

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2011/00282

BETWEEN:

J. ASTAPHAN & CO. LTD

Claimant

and

[1] MARY – ANN LEE

[2] NORLYSE NICKY JOHN BAPTISTE

Defendants

Appearances:

Mrs. Heather Felix Evans for the Claimant

Mrs. Vanica Sobers Joseph for the First Named Defendant

Mrs. Zena Moore Dyer for the Second Named Defendant

2016: April 21; 28

2016: May 18

DECISION

[1] STEPHENSON J.: This is an application, by the claimants to amend its re-amended Statement of Claim. The application is being made pursuant to Part 20.1(2) of Civil Procedure Rules 2000 (CPR).

- [2] Part 20.1 (2) empowers the court to allow a party to amend its statement of case at a case management conference or at any time on an application to the court. The ambit of this section has been considered by our courts as being generous. Part 20.1 (3) lists the factors which must be taken into consideration by the court in deciding whether not to grant the leave to amend.
- [3] This application was filed on 1st April 2016 with an affidavit in support setting out the facts upon which the claimant is seeking to rely on. The draft amended statement of claim was also exhibited. Brief oral arguments were entertained on the application.
- [4] Learned Counsel Mrs. Sobers Joseph for the first named defendant did not have any objections in principle to the application, save that, she noted that her client is suffering some prejudice when one considers the age of the case and that her client's monies have been frozen pending the hearing and the outcome of the matter and that her client has been made to have multiple consultations with counsel because of the previous amendments. Mrs. Sobers Joseph informed the court that there would be no objection to the application however they would ask for their costs for the prejudice suffered by their client as provided for by Part 20.1(3)(d).
- [5] Learned Counsel Mrs. Zena Moore Dyer appearing on behalf of the second name defendant objected to the application.
- [6] The central question in this application is whether or not the court's discretion should be exercised to grant the claimant leave to amend their re amended statement of claim. In the court's judgment the claimant has met the requirements of Part 20.1(3) and the application will be granted as prayed for reasons which will be elaborated below.

The Facts

- [7] The claim against the defendants is one for damages for conversion, interest and costs. The claimant J. Astaphan & Co. Ltd is a retail agent for Canadian Bank Note Dominica Inc (CBN Dominica Inc.), manager of the Dominica National Lottery. The claimant claims that the two defendants were employed by J. Astaphan & Co. Ltd. as cashiers with the responsibility of selling various lottery products including Hot Cash tickets. The claimant alleges that on various dates between January 2009 and March 2010 the defendants whether jointly or severally, unlawfully and without the claimant's consent issued Hot Cash tickets to themselves and/or to others not known to the claimants without receiving and or collecting the requisite payment for the said tickets.
- [8] It is claimed, that in issuing the tickets to themselves and/or to others without receiving and/or collecting the requisite payments for the said tickets the defendants converted the said tickets to their own use.
- [9] The claimants said that they remitted monies after deducting its commission for lottery tickets issued to the Dominica Lottery Commission including the value of the Hot Cash and other tickets issued by the defendants to themselves and or others for which there was no payment, thereby suffering loss.
- [10] The claimant claims that they suffered loss in the sum of EC\$411,650.15 being the value of the lottery tickets issued by the defendants but for which there was no payment.
- [11] The claimant claims additionally that the defendants redeemed winning tickets from among the unlawfully issued tickets and received therefore, cash winnings in the sum of EC\$99,510.00 plus EC\$23,200.00.

- [12] In their initial claim, the claimants specified the Hot Cash game and they now seek to amend their re amended statement of case¹ to include other games for which tickets were involved in the lottery.
- [13] The reason given by the claimant was that it is only when counsel was going through the many documents which it intends to rely on in the trial of this matter that it was realized that it was erroneously stated in the statement of case that the alleged conversion by the defendants related to the sale tickets of the Hot Cash game. That in fact, the alleged conversion related to other games also sold by the claimants on behalf of CBN Dominica Inc.²
- [14] Learned counsel for the claimant Mrs. Heather Felix Evans submitted that the proposed change is not to the quantum of damages claimed but the amendment seeks to include all the games sold by the claimant relating to the claim against the defendants.
- [15] The claimant contends that the amendments are not substantial and that if they are not allowed to include these additional games in their claim, their recovery of their loss would be restricted to one specific game “Hot Cash” which does not amount to the amount claimed.
- [16] Mrs. Felix Evans contends that the proposed amendments is not going to interfere with the defendants’ defence as they essentially claim that they never converted the claimant’s monies as claimed and that the winnings that they have enjoyed are from tickets purchased by themselves from other agents and other Cashiers in the employment of the claimant.

¹ The claimant amended its statement of case twice already. The first amendment was done without the leave of the court to inset “and or jointly” and the second amendment was so as to include copies of the cheques showing the defendants’ winnings.

² Paragraph 14 of the Affidavit of Genevieve Astaphan sworn to on the 1st April 2016 in support of the application for leave.

Factors to be considered by the court:

[17] Part 20.1(3) states:

“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.”

Applicant's Submissions

(1) Promptitude

[18] Learned Counsel Mrs. Felix Evans submitted that the application for the amendment was prompt in that it was made as soon as the error came to counsel's knowledge, that is, during the collation of documents for standard disclosure. That it was during this exercise upon review of documents submitted by the client that it was realized by counsel that Hot Cash was not the sole game involved in the lottery but that there were other games involved. The application was made as soon as the claimant became aware of the need to make the change to the statement of case to include the other games sold.

(2) Prejudice to the Applicant

[19] The applicant contends that much prejudice would be suffered by the claimants if they were denied the opportunity to amend as they would be limited to recovering as it regards the alleged conversion solely from the Hot Cash game, which is significantly less than the entire amount claimed.

(3) The Prejudices to the other Parties if the Change were Permitted

[20] The applicant contends that there would be no prejudices to the defendants as their defence is not going to change as the amount which is being claimed has not changed. Further that in any event it was submitted that the defendants would have the right to file an amended defence if they feel the need so to do. Learned Counsel Mrs. Felix Evans submitted that in her view the proposed amendments ought not to affect the defence put up by the defendants.³

(4) That if there is Prejudice it can be Compensated by Payment of Costs and or Interest

[21] It was submitted by Mrs. Felix Evans that in the event the court finds that there is prejudice to the defendants then that prejudice can be compensated by payment in costs or interest as provided for in Part 20.1(3)(d).

(5) Whether the Trial Date can be Met

[22] Learned counsel submitted that there are no trial dates set in the matter and even the dates set in the case management direction given can still be met.

(6) That the Court should take into Consideration the Administration of Justice.

[23] Learned counsel on behalf of the applicant submitted that it is in the interest of the administration of justice that the application should be granted and submitted that should the court not grant the application then the claimant would be denied their opportunity to recover their entire loss.

[24] Learned Counsel Mrs. Felix Evans relied on the decision of the Court of Appeal in the case of **Mark Brantley –v- Dwight Cozier**⁴ which sets out the factors which

³ See Paragraphs 12-14 above

⁴ SKBHCVP2014/0027

the court must take into consideration considering an application to amend a statement of case and where it was held *inter alia* that the court's 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. It was also held in that case that the amendment should be allowed regardless of how negligent or careless the omission from the statement of case may have been and no matter how late the proposed amendment is.⁵

[25] It was also submitted by Mrs. Felix Evans that the Court of Appeal in the **Mark Brantley –v- Dwight Cozier** ⁶ also held that an award of costs was adequate compensation for any prejudice that Mr. Cozier would have suffered as a result of Mr. Brantley's application.

[26] Learned Counsel Mrs. Felix Evans also referred to the case of **George Allert et al –v- Joshua Matheson et anor**⁷ in support of her application.

Second Named Defendant's Submission

[27] Learned Counsel Mrs. Moore Dyer for the second named defendant objected to the application and submitted that the application did not satisfy the requirements of the rules. Mrs. Moore Dyer stated that the disclosed documents must have been in the hands of counsel for the claimant from the beginning of the proceedings and sometime thereafter and in those circumstances that counsel ought to have been aware of the other games sooner. That in the circumstances, the application is being made as a result of a mistake made by counsel as stated in paragraph 14 of the affidavit in support of the application. Tthat "If that had been a reason for delay the it would make a nonsense of the rule because all a party would have to

⁵ See Held number 3 in the Mark Brantley –v- Dwight C Cozier case.

⁶ Op cit

⁷ GDAHCVAP2014/007

say is that they did not see or rely on certain things until they were reading documents pertaining to the matter”⁸

[28] Mrs. Moore Dyer submitted that the **Mark Brantley case** relied on by the claimant can be distinguished from the case at bar, because in that case, the factual finding had not been available at the time Mr. Brantley filed his defence since the decision in the **Ramsbury Properties case** had not yet been delivered that this is different from the situation in the case at bar where a mistake has been made by counsel for the claimant which could have been avoided. That the reason proffered as to the mistake of counsel ought not to be accepted to satisfy the requirement of the rule.

[29] As it regards the significance of the amendments sought by the claimant, Learned Counsel Mrs. Moore Dyer submitted that the second named defendant’s defence addressed issues relating to Hot Cash games only and with the introduction of other games the defendant will have to amend their defence which will cause considerable delay in the circumstances.

[30] Learned Counsel further submitted that the case management order in the matter was made on 22nd March 2016 and the parties have complied with the directions thus far. That pretrial review is set for July and the witness statements should be filed in June. That this amendment by the claimant will cause delay. That all in all the application for amendment was not made promptly and does not satisfy the requirements of the rule and ought not to be allowed.

Claimant’s Response

[31] Learned Counsel Mrs. Felix Evans in response to the submissions of counsel for the second named defendant submitted that, the **Mark Brantley Case**⁹ is applicable as that was a case where a new defence was being brought in by the

⁸ Quoted from Counsel’s oral submissions to the court

⁹ Op cit

amendment sought and that the claimant is relying not on the facts but on the principles of law that are set out in that case.

[32] As it regards promptitude the requirement relates to how soon after the applicant became aware of the need for the amendment which is subjective and in this case the application was made immediately upon counsel becoming aware of the need for the amendment.

[33] Learned counsel further submitted that this application is being made before the date for standard disclosure and even if there was an error on the part of the lawyer the application can be made and allowed.

Court's Consideration

[34] Mrs. Felix Evans relied on the case of **Mark Brantley –v- Dwight C Cozier**¹⁰ in support of her application. Learned Counsel also relied on the decision in the case of **George Allert et al –c- Joshua Matheson et anor**¹¹ where it was held *inter alia*, that there are several factors that the court must take into consideration when deciding whether to exercise its discretion to amend a statement of case¹² and that the court should be guided by the principle that amendments to a statement of case should be allowed which are necessary to ensure that the real issues which are in dispute between the parties are determined provided that such amendments can be made without there being injustice to the other party and that the other party can be compensated in costs. This court finds the principles enunciated in these two cases to be very instructive.

¹⁰ Op cit

¹¹ Op cit

¹² See Held Number 2 *ibid*

- [35] Being guided by the principles enunciated by these cases and by the provisions of Part 20.1(3) and Paragraph 4 of **Practice Direction 20**¹³ consideration will now be given to the application.
- [36] As it regards the promptitude the onus is on the applicant to provide the court with the relevant information that will allow the court to make the determination as to the issue. I agree with Learned Counsel Mrs. Felix Evans that the promptitude relates to how soon the application was made after the applicant became aware of the need to make the application. In the circumstances of the case I find that the applicant has been prompt in its application, that is, I accept that it was when counsel was preparing its list of documents and that the application was made immediately. It is noted that the date for disclosure as stated in the Case Management Order¹⁴ is 15th April 2015 which was before the date that the application was made.
- [37] In considering the issue of prejudice, it is the claimant's submission that the claimant would be prejudiced if the application was not allowed. The claim filed by the claimant makes mention of the Hot Cash games which only covers a small amount of the monies claimed and should the amendment be denied they will not have the opportunity of recovering the full amount claimed. This would be a grave prejudice to be suffered by the claimant. In the **George Allert Case**¹⁵ Blenman J A said

"In exercising its discretion the court should be guided by the general principle that amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing inconvenience to the other party and can be compensated in costs. Indeed, in the exercise of its discretion, where the court's permission is sought, the court, in determining whether or not to grant an amendment, must have regard to the overriding objective and the need to ensure that the real issues in controversy between the parties are determined. The rules must be applied in a manner that is fair to both

¹³ NO.5 of 2011 of the Civil Procedure Rules

¹⁴ Case Management Order dated 22nd February 2016

¹⁵ Op Cit

parties and should not be applied in an inflexible manner that will prevent a litigant from prosecuting its case based on mere technicality”.¹⁶

- [38] As it regards possible prejudice to be suffered by the defendants if the amendments were to be allowed, the claimant contends that the inclusion of the names of the new games ought not to alter the defendants’ case as essentially the defendants contend that they did not issue the Hot Cash tickets to themselves or to any one at any time without receiving or collecting payment for such tickets. That any tickets taken by them were always paid for. That whatever winnings retrieved were for tickets which were paid for.
- [39] The claimants will be required at the trial of the matter to prove their case and this court is of the view that severe prejudice would be suffered by the claimants if they are not allowed to amend the re amended statement of claim. It is noted that the defendants are clothed with the right to file an amendment to their defence in the event that one is needed.
- [40] The date for filing the witness statements in this matter has not yet passed and the pretrial review has yet to be heard, therefore in the circumstances of this case there is no eminent trial date which would be compromised.
- [41] In considering all the factors stated in Part 20.1(3) this court finds that even if the omissions of the additional games from the original and amended statement of claim was as a result of counsel’s error, leave can be granted to the claimant to amend the statement of case. This court finds that there was no delay in making the application and that the nature of the amendment is important to the claimant’s case and that a grave injustice would be suffered by the claimant if they are not allowed to include the other games in their claim. It is found that the amendment will allow the real issue of the case at bar to be fully ventilated and that the

¹⁶ Ibid paragraph 49

inclusion of the additional games ought not to substantially interfere with the defence proffered by the defendants.

[42] The court is cognizant of the fact that the defendant can amend their defence to include reference to the additional games if they so desire.

[43] I agree with learned counsel for the claimants that the timetable of this matter ought not to be set back in any way and compliance with the case management order and the movement of the case forward would not be anyway compromised.

[44] This court is persuaded that the application to amend the re – amended statement of claim should be allowed in the interests of justice and in the furtherance of the overriding objective. This court is of the view that to disallow the amendment would make it impossible for the claimant to air all the issues of its case before the court. The proposed amendment do not in any way prejudice the defendants' cases in this matter and is in fact appropriate and proportionate in all the circumstances of this case.

[45] In view of the totality of the circumstances of this case the court will make the following orders:

- (i) That the claimant is granted leave to file and serve their re amended statement of claim in terms of the draft amendments exhibited to the affidavit in support of the application to amend herein within 7 days hereof;
- (ii) The Defendants are granted leave to file and serve amended re amended defence if necessary within 21 days here of;
- (iii) The case management order of 23rd February 2016 is varied to the extent that the parties shall file their witness statements on or before **7th July 2016**.
- (iv) Pre Trial Review is fixed for **14th July 2016**.

- (v) Costs to each of the defendants in the sum of \$750.00 to be paid before the filing of the amended re amended statement of claim.

M E Birnie Stephenson
High Court Judge