

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2016/0565

BETWEEN:

KENNETH MEADE
HILDA MEADE

Claimants/Applicants

and

CLEVELAND SEAFORTH
BRIAN GLASGOW as Joint Receivers of
ANTIGUA OVERSEAS BANK LIMITED (In Receivership)

Defendants/ Respondents

APPEARANCES:

Mr. Hugh C. Marshall Jr. for the Claimants

Ms. Kathleen Bennett and with her Ms. Cherise Archibald for the Defendants

2018: January 18th
October 18th

Oral Judgment

- [1] **Wilkinson J.:** On 16th November 2016, Mr. and Mrs. Meade, husband and wife (“the Meades”), filed their claim form and statement of case. On 5th December 2016, they filed an amended claim form and amended statement of case. The essence of their claim is that the Meades wish to prevent Mr. Seaforth and Mr. Glasgow (“the Liquidators”) from enforcing the terms of legal charges in favour of Antigua Overseas Bank Limited (“the Bank”) and selling their property registered as **Registration Section: St. Phillips South, Block:32 3286A Parcel 210.**
- [2] The Court is well familiar with this matter having heard and delivered an oral decision on an application for an interim injunction. From the records on file, the denial of the interim injunction was appealed. There was no stay pending the appeal.
- [3] There being no stay pending appeal, pleadings were deemed closed and the suit proceeded to its case management conference before the Master on 25th July 2017. A case management order was

made on the said date. Amongst other orders for disclosure and witness statements, the pre-trial review was fixed for 18th January 2018.

- [4] From the records on file, the Court of Appeal heard the appeal of this Court's denial of the interim injunction on 8th November 2017, and judgment was delivered on 9th November 2017. The interim injunction was denied by the Court of Appeal.
- [5] When the matter came on for pre-trial review on 18th January 2018, the Court was faced with an application filed by the Meades on 10th January 2018, seeking leave to further amend their amended claim form and amended statement of case.
- [6] By the draft further amended claim form, the Meades seek to amend their 2nd prayer by (a) deletion of the words "First Named" and inserting "Borrower and or the Claimants", and (b) amend the 4th prayer by deletion of the name "Hilda Meade" and inserting "the Second-named Claimant".
- [7] By the draft further amended statement of case, the Meades seek to (a) at paragraph 2 delete "Second Named" and insert "Claimants" and delete Mr. Meade as sole proprietor of the property, (b) at paragraph 4 add that neither Mrs. Meade nor Mr. Meade is under an obligation to pay; (c) by a new paragraph 6(a) there is added a pleading that no demand was made of the borrower Emerald Springs Villas Ltd. at any time in accordance to with the provisions of the Registered Land Act; (d) paragraph 10 (c) deleted "First Named" and inserted "Borrower and or Claimants", and 10 (e) inserted "therefore, neither Claimant is under an obligation".
- [8] The grounds in the Meades' application were:
 - (i) "The Meades with their Counsel in the latter part of December 2017 reviewed their statement of case and observed that it does not best reflect their original instructions and their case;
 - (ii) The Meades will be greatly prejudicial (prejudiced) if the amendment is not permitted as they will not be able to advance an essential aspect of their case for the consideration of the Court;
 - (iii) The Receivers (Liquidators) will have sufficient time to present their defence (amended defence) to the amendment and it cannot reasonably take them by surprise as the Meades have argued this aspect in interlocutory proceedings prior;
 - (iv) No trial date has been fixed, and therefore the amendment would not occasion the vacation of any trial date;
 - (v) The administration of justice is best served by allowing the Parties to fully ventilate their case which also affords the Parties a clearer picture going into mediation;
 - (vi) It is just and equitable."
- [9] An affidavit in support of the application was filed by Ms. Anthea Joseph, a litigation clerk within the chambers of Counsel for the Meades. She deposed that:

- (i) "Following a court of appeal hearing on an interlocutory appeal in the matter, a meeting was convened between the Meades and their Counsel who had conduct of the matter. The meeting was held on or about 21st December, 2017 to discuss the court of appeal hearing and the future of this suit.
- (ii) During that meeting it became apparent that the Meades instructions were not fully reflected in the statement of case and the Attorneys were there and then instructed to make the appropriate amendments which has now been done and is reflected in the attached draft further amended claim form and further amended statement of case exhibited.
- (iii) A review of the file reflects that this matter has not been to case management as yet, nor been referred to mediation as yet. However, the claim form and statement of case have already once been amended on the 6th December, 2016.
- (iv) In the circumstances I am informed by my Principal and do verily believe that the permission of the Court must be sought prior to filing any further amendment.
- (v) Given the stage of proceedings there is no real prejudice to the Liquidators if the amendment is permitted.
- (vi) If the amendment is not permitted the Meades will not at trial be able to fully ventilate their true case.
- (vii) In the circumstances we hereby pray that the Court exercise its decision to grant the Meades permission to amend their claim form and statement of case."

[10] On 16th January 2018, Mr. Seaforth filed an affidavit opposing the application. The Court observes that his paragraph 8 is a submission on law and will have no regard to it. See **Civil Procedure Rules 2000** rule 30.3 on the contents of affidavits.

[11] Mr. Seaforth deposed that:-

- (i) "The claim herein was initially filed on 16th November 2016. It was then amended on 5th December 2016. By application filed on 10th January 2018, the Meades seek to further amend the claim. The only new factual issue raised in the draft further amended statement of case is whether demand was made of the Borrower (Emerald Springs Villas Limited) and the consequence of the same.
- (ii) The Liquidators object to the proposed amendments on the ground that the proposed amendments have no prospects of success even if granted. We rely on the following grounds:
 1. The matter has proceeded all the way to the court of appeal where the Meades' appeal was dismissed.

2. Mr. Kenneth Meade, was present in court before the high court judge and he believes also the court of appeal.
 3. During the period of the hearing before the Judge and during the court of appeal there was no indication that alleged instructions were not followed by the Meades' attorneys.
 4. The Meades have not given evidence.
 5. The affidavit of Anthea Joseph does not disclose what the alleged instructions were and when they were given to the attorneys.
 6. There is no explanation given as to why the proposed amendment was not made when the claim was first amended more than a year ago, or why the Meades have decided to make their application only after the court of appeal hearing.
 7. The fact that no demand was made of the Borrower (Emerald Springs Villas Limited) would have been known to the Meades, especially to Mr. Meade who is a Director of the said company, from the time the claim was first filed in November 2016. The Meades have proffered no explanation for their excessive delay in seeking to amend their claim.
- (iii) Further, at paragraph 4 of the affidavit of Anthea Joseph it states that "this matter has not been to case management as yet, nor been referred to mediation as yet". This statement is untrue. The case management conference was in fact held on 25th July 2017 and Mr. Meade was present in Court. The case management order was filed on 28th July 2017 by the Meades' Attorneys. A copy of the said order was attached. The case management order also notes that the Parties were not of the view that mediation was likely to assist in resolving the issues in dispute.
- (iv) The Liquidators will be significantly prejudiced if the Meades' application was granted at this late stage in the proceedings. The Liquidators have already filed and served their list of documents and witness statements, and are ready for trial. Further, the delay that will be caused by the granting of the Meades' application and the attendant costs will also be prejudicial to the Liquidators as the proposed amendment is without merit."

Law

[12] The **Civil Procedure Rules 2000** rule 20.1(2) (as amended in 2014) provides:

"20.1(1)...

(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 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.”

- [13] The UK Civil Procedure Rules are dissimilar in that they do not lay out the 6 factors that the Court must consider in assessing the Meades’ application.

Findings and Analysis

- [14] As the Court sees the amendments, save for the one (1) in the amended claim form which simply wishes to replace the words “Hilda Meade” with “the Second Named Defendant”, they in a nutshell show, that the Meades (i) are seeking to make Mrs. Meade a party to the proceedings in the fullest sense of the word as she is added in all respects by the new reference to “Claimants” where before the reference was either to Second Named Claimant or First Named Claimant, and (ii) make the allegation that there was no demand for payment on the borrower, Emerald Springs Villas Ltd.
- [15] The Court observes at this juncture that Mr. Seaforth states that the proposed amendments have no prospects of success even if granted. Unlike Rule 13.3 (setting aside a default judgment) the factor of prospect of success is not a consideration for the Court on an application for leave to amend.
- [16] Rule 20.1 sets out the factors under which an application must be assessed before the Court can allow an amendment. This therefore in some respects curtails the Court wide discretion on this application.
- [17] The first factor which the Court has to consider is the promptitude of the application. A central question is, from when is time to be measured. The Court is prepared to accept for reasons stated below that time should be measured from the Court of Appeal hearing.
- [18] While ground 1 of the application does not say what caused the Meades and their Counsel to review the amended claim form and amended statement of case, paragraphs 2 and 3 of Ms. Joseph’s affidavit appears to point the way as she says that the Meades and their Attorneys had a meeting following the hearing before the Court of Appeal and at this juncture it was understood that (a) prior instructions were not fully reflected in the amended statement of case, and (b) instructions were issued to make the “appropriate amendments” reflected in the draft further amended claim form and further draft amended statement of case.
- [19] While this Court may have made certain rulings on the hearing for the application for the interim injunction, the Court believes that it is not farfetched or unreasonable for Parties and their Attorneys after an interim appeal decision to review the pleadings and chart the way forward based on the Court of Appeal’s decision and matters discussed at that hearing. The Court therefore

accepts that the hearing at the Court of Appeal could have triggered the Meades to become aware of the changes they wished to make to their amended claim form and amended statement of claim.

- [20] On the measure of promptitude, it is a fact that the Court of Appeal heard the matter at 8th and 9th November 2017. Not counting the date of the Court of Appeal's decision and the date of filing of the application, 60 days elapsed before the application was filed on the 10th January 2018. The Court recognizes that December 2017, and early January would have included the Christmas and New Year's holidays, and so is prepared to make a deduction of 14 days. That leaves 46 days between the Court of Appeal decision and the filing of the application.
- [21] The issue now is whether in taking approximately 46 days outside of the Christmas and New Year's holidays to file the application, the Meades failed the promptitude test.
- [22] There is no ground or evidence from Ms. Joseph accounting for the delay in filing the application for 46 days. It appears to the Court that without excuse, 46 days would fail the promptitude test.
- [23] The second factor for the Court's consideration is what would be the prejudice to the Meades if the application was refused. Here, as the Court pointed out earlier, the application in the first instance seeks to bring Mrs. Meade fully into the suit by in instances where she or Mr. Meade were solely cited, both are now cited. The Court believes that since Mrs. Meade is the co-owner of the land, and did sign the 2 charges in issue and from which all things flow in this case, that she would be prejudiced if she were not allowed to present her best case. The Court is therefore prepared to allow the amendment under this consideration.
- [24] Still with the second factor, in regard to the 2nd amendment sought, the pleading is that there was no demand for payment made of the Borrower, Emerald Springs Villas Ltd. at any time. As the Liquidators rightly point out, this is a factual statement. They also say that this is a fact known to the Meades from inception of their claim. That may be so. However, Court recognizes that the loan to Emerald Springs Villas Ltd is at the root of the suit and so is of the view that it would be prejudicial if it were not to allow this amendment. Further, the Court recalls that the Meades position is that it was only after the Court of Appeal hearing and at the meeting with their Attorneys thereafter, that the Meades became aware that previous instructions did not fully reflect their case. The Court is prepared to allow the amendment under this factor.
- [25] The third factor for the Court's consideration is whether the Liquidators would be prejudiced by the amendments sought. The Liquidators position is that they would be significantly prejudiced because they have already filed their list of documents and witness statements and stand ready for trial. The Court acknowledges there is some prejudice by any delay. On the issue of prejudice the Court must in the round seek to do justice nevertheless, so while understanding the Liquidators' position, in light of the Court's position on the amendments in relation to the prejudice to the Meades, the Court believes that on balance, prejudice to the Meades would be greater in weight than prejudice to the Liquidators. At the end of the day while there would be delay, the Liquidators even with the delay will get to put their full case.
- [26] The fourth factor for the Court's consideration is whether the Liquidators can be compensated in by the payment of costs. It is not to be doubted that the amendment restarts the pleadings and so there is a professional costs and loss of time in bringing the matter to a conclusion. Indeed given

the nature of the matter, the loan in issue would also be continuing to accrue interest. In instances like this, it is hard to measure how costs can satisfy the delay. However, the Court must weigh the costs against the prejudice to the Meades. The Court is prepared to award the Liquidators \$2,500.00 costs as compensation.

- [27] On the fifth factor of whether the trial date can still be met, there was no trial date fixed.
- [28] On the sixth factor of whether in the administration of justice the amendment ought to be allowed. This consideration requires the Court to look at the application in the round. On review of all the considerations as addressed by the Court, the Court believes that in the round under this consideration, that it ought to allow the amendments so that all matters pertaining to the suit are before the Court.
- [29] The Court having considered the application applying the factors at rule 21.1 (2), will allow the amendments with costs to the Liquidators.
- [30] Court's orders:
1. The Meades are granted leave to file and serve their further amended claim form and further amended statement of claim within 7 days.
 2. The Liquidators are granted leave to file an amended defence within 14 days of service of the further amended claim form and further amended statement of claim upon them.
 3. Any further disclosure and amended witness statements are to be filed on or before 30th November 2018.
 4. The Registry is to fix this matter for pre-trial review at January or February 2019.
 5. The Liquidators are awarded \$2,500.00 costs and same is payable within 7 days.
 6. The Meades are to draw, file and serve this order.

Justice Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar

