

THE EASTERN CARIBBEAN SUPREME COURT:

IN THE HIGH COURT OF JUSTICE
Civil Division

COMMONWEALTH OF DOMINICA

Claim Number DOMHCV2019/0107

Between

H.H.V. WHITCHURCH & COMPANY LIMITED

Claimant

-and-

AL MOTORS LINTIED

Defendant

Before Master Alvin Shiva Pariagsingh

Appearances: Joffrey Letang for the Claimant; and
Gina Dyer – Munro for the Defendant.

2022: June 29
October 04.

DECISION

*Defendant's application for permission to
amend its defence and counterclaim*

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application seeking permission to amend its defence and counterclaim filed in this matter.¹

[2] In support of the application is the joint affidavit of Garth Lewis and Daryl Lewis, Directors of the Defendant. They contend that they retained new counsel in this matter on May 23, 2022 and based on advice received, it was absolutely necessary to amend their defence. This application was filed the same day. The Applicants contend that this application was made promptly, the amendments sought to be made arises out of

¹ Application filed on May 23, 2022

the same or substantially the same facts as contained in their defence filed on May 16, 2019. They also contend that if this application is not granted, they would be severely prejudiced as they will not be able to properly present their defence to this claim. They also contend that the Claimant is not prejudiced as it will have the opportunity to file an amended reply if necessary and any prejudice can be compensated. Exhibited to the affidavit as "GLD1" is a draft of the amended defence and counterclaim in respect of which permission is sought.

- [3] The proposed amendments are quite involved. The defence of the Defendant not contracting with the Claimant has not be removed. All the Defendant seeks to do is set out in greater detail material facts on this issue. What the amendments seek to do is expand on the non-contracting point to say that the Defendant engaged with DHL and that the Claimant was acting as agent for DHL. The introduction of DHL also sees a shift in the pleadings from allegations made against the Claimant being ascribed to DHL in most instances. This again is consistent with the original defence, that there was no contract between the parties. The Defendant also seeks to identify and annex several documents in the proposed draft amended.
- [4] In respect of the counterclaim, much like the defence, all that is done is the counterclaim more clearly sets out material facts. No new remedy is claimed. In the relief where 'damages' alone was claimed the proposed amendment identifies the damages claimed as damages for breach of contract and damages for negligence. Both these causes of actions are pleaded in the original defence. Special damages however, was added to this claim in the proposed amended defence. In the original counterclaim, only 'damages' was claimed.
- [5] The Claimant opposes this application. In opposition to the application is the affidavit of Ian Dorival filed on June 14, 2022. The Claimant say that the Defendant was self-represented until May 23, 2022 when they appeared with their current counsel. This is despite the fact that an Attorney did file an acknowledgment of service on their behalf.

This fact is consistent with the Court's record. The first time the Defendant appeared with counsel in this matter was on May 23, 2022.

- [6] The Claimant contends that in considering promptness the Court ought to take into account that this application was made 3 years after filing a defence. The Claimant further contends that no details are given about the Defendant's intention to retain counsel or attempts made to retain counsel throughout the entire 3 year period while the matter was before the Court.
- [7] The Claimant contends that despite the application being made soon after retaining an Attorney, the Defendant's gross delay in soliciting the advice of an attorney who could have advised sooner of the intended amendments must be seen as untimeliness and prejudicial to the Claimant.
- [8] The Claimant further contends that the proposed amendments can be considered a total new defence and counterclaim. This the Claimant contends will necessitate the filing of further pleadings which would further delay the progress of the case before the Court.
- [9] The Claimant further contends that any resulting prejudice cannot be compensated by an order for costs. Further, it is contended that the Defendant's action must be seen as a waste of judicial time and would be a further waste of the Court's timetable and resources would be affected.

LAW

- [10] Changes to statements of case (which include a defence) are governed by **Part 20 Rules 20.1 of the Civil Proceedings Rules 2000 as amended** which state:

'20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.

(2) 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.

(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –

- (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;
- (b) the prejudice to the applicant if the application were refused;
- (c) the prejudice to the other parties if the change were permitted;
- (d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;
- (e) whether the trial date or any likely trial date can still be met if the application is granted; and
- (f) the administration of justice.’

CONSIDERATION OF THE 20.1 (3) FACTORS:

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

[11] The evidence is that the Defendant became aware that it there was a desire to change its defence on May 23, 2022 when it retained new counsel. On the same day, a notice of acting and this application was filed. The Claimant’s grouse on promptitude is not with the delay in making the application after retaining new counsel. It is with the delay in seeking advice or to retain counsel earlier.

[12] The Court’s record show that a mediation referral order was made in this matter at the first case management conference on February 18, 2020. Paragraph 4 of that order states; “These proceedings are stayed pending the outcome of mediation”.

[13] This matter then suffered the misfortune of being plagued with extensions of the mediation referral order for a period of 2 years 1 month and 17 days. On April 04, 2022 the mediation referral order was not extended. The matter was however adjourned to May 24, 2022 to allow the Defendant the opportunity to retain and instruct counsel.

[14] It is on this day, April 04, 2022 that the stay on the proceedings was discharged.

Promptitude in my view cannot take into account the 2 years 1 month and 17 days the claim was stayed pending mediation. Prior to the claim being stayed, up to the day of the first case management conference in February 2020, the Defendant could have amended without permission.

[15] The period between the mediation referral order not being renewed and the filing of this application is 1 month and 19 days. The period between the filing of the claim and the staying of the claim is 9 months and 2 days. The overall delay in making this application from the filing of the defence is therefore 10 months and 21 days.

[16] This period when separately analysed reveal that; from the filing of the defence to the first case management conference some 9 months and 2 days later the Defendant was acting on its own behalf through its directors. I am not considering the time that the matter was stayed pending mediation. The second period of delay is between the hearing on April 04, 2022 and the filing of the application, that is 1 month and 19 days. The Defendant contends that during this period discussions were had between shareholders.

[17] From April 11 the Defendant sought appointments with Counsel. Counsel was however unable to immediately assist as the Defendant did not have copies of the any documents. Counsel was also indisposed in preparation for the upcoming Court of Appeal sitting on the week of April 25. Counsel did however obtain copies of the documents filed from the Court office and was able to draft and file this application on May 23, 2022 the day before the matter was scheduled for a case management conference.

[18] In my view the delay on the second period has been properly explained. Delay is always contextual. In the context of this case, I am of the view that the delay in making this application was not inordinate.

The prejudice to the applicant if the application were refused; and to the other parties if the change were permitted:

[19] If this application is refused, the Defendant will not be able to lead vital evidence of the third party arrangement it seeks to rely on with DHL. Further, several material documents which are relevant and necessary were not identified or annexed to the original defence which are material and will be of assistance to the Court in determining the issues between the parties. The overall prejudice would be that the Defendant would not be able to advance facts which are relevant to advance their full defence to this claim.

[20] The prejudice to the Claimant would be that it would have to consider the factual additions and answer them. This can be done through an amended reply and defence to counterclaim. This will no doubt result in additional legal fees being incurred by the Claimant. There is also the delay in progressing this matter towards a trial.

[21] In determining where the balance of prejudice lies, I am mindful of the fact that this claim is at the embryonic stage. After 3 years in the system, regrettably this claim is still at pleadings stage. Whilst that in itself is unacceptable, the greater prejudice would be caused to the Defendant in refusing the amendment.

Whether any prejudice to any other party can be compensated by the payment of costs and or interest:

[22] As stated above, the prejudice to the Claimant by the granting of the application will largely be a financial loss. This can be compensated in an order for costs.

[23] In terms of the future progress of this matter, very short and stringent timelines will be given to ensure that quick progress of this matter. This will be with an accompanying order that the parties are not at liberty to vary the case management order of the Court by consent.

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

[24] This matter is still at case management stage. Standard disclosure has not been made nor have witness statements been filed. The matter is far from pre-trial review and no likely trial date has been set.

The administration of justice:

[25] The administration of justice favours the determination of cases on the merits. Blenman JA (as she then was) in **Mark Brantley v Daniel Cozier** ² stated that:

“In exercising its discretion with regard to the appellant’s application to amend his defence, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs. The amendment should be allowed regardless of how negligence or careless the omission from the statement of case may have been, and no matter how late the proposed amendment is ...”

[26] For completeness I find Counsel’s reliance on the Trinidad case of **Winston Padmore v James Morgan** ³ to be misplaced. At the time of that decision (June 04, 2007) Part 20 Rule 20.1 (3) ⁴ of the Civil Proceedings Rules 1998 as amended (Trinidad and Tobago) read:

‘The court may not give permission to change a statement of case **after the first case management conference** unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.’

[27] There is no corresponding rule in our CPR. In particular, our rules does not enjoin the Court from granting permission to amend unless a change in circumstances after the first case management conference is demonstrated.

² SKBHCVAP2014/0027

³ CV2006/00277 (Trinidad and Tobago)

⁴ This rule has been changed altogether in Trinidad by virtue of Legal Notice 126 of 2011.

ORDER:

[28] IT IS HEREBY ORDERED that:

1. Permission is granted to the Defendant to file and serve an amended defence and counterclaim in terms of the draft exhibited to the supplemental affidavit of Garth Lewis and Daryl Lewis as "SGDL1" filed on June 01, 2022 on or before 3:00pm on October 10, 2022; and
2. The Defendant shall pay the Claimant's costs of the application filed on May 23, 2022 to be assessed by this Court in default of agreement within 28 days from today's date.

[29] AND IT IS FURTHER ORDERED that:

1. Permission is granted to the Claimant to file and serve an amended reply and amended defence to counterclaim on or before 3:00pm on October 31, 2022;
2. The parties are to make standard disclosure in accordance with Part 28CPR in the prescribed form on or before November 14, 2022; any document(s) not disclosed pursuant to this order shall not be relied on or admitted into evidence without permission of the Court.
3. The Claimant shall file a list and bundle of the agreed documents and documents not agreed for use at the trial, such bundle shall be countersigned by Counsel for the Defendant on or before November 28, 2022 ; this bundle shall be used at the trial as the third bundle required by Part 39 Rule 39.1 (c) CPR;
4. The parties are to file and exchange their witness statements (or summaries) to stand as evidence in chief at the trial of this claim on or before January 31, 2022 no witness in respect of whom a witness statement or summary is not filed

in compliance with this order will be permitted to give evidence at the trial of this claim without permission of the Court;

5. The parties are granted liberty to file and serve any interlocutory applications at least seven (7) days before the next hearing;
6. This matter is adjourned to February 15, 2023 for a further case management conference.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar