2023; 24 March 2023; **25 March 2023; 26 March 2023;** 7 April 2023 and 8 April 2023; **10 April 2023 thereby using Parcel 15 as an Inn and for commercial purposes other than single booking rentals;**
- Continuing to promote the property as an Inn via social media marketing throughout March 2023 **thereby using Parcel 15 as an Inn and for commercial purposes other than single booking rentals;**
- Continuing to operate profiles on travel sites like Expedia.com and TripAdvisor which allow booking of individual rooms of the Inn as recently as 25 March 2023 **thereby using Parcel 15 as an Inn and for commercial purposes other than single booking rentals;**
- Continuing to offer sale of breakfast to non-guests on 15th March 2023 thereby operating as a commercial restaurant **and thus using Parcel 15...for any commercial purpose except single booking rentals;**

- *Offering food and alcohol for sale ~~which service is available to non-guests~~ **thereby ‘using Parcel 15 ... for any commercial purpose except booking rentals;***
- *Advertising the Property on 27 March 2023 for commercial activities such as corporate retreats, weddings and photoshoots with the ability to host up to 20 persons along with its sister property **thereby ‘using Parcel 15...for commercial purposes except single booking rentals;**”*

[The new text introduced by the re-amendments are in bold]

[20] The court notes that the allegations in the re-amended paragraph 5 are not in the same order as in the original paragraph 5; that there are seven bulleted allegations of breach in the re-amended paragraph 5 whereas there are 6 bulleted allegations of breach in the original paragraph 5; the allegation of breach at the second bullet of the original paragraph 5 is split into two allegations of breach in the re-amended paragraph 5 (first and sixth bullets); that at the second bullet of the re-amended paragraph 5 (counterpart to sixth bullet of original paragraph 5), additional dates are stated for commencement of rentals of individual rooms at the Inn; that generally the re-amendments comprise the adoption of the language of the injunction order.

[21] Having considered each re-amended allegation against its corresponding original allegation, the Court does not agree with the Respondent that the proposed re-amendments add new grounds of contempt and/or are wide-ranging; they do not require the Respondent to meet any new or fresh allegation which it was not confronted with in the original application notice or supporting affidavits. The re-amended application notice alleges additional instances of an original ground, that is, renting of individual rooms. These additional instances are not new to the Respondent as that evidence is contained in the supporting affidavits of Robert Merrick and Michael Dabrowski, the last of which was filed on 28th August 2023 and to which the Respondent filed affidavits in reply. The court finds that the proposed re-amendments substantially comprise the adoption of the language of the injunction order to particularize the prohibited activity that has been breached by the Respondent’s alleged actions. The court therefore agrees with the Applicant that the proposed re-amendments are not substantive in nature and only seek to clarify and reinforce what was already alleged.

- [22] Considering the nature of the proposed re-amendments and the fact that the grant of an application to re-amend on 29th May 2024 would unlikely have caused the original hearing date to be vacated, the court does not agree that the application was very late. In any event, for unrelated reasons, the hearing of the Contempt Application is listed for May 2025, so this lateness argument is now moot.
- [23] The new hearing date for the Contempt Application gives the Respondent sufficient time to respond to the re-amended application notice, if it considers it necessary.
- [24] Taking into account all the relevant facts and considerations, the court is of the view that permitting the re-amendment will not result in any prejudice to the Respondent and would satisfy the overriding objective of the CPR.

(b) Whether the original or re-amended application notice are defective in that they have not adequately particularized the allegations of breach.

- [25] CPR 53.7(1)(a) states that an application for a sequestration order must specify the “*exact nature of the alleged breach or breaches of the order ...*”.
- [26] In **Deutsche Bank AG v Sebastian Holdings Inc.**⁶, Mrs. Justice Cockerill DBE conducted a review of the authorities on the degree/extent of particulars required in a contempt application and concluded that as it is with pleadings, the notice of application should enable the contemnor to understand the case that he or she has to meet. According to the Honourable Madam Justice at paragraph 80 “*[t]he authorities carefully read indicate that the Application Notice needs only to set out a succinct summary of the Claimant’s case, to be read in the light of the relevant background known to the parties; it is for the evidence to set out the detail. So, the requirement for particularity must not “produce a result which unnecessarily makes a mockery of justice”: Harmsworth, Woolf LJ at 1685-1686.*”

⁶ Paras 68 - 94

- [27] The Respondent participated in the injunction hearing and was present, through its representative, Rosemary Giacinto, at the delivery of the judgment on 6th February 2023. The judgement was served on the Respondent subsequently. The Respondent therefore knew or ought to have known the conduct that the injunction prohibited.
- [28] Against this background, the Respondent served with the original application notice would have had no doubt as to the substance of the breaches alleged therein and the case that it had to meet. The re-amended application notice did not reduce the particulars of the allegations of breach and so the same finding holds.
- [29] The court orders:
- i. Permission is granted to the Applicant to amend its Notice of Application for Contempt in terms of the Re-Amended Notice of Application filed on 29th May 2024;
 - ii. The Re-Amended Notice of Application for contempt as filed on 29th May 2024 is deemed to be properly filed;
 - iii. Costs hereof in the cause.

**Heather Felix-Evans
High Court Judge (Ag.)**

By the Court

Registrar