

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 0172 of 2018

BETWEEN:

[1] **SUMITOMO MITSUITRUST (UK) LTD**
[2] **STERLING TRUST (CAYMAN) LIMITED**
(in its capacity as Trustee of the ZAM Specialist
Opportunity Liquidating STAR Trust)
[3] **ZAM ASSET FINANCE FUND**
[4] **ZAM SPECIALIST OPPORTUNITY LIQUIDATING STAR TRUST**
Claimants

and

SPECTRUM GALAXY FUND LTD

Defendant

Appearances:

Mr. Peter McMaster QC, with him Mr. Fraser Mitchell of Appleby, for the claimants
Mr. Timothy de Swardt, with him Mr. Merrick Ricardo Watson of Kobre & Kim BVI, for
the defendant

2020: April 23;
May 4.

JUDGMENT

[1] **JACK, J [Ag.]:** It has been said that pleadings:

“fulfil an important function in the conduct of litigation. They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that

may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds.”¹

- [2] In the current case, the claimant wishes to serve a reply to the defendant’s defence. To determine whether it can do so, it is necessary to examine the current system of pleadings in the Eastern Caribbean. Before reaching that determination, and in deference to Mr. de Swardt’s arguments for the defendant, I need to look at how we have got to where we are.

The development of the system of pleadings

- [3] It has long been recognised that balancing the conflicting purposes of a system of pleading, as summarised in para [1] above, has never been easy. The history of the reform of pleadings is littered with failure. The object of common law pleadings was to produce either an issue of law which the full court could determine or an issue of fact which could then be left to the jury at *nisi prius*.² Until 1705 pleadings could only produce one issue.³ The effect was that the plaintiff’s declaration (the precursor of our statement of claim) was met by the defence. The plaintiff could join issue with the defence, but if he wanted to meet the defence with further averments, he needed to serve a reply. The defendant in turn could serve a rejoinder, the plaintiff a surrejoinder, the defendant a rebutter and (lastly) the plaintiff a surrebutter. All these pleadings were exchanged sequentially until an issue of either law or fact was joined. A key feature of this form of pleading is that it is *responsive*, in other words, after the initial pleading, each pleading responds to the previous pleading until an issue is joined.
- [4] Pleadings at common law were largely formulaic, giving the parties little information about the case. Despite the availability of all these pleadings up to the surrebutter, defendants would often simply plead the general issue (a blank

¹ Bailey v Federal Commissioner of Taxation (1977) 136 CLR 214 at 219.

² Or occasionally other means of proof of facts, such as by a search of the Court’s records if an averment of *res judicata* was made.

³ 4 Anne c 16 section 4.

denial), without any of the special pleading theoretically available.⁴ This resulted in retrials having to be ordered on the basis that the plaintiff had been taken by surprise at trial.

[5] To remedy this problem, the judges of the three Courts of Common Law made the **Hilary Rules 1834**.⁵ These required most matters to be specially pleaded, with the full panoply of replies, rejoinders, rebutters etc, all in responsive form. The results, however, were disastrous.⁶ Any technical failure of a pleading could be made the subject of a special demurrer. Particularly egregious was that these could be brought to the full court by the loser after a jury had returned its verdict at *nisi prius*. Success on the demurrer would mean the party who won on the facts still lost on the basis of what might have been a minor drafting infelicity which caused the other side no prejudice at all.

[6] The injustices caused by the intricate rules of special pleading were somewhat alleviated by reforms brought about by the **Common Law Procedure Acts 1852 and 1854**,⁷ however these still involved pleading law rather than facts. There was still a responsive backwards and forwards in the pleadings until the parties joined issue. (This style of pleading continued to be used in New South Wales until 1972, when the legislature finally fused law and equity.⁸) The **Judicature Acts 1873 and 1875**⁹ substantially changed the form of pleading, so that the parties had to plead the facts on which they relied. The **Rules of the Supreme Court**¹⁰ originally introduced by the 1873 and 1875 legislation continued to govern civil litigation in England until 1999. The object, however, was still to reach a joinder of issue. As such the RSC still required that pleadings be responsive, so that if the plaintiff was, for example, to confess and avoid an averment in the defence, he

⁴ Blackstone's Commentaries Vol 3 pp 305-306.

⁵ Reported 2 Crompton & Meeson 651. The Hilary Rules were made under the Civil Procedure Act 1833 (3 & 4 Will IV c 42) section 1.

⁶ See Holdsworth, "The New Rules of Pleading of Hilary Term 1834" (1923) 1 Cambridge LJ 261.

⁷ 16 & 17 Vict. c 76, 17 & 18 Vict. c 125.

⁸ Supreme Court Act 1970, Act No 52 of 1970, Statutes of New South Wales.

⁹ 36 & 37 Vict. c 66 and 38 & 39 Vict. c 77.

¹⁰ The RSC were from 1883 made by subsidiary legislation. The last consolidation was in 1965 by SI 1965 No 1776.

needed to plead that in his reply. It was not open to the plaintiff to “get his reply in first” by pleading the confession and avoidance anticipatorily in the statement of claim. Provision was made (with leave of the court) to serve a rejoinder and the other ancient forms of responsive pleading.

[7] All of that has gone with the Eastern Caribbean Civil Procedure Rules. The CPR requirements¹¹ are as follows:

“8.7 (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

(2) The statement must be as short as practicable.

(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.

(4) If the claimant seeks recovery of any property, the claimant’s estimate of the value of that property must be stated.

(5) The statement of claim must include a certificate of truth in accordance with rule 3.12.

8.7A The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.”

[8] The CPR requirements for the defence are these:

10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) Such statement must be as short as practicable.

(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

(a) are admitted;

(b) are denied;

(c) are neither admitted nor denied, because the defendant does not know whether they are true; and

¹¹ There are special requirements for both the statement of claim and the defence in personal injury claims, but I do not reproduce these.

- (d) the defendant wishes the claimant to prove.
- (4) If the defendant denies any of the allegations in the claim form or statement of claim –
- (a) the defendant must state the reasons for doing so; and
 - (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.
- (5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not –
- (a) admit it; or
 - (b) deny it and put forward a different version of events;
- the defendant must state the reasons for resisting the allegation.
- (6) The defendant must identify in or annex to the defence any document which is considered to be necessary to the defence.
- (7) A defendant who defends in a representative capacity must say –
- (a) what that capacity is; and
 - (b) whom the defendant represents.
- (8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12.”

[9] The general scheme is thus fairly clear. All matters of fact on which the claimant relies should be in the statement of claim (amended, if necessary, to meet points pleaded in the defence); all matters of fact on which the defendant relies should be in the defence (again amended if necessary to respond to amendments to the statement of claim). There is no need to plead points of law, even matters such as the **Limitation Act 1961**¹² or the **Statute of Frauds 1677**¹³ which needed and still need to be pleaded under the English RSC and the English CPR: see **Commodo Holdings Ltd v Renaissance Ventures Ltd**.¹⁴

¹² No 43 of 1961, Laws of the Virgin Islands.

¹³ 29 Car. II c 3.

¹⁴ BVIHC (COM) 0045/2013 (delivered 26th July 2019) at para [44], on the Statute of Frauds Amendment Act .1828 (better known as Lord Tenterden's Act), 9 Geo. IV c 14.

[10] Now CPR 10.9(1) provides:

“A claimant may file and serve a reply to a defence —
(a) 14 days after the date of service of the defence; or
(b) at any time with the permission of the court.”

(The 14 day period is extended in the Commercial Division to 21 days: CPR 69A.6.)

[11] There is, however, no indication that this provision is intended by a sidewind to alter the general scheme of the CPR that everything in dispute should be in the statement of claim and the defence. Rather, it appears to be a practical measure. In many cases, instead of incurring the expense of amending the statement of claim, it will be simpler and cheaper to put in a short reply, if there is a limited point which needs to be made arising from the defence. There is nothing in the rule which indicates that the old RSC requirement for sequential responsive pleadings must be adopted. Such an interpretation would be contrary to CPR 8.7, 8.7A and 10.5. In deciding whether an allegation should go in a reply or in an amended statement, the Court should in my judgment be guided by case management principles and apply the overriding objective. It should not be bound by rules of procedure which have ceased to apply in this jurisdiction.¹⁵

[12] The modern approach to pleadings is to ensure that an opposing party has proper notice of the case against him, not to look mechanically at whether the old technical rules of pleadings have been observed. As Pereira CJ held in **Cedar Valley Springs Homeowners Association Incorporated v Pestina**:¹⁶

“[19]... [I]t is now well settled that with the advent of witness statements the strictures to which pleadings were required to conform in earlier pre-CPR times have now been ameliorated with the advent of the CPR,

¹⁵ See the very much reduced scope for requests for further information under CPR 34.1 as against the RSC procedure of making a request for further and better particulars: *Renova Industries Ltd v Emmerson International Corp* (BVIHC (COM) 2013/0160, delivered orally 18th June 2019 with written hand-down on 12th July 2019).

¹⁶ ANUHCVP2016/0009 consolidated with ANUHCVP2016/0010 (delivered 18th January 2017, unreported).

where, once the case is sufficiently pleaded to enable the party to know the case which he has to meet, fuller details may be fleshed out in the witness statements."

The approach in Trinidad and Tobago

- [13] Mr. de Swardt for the defendant sought to rely on the CPR of Trinidad and Tobago. The relevant Trinidadian Rule provides:

10.10(1) A claimant may not file or serve a reply to a defence without—
(a) the permission of the court; or
(b) if it is to be filed before a case management conference, the consent of the defendant.

(2) The court may only give permission at a case management conference.

- [14] In **Mayfair Knitting Mills (Trinidad) v McFarlane's Design Studios Ltd**¹⁷ Pemberton J sitting in the High Court of Trinidad and Tobago held, citing **Blackstone's Civil Practice 2001** (on the English CPR) at para 27.2, that the English approach, whereby a reply had to be responsive to the defence, applied. A reply was thus (a) required in cases where an answer was to be made to averments in the defence and (b) limited to matters which are so responsive.
- [15] The effect of this approach can be seen in the subsequent Trinidad case of **Gail Austin-Pinder v Massy Stores (Trinidad)**.¹⁸ The claimant slipped and fell in the defendant's supermarket. The proposed reply was a 14 paragraph document. Mohammed J, in considering the application under CPR 10.10, had to produce a 15 page judgment. He concluded that much of the reply was an embellishment of the statement of claim and thus not strictly responsive to the defence. Various other points, such as the appropriate rate of interest, could simply be part of the legal submissions at trial, he held. He considered that most of the reply was

¹⁷ CV 2007 – 002865 (delivered 30th June 2008) (High Court of Trinidad and Tobago).

¹⁸ CV 2016-02391 (delivered 27th September 2018) (High Court of Trinidad and Tobago).

inadmissible as being non-responsive and the rest unnecessary. He refused permission to serve the reply.

- [16] In this Territory, under the different rules of our CPR such a case is in my judgment better approached as a matter of case management. Dealing with the issue on case management principles obviates the detailed analysis necessary under the Trinidadian approach. It would in my judgment be consistent with the Court's duty under CPR 1.1(2)(e) to allot only "an appropriate share of the court's resources" to a case.

The current application

- [17] The factual background to the current application is set out in Mr. Terence Wong's first affidavit, where he says:

"3. This action concerns shares in an open ended investment company ('Fund'). The claimants invested in the Fund and received shares in return for their investment. Another investor ('Pentagon'), who invested in the Fund after the claimants, was given preferential terms by way of a side letter. Shares in the Fund were redeemable on notice. The notice period was determined by the directors of the Fund. Pentagon was given a shorter notice by way of a secret side letter and redeemed taking advantage of the shorter notice period.

4. The claimants maintain that when the Fund issued Pentagon with shares on the terms of the side letter it acted in breach of the Fund's memorandum and articles of association and in breach of a warranty to the effect that no subsequent investor would receive preferential terms ('warranty'). They also maintain that a representation was made to them in terms of the warranty and claim relief in respect of further share subscriptions that they claim were induced by the misrepresentation. They also claim that they were unfairly prejudiced when Pentagon were issued shares on preferential terms...

5. In its defence the defendant maintains that the claimants were not entitled to rely on any statement not contained in an offering memorandum or incorporated documents ('OM') because the OM itself contained a statement that any Information or representations made otherwise should not be relied upon. [The defendant describes this exclusion clause as the 'OM Limitation'.] The OM is pleaded and the relevant passage appears in full in the Defence.

6. There was an order for the exchange of witness statements, which provided for a second round of witness statements in answer to the first. The defendant's first witness statement made the same point as had been made in the defence by reference to the OM and this point was addressed in the claimant's witness statement in answer. By the time this point came to be addressed in this witness statement the claimant's thinking about the case had developed. Further (as is normal in litigation) and the claimants in their witness statement made a point in answer to the defendant's point on the offering memorandum, which I explain below.

7. The alleged warranty and representation were to the effect that no other shareholder would better terms than the claimants — terms that gave them preferential treatment over the claimant. The OM itself says that the only terms on which shares would be offered were those in the OM. It is for that reason that the OM contains the statement relied upon by the defendant. The corollary of the statement relied upon by the defendant is that all Investors in the Fund would be issued shares on the same terms (absent a reissued OM with different terms). The claimants on realizing this made the point in their evidence in answer that the statement in the OM did not assist the defendant because the OM was in the same terms as the warranty.

8. On considering the case as a whole after the exchange of witness statements (as is normal in litigation) the claimants reached the view that a short reply should be served in which this point was specifically pleaded."

[18] The defendant's response in Mr. de Swardt's skeleton (omitting references and adapting the capitalisation) is this:

"20. In reliance on the OM Limitation, the defendant has pleaded:

20.1. At paragraph 8.3 of the defence, that the claimants are not entitled to rely on a due diligence questionnaire which contains the first of the two representations relied upon by the claimants, namely the 'Preferential Terms Representation'.

20.2. At paragraph 9.5 and 13.6 of the defence, that the claimants were not induced to invest by the Preferential Terms Warranty or the Preferential Terms Assurance. The Preferential Terms Assurance is the second and final alleged misrepresentation relied on by the Claimants in their claims for breach of warranty, misrepresentation, negligent misrepresentation, and unfair prejudice.

21. On its face, the draft reply purports to respond to paragraph 8.3 of the defence. The issue raised in paragraph 8.3 of the defence is whether the claimants were entitled to rely on any representations other than those in the OM (the 'Reliance Issue').

22. Far from addressing the Reliance Issue — which would not in principle be inherently objectionable (although it would really be a matter for evidence) — the draft reply attempts to:

22.1. Plead a new representation, pieced together from disparate parts of the Offering Memorandum and Share Class Particulars, that 'shares would be offered only on the basis of the redemption terms contained in the Share Class Particulars' (the 'Alleged OM Representation')

22.2. Plead that even if the defendant is right on the Reliance Issue, 'the result is the same' because the Alleged OM Representation is in the same terms as the Preferential Terms Representation and Assurance.

23. The Court is invited to scrutinise that language in the final paragraph of the draft reply very carefully. The claimants are pleading an alternative case, based on a new representation made at a different time and from a different source and in a different manner, purportedly giving rise to the same relief sought in the [amended statement of claim] (the 'Alternative Case').

24. The Alternative Case could easily be described as 'a "new" case', a 'second bite of the cherry', or 'an opportunity to restate the claim.' The case law is quite clear that this not permissible in a reply.

25. The guidance from **Atkins** is that '[a] reply is only necessary where the defence raises further issues which require definition or where the claimant wishes to limit costs by admitting aspects of the defence.'¹⁹ The draft reply does neither of those things. On its own terms, it advances the claimants' Alternative Case in the event that the defendant is right on the Reliance Issue.

26. Since the claimants have not pleaded the Alternative Case in their statement of claim, the defendant cannot set out its case in response in its defence.

27. The scheme of the CPR is that a claimant must plead all the facts on which it relies in its statement of case (CPR 8.7), and the defendant should then plead in defence the facts on which it relies (CPR 10.5). These are important rules, violation of which attract condign consequences (Rules 8.7A and 10.7).

¹⁹ Atkins Court Forms, Vol. 14(1) (2019 ed.) at para [284].

28. The claimants are well aware that they must plead their Alternative Case, if they are to rely on it, and it should not simply be a matter of evidence... The claimants have belatedly realized that if the defendant is right on the Reliance Issue, the claimants' claims for misrepresentation, breach of warranty, negligent misrepresentation or unfair prejudice would face insuperable difficulties.

29. However, if the claimants are to plead and rely on their Alternative Case, the defendant must be allowed to plead its response.

30. As Mr. Watson explains, that is especially important because the claimants' alternative case is factually wrong... Further, according to the claimants, they only realized the Alleged OM Representation could be made out when filing their supplemental witness statements in late November 2019. How, then, they were induced to invest by the Alleged OM Representation in 2006 is hard to follow. These are all factual matters that ought to be properly pleaded and then dealt with in witness statements, the deadlines for which have long closed."

Relief from sanctions

[19] Before reaching my conclusion on whether to allow the reply to be served, I should deal with a point raised by Mr. de Swardt based on delay. The case management orders in this matter were made by Adderley J on 16th May 2019. The current application was only issued on 13th March 2020. CPR 10.9(1)(a) (as varied by CPR 69A.6) provides for the claimant to serve its reply within 21 days of service of the defence. If the claimant does not timeously serve its reply, it needs the Court's permission under CPR 10.9(1)(b). Mr. de Swardt submit that, even if there is an implied sanction for failure timeously to serve the reply, it may not be served without leave. The Court should apply its case management powers analogously with **Carleen Pemberton v Mark Brantley**²⁰ even if the checklist for relief for sanctions in CPR 26.7 and 28.8(2) and (3) does not need to be applied in terms.

[20] I agree that there is no implied sanction for failure to serve the reply within 14 or 21 days. The Court of Appeal in **KMG International NV v DP Holding SA**²¹

²⁰ SKBHCVP2011/009 (delivered 14th October 2011, unreported).

²¹ BVIHCP2017/0013 (delivered 18th April 2018, unreported).

refused to recognise the concept of an “implied sanction” which had been adopted by the English Court of Appeal in relation to the English CPR in **Sayers v Clarke Walker (A Firm)**.²² Our Court of Appeal held:

“[26] It is our view that the decision of the Privy Council in **Keron Matthews** ²³ in considering provisions of the CPR of Trinidad and Tobago (on all fours with ours) rejected once and for all the notion of an implied sanction as espoused by **Sayers** and has thus settled the matter. At para 15 Lord Dyson stated:

‘Rule 26.6(2) [our CPR 26.7(2)] provides that where a party has failed *inter alia* to comply with any rule, “any sanction for non-compliance **imposed** by the rule ... has effect unless the party in default applied for and obtained relief from the sanction” ... In the view of the Board, this is aiming at **rules which themselves** impose or specify the consequences of failure to comply.’ [Court of Appeal's emphasis.]

[27] This Court holds a similar view, as earlier expressed in **Pemberton** and endorsed in **C.O. Williams**,²⁴ and for the sake of clarity and completeness, adopts the statements of the Privy Council in **Keron Matthews**. We accordingly observe and would have been prepared to hold, were it necessary, that our CPR makes no room for implying sanctions and none should otherwise be implied in any case.”

[21] **Pemberton** was a case about extending time for appealing, where the Rules gave no express power to do so in relation to appeals. In the current case, there is an express power to allow a reply after 14 or 21 days. In my judgment in deciding whether to give permission to serve the reply, I need only apply the usual case management tests, not the much more stringent tests in CPR 26.8(2) and (3). The approach in **Pemberton** would be relevant if CPR 10.9(1)(a) stood alone, but CPR 10.9(1)(b) gives an express power to serve a reply after the time in CPR 10.9(1)(a) has expired. In my judgment CPR 10.9(1)(b) requires the Court to apply the same considerations as would apply to an application to amend the statement of claim.

²² [2002] EWCA Civ 645, [2002] 1 WLR 309.

²³ Attorney General v Keron Matthew [2011] UKPC 38.

²⁴ C.O. Williams Construction (St Lucia) Ltd v Inter Island Dredging Co Ltd. SLUHCVP2011/017 (delivered 19th March 2012, unreported).

Discussion

- [22] I turn then to the question whether to give permission for service of the reply. In practice, there are three possibilities: (a) give permission for service of the reply; (b) give permission to re-amend the statement of claim to plead the matters in the proposed reply; and (c) refuse permission altogether. In my judgment, in determining which of these three possibilities to approve, I have to take a holistic view of the case and consider how best it should be case-managed.
- [23] My starting point is to consider the nature of the matters which the claimant wishes to add. Mr. de Swardt says that the new matters amount to an “Alternative Case” (his capitals). This in my judgment overdramaticises the point. The new representation is just a fairly minor tweak on the representations already pleaded. I think that it is technically a new case, but it is very closely bound up with the existing averments. Although Mr. de Swardt says that it will fail on the facts, that is not a matter which I can determine at this stage, so I proceed on the basis that it is arguable.
- [24] The second point is to consider whether there is any prejudice to the defendant or whether allowing the point to be made will interfere with the timetable for trial. The position is that disclosure and exchange of witness statements have occurred. However, neither party has sought to set the matter down for trial. The time estimate has been reduced to three days. The Court is likely to be able to accommodate a trial toward the end of the year or early next year. There are interlocutory applications, including for specific disclosure, listed before me on 18th May 2020. There is thus ample opportunity for any further disclosure to be given and any supplemental witness statements to be served.
- [25] All of these matters are strongly in favour of allowing the claimants to take the new point. Mr. de Swardt says there has been delay. This is true to a degree, but I accept the claimants’ assertion that they only thought of the point fairly recently. That is often the way when late applications to amend are brought and the same must in my judgment go for an application to serve a reply late. Given the

absence of prejudice I do not consider on the facts of this case that delay is a strong point in the defendant's favour.

[26] Of the three possible outcomes, I therefore reject (c). The choice thus comes down to allowing the late service of the reply or permitting the claimants to re-amend. Mr. de Swardt takes the point that, in the absence of the ability to serve a rejoinder, the defendant would be unable to plead to the matters pleaded in the reply. For the reasons I have set out above, I do not accept that this is the law. Because pleadings do not in my judgment have to be responsive, the defendant can amend its defence to deal with matters raised in the reply.

[27] Nonetheless in my judgment on case management grounds it is likely to be clearer if the proposed new points are made by way of amendment to the existing amended statement of claim. A trial judge is likely to be assisted by seeing the way the case has developed in the same document. Further time is likely to be saved, because the claimants' pleaded case will be clearer.

Conclusion

[28] Accordingly, I shall refuse to permit the reply to be served out of time, but I shall permit the claimants to re-amend the amended statement of claim to plead the matters in the proposed reply and for the defendant to make consequential amendments to its defence. There is a supplemental issue as to whether it is still necessary to have a pre-trial review, but I shall revisit that on 18th May 2020.

[29] As to costs, I shall reserve costs to 18th May 2020, but my preliminary view is that, since this is a case management decision, the costs of the application should be costs in the case. It is true that I have not granted permission to serve the reply, but the defendant has lost on the substance of the matter. Subject to any submissions counsel may make on 18th May 2020, the honours are roughly even. My preliminary view is that the costs of and occasioned by the amendments should be paid by the claimants in any event.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar