

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **SKBHCV2015/0283**

Between

Mohammad Sadek Atassi
(by His Attorney Malek Atassi)
Chirin Atasi
(by His Attorney Malek Atassi)

1st Claimant

2nd Claimant

and

Raghd Murtada
Live Nevis Development Limited
Bank of Nevis

1st Defendant

2nd Defendant

3rd Defendant

APPEARANCES:

Ms Angela Cozier with Ms. Emily Prentice for claimants

Mr. O'Grenville Browne with Dr Henry Browne QC for 1st & 2nd defendants

Ms. Cindy Herbert for the Bank of Nevis Limited

2017: October 19
November 16
2018: January 12

JUDGMENT

- [1] **ACTIE, M.:** The first and second defendants and the Bank of Nevis Limited respectively, apply to strike out an amended claim with amended statement of claim filed by the claimants. The claimants in response filed an application for leave to file the amended statement of case and to deem the amended statement of case filed without first obtaining leave as properly filed. For the reasons given below, the amended statement of case filed by the claimants on 1st February 2017 is struck out.

Background

- [2] On 14th December 2015, the claimants filed a claim against the 1st and 2nd defendants seeking damages for fraudulent misrepresentation and other reliefs. On 28th July 2016, the claimants filed an application seeking an order of the court for the Bank of Nevis Limited to be added as a party to the claim and for further disclosure of certain information. In a

judgment dated 13th December 2016, Ward J. denied the application to add the Bank of Nevis Limited as a party but granted the relief for further disclosure.

- [3] On 1st February 2017, the claimants filed an amended claim form with an amended statement of claim adding the Bank of Nevis Limited as a party to the proceedings.
- [4] In their applications to strike out, the 1st and 2nd defendants and the Bank of Nevis Ltd contend that the amended statement of case filed by the claimants in stark defiance of the order of Ward J. constitutes a contempt of court. The Bank of Nevis Ltd further contends that the addition of the party and amended statement of case without the leave of the court is an abuse of process.
- [5] The applications to strike out the amended statement of case came on for determination on 19th October 2017. On that date, the Court was informed that the claimants' application for leave to file an amended statement of case was short served on the respondents. The matter was adjourned to the 16th November 2017 for the continuation of hearings of all the applications.
- [6] The applications to strike out the amended statement of case were filed first in time to the claimants' application for leave. However, I will first determine the claimants' application for leave to file the amended statement of claim.

Application for leave to file an amended statement of case

- [7] Counsel for the claimants concedes that that the filing of the amended statement of case without first obtaining leave was in breach of CPR 20.1. However, counsel contends that the defect can be cured pursuant to CPR 26.9 and relies on the authorities in **Savita Indira Salisbury v The Director of the office of National Drug and Money Laundering Control Policy**¹ and **Comodo Holdings Ltd v Renaissance Ventures Ltd**²
- [8] Counsel submits that the amended statement of case was necessitated as a result of the documents disclosed pursuant to the order for disclosure made by Ward J on 16th

¹ ANUHC VAP 2012/044

² BVIH CMAP 2014/0032

December 2016. Counsel avers that the disclosed facts lead to an obvious conclusion that the first respondent had converted the claimants' money to its own use with the dishonest assistance of the Bank. It was therefore necessary to add the Bank as a party to ensure that the real issues in controversy between the parties are determined in these proceedings without the need to institute further proceedings in an effort to prevent duplicitous and/or parallel claims.

[9] The application for leave to file the amended statement of case is vehemently opposed by respondents.

[10] Counsel for the Bank contends that the claimants having filed an amended statement of case after the first case management conference without first obtaining leave cannot now apply some nine months later to set matters right. Counsel in support relies on the dicta of Blenman JA in **Comodo Holdings Ltd v Renaissance Ventures Ltd**³ which states :-

“CPR 20.1 enables a party to amend its statement of case once before the date for that is fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining leave.”

[11] Counsel further contends that the amended statement of case without first obtaining leave of the court is analogous to the filing of a notice of appeal requiring leave without first obtaining leave. The Bank contends the amended statement of case claim is a nullity which cannot be revived retrospectively or revived by subsequently granting of leave. The Bank relies on the Court of Appeal decision in **Travia Douglas v Shivoughn Warde**⁴.

Law and Analysis

Issue - Whether the court can grant leave to deem an amended statement of case filed without first obtaining leave as being properly filed

[12] 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 conference⁵. The court

³ BVIHCMAP2014/0032

⁴ SKBHC VAP 2008/0011

⁵ Rule 20.1

may give permission to amend a statement of case at a case management conference or at any time on an application to the court. When considering an application to amend a statement of case pursuant to Rule 20.1(2), the court must have regard to: – (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.”

[13] Rule 20.1 requires the applicant to seek the court’s permission prior to the filing of the amended statement of case after the first case management conference. Not only is permission required but the court must have regard to all the factors raised in Rule 20.2 and Practice Direction 5 of 2011. The Court has a very restrictive approach when dealing with an application for an amended statement of case subsequent to the first case management conference.

[14] A party seeking permission to make changes to a statement of case must file a copy of the statement of case with the proposed changes. The purpose for the draft proposed amended statement of case is to ensure that the proposed amendments are just, proportionate and comply with the Rules of Court. A proposed amendment will be refused where the proposed amended statement of case has no real prospect of success or is an abuse of process.

[15] Counsel for the claimants having conceded that leave was required prior to the filing of the amended statement of claim is of the view that it is within the ambit of the court’s discretion to put matters right in accordance with CPR 26.9.

[16] Rule 26. 9 deals with the court’s general power to rectify matters where there has been a procedural error. The Rule applies:

- (1) Only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order.

- (2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders
- (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.
- (4) The court may make such an order on or without an application by a party.”

[18] Counsel for the claimants avers that amended statement of claim filed without first obtaining leave is procedurally based as it is grounded on the failure to comply with Rules and /or court orders.

[19] Rule 26.9 applies only where the consequence of failure to comply with a rule, practice direction, court order or direction has not been specified by any rule, practice direction or court order. Rule 20.1 does not provide the consequence for failure to comply to the requirements.

[20] The Court has a very broad discretionary power under CPR 26.9 which cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the exercise of this discretion, the court must seek to give effect to the overriding objective which is to ensure that justice is done as between the parties⁶.

[21] The court is in agreement with the claimants that the filing of a statement of case without first obtaining leave is procedural base and the court may exercise its discretion in appropriate circumstances to put matters right. The court may well be inclined to exercise its discretion pursuant to CPR 26.9 to allow the amended statement of case if all the conditions in CPR 20.1 are met.

[22] In the case at bar, the Bank would not be prejudiced as it has already filed a defence to the amended statement of case. The 1st & 2nd defendants having already filed a defence in the original claim could be compensated in costs for the filing of an amended defence, if

⁶ Carleen Pemberton v Mark Brantley Saint Christopher and Nevis HCVAP 2011/009

necessary. The court would also take into consideration that the matter is still at case management stage and a trial date would not have been affected.

[23] However, the matter before the court turns on whether the court should exercise its discretion in light of the judgment of Ward J. As indicated previously, the claimants had by application dated 26th July 2016 applied to the court for an order to add the very same Bank of Nevis Ltd as a party to these proceedings. In a judgement dated 13th December 2016, Ward J at page 17 states:-

“[66] The Court is of the clear view that, on the evidence, an arguable case has not been made out for treating the respondent bank as a constructive trustee. Accordingly, I can perceive no issue to be resolved in the present claim such that the respondent is a necessary party if the Court is to resolve the real issues in dispute or to which the respondent is connected.

[68] The application to add the respondent bank as a defendant is denied”

[24] Counsel submits that it became necessary for the claimants to add the Bank as a party after the disclosure of the documents by defendants pursuant to the Order of Ward J.

[25] I am of the view that the proper course of action which was available to the claimants upon receipt of the fresh evidence was to have made an application to Ward J to either set aside or vary his order. It would have been open to Ward J to make a determination as to whether or not there was merit to revisit his order to allow the claimants to add the Bank as a party.

[26] The Claimants also had the option to discontinue the present claim and file a new claim with the necessary pleadings to support the claim against the Bank.

[27] The adding of the Bank in the same proceedings without first seeking to set aside, vary or appeal the order made by Ward J is not a procedural defect which can be remedied under Rule 26.9.

[28] It should have been plain to the claimants that the adding of the Bank to the proceedings was in breach of the order made by Ward J. The action of the claimants is clearly a collateral attack on the judgment on ward J.

[29] I entirely agree with the applicants that the filing of the amended statement of case is a contempt of court and an abuse of process. Accordingly, the application for leave to file the amended statement of case fails and the applications to strike out the amended statement of case are granted.

Conclusion

[30] In summary and for the foregoing reasons, It is hereby ordered and directed as follows.

- (i) The claimants' application for leave to file an amended statement of case and to deem the amended statement of case filed without leave as properly filed is denied.
- (ii) The applications to strike out the amended claim with amended statement of claim filed by the 1st and 2nd defendants and the Bank of Nevis Ltd claim are granted.
- (iii) The amended claim form with amended statement of claim filed by the claimants on 1st February 2017 are struck out.
- (iv) The claimants shall pay costs to the 1st and 2nd named defendants in the sum of \$1500.00.
- (v) The Bank of Nevis Ltd having filed a defence to the amended statement of claim is awarded costs in the sum of \$2000.00.
- (vi) The original claim between the claimants and the 1st and 2nd defendants shall be listed for case management conference on a date to be notified by the court office.

**AGNES ACTIE
MASTER**

BY THE COURT

REGISTRAR