

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

SUIT NO GDAHCV 2012/0171

BETWEEN:

GEORGE ALLERT
(Administrator of the Estate of George Gordon Matheson, Deceased)
GEORGE ALLERT
EDMUND ALLERT
ANTHONY ALLERT
MARY GLENNIE ALLERT
PEARL ALLERT

Claimants

and

JOSHUA MATHESON
MADELINE MATHESON

Defendants

Appearances:

Mr. Alban John and Ms.Thandiwe Lyle for the Claimant
Ms. Kindra Mathurine-Stewart for the Defendants

2013: November 27
2014: February 13

DECISION

[1] **MOHAMMED, J.:** The Claimants have applied for a stay of execution of the order of this Court made on 23rd May 2013 (“the May 2013 order”) and for leave to

appeal (“the instant application”). In the May 2013 order the Court refused the Claimants application to strike out the Defendants Amended Defence and Counterclaim (“the Claimants application to strike out”). The reasons provided by the Court in refusing the Claimants application to strike out were: the Court accepted the Defendants submission that the amendment was a genuine mistake and there were no mala fides intended; at the Case Management Conference (“the CMC”) the role of the Court is to narrow the issues between the parties and it was more prejudicial to the Defendants to not permit them to rely on a defence which they had originally intended to rely on since any prejudice to the Claimants can be compensated in costs.

- [2] The grounds of the instant application are: the May 2013 order allows the Defendants to raise a plea of limitation which they had deliberately abandoned or not taken after the effective close of pleadings and at a time when the limitation period had accrued. The said plea/amendment was only taken or raised upon receipt of the Claimants’ Reply and Defence to Counterclaim which demonstrated the illegality and untenable nature of the cause on which the Defendants intended to mount their Defence and the May 2013 order prejudices the Claimants since it potentially bars the claim and costs cannot compensate such jeopardy.
- [3] The Defendants have opposed the instant application on the basis that it ought to fail in law and the intended appeal has no chance of success. The bases of their opposition are: the fact that the amendment could bar the Claimants claim is an irrelevant consideration since the Claimants knew that their claim may be statute barred and it was likely that the Defendants may raise the defence of prescription as part of their Defence; there is no prejudice to the Claimants who could be adequately compensated by costs and placed in the same position as if the Defendants had pleaded correctly in the first instance and the amendment in issue was made by the Defendant prior to the first date fixed for the CMC.
- [4] Both parties agreed that the test the Court is to apply in determining whether to grant leave to appeal is the appellants, in the instant application, the Claimants

must establish that the intended appeal has a realistic prospect of success¹. In **Othneil Sylvester v Faellesje, A Danish Foundation**², Barrow JA described the burden on the appellant as “The appellant needs to show that the intended appeal has a realistic prospect of success³ which is a heavier burden than showing only that he has an arguable appeal”. In **The Attorney General of Grenada v Andy Redhead and Ors**⁴ Edwards JA at paragraph 15 was of the view that a realistic prospect of success is more than a fanciful prospect of success. I will now address the grounds raised by the parties.

Are the Claimants prejudiced by the amendment?

- [5] The main claim against the Defendants is for vacant possession of a certain parcel of land situated at Balance Carriacou (“the Property”). The Claimants claim is grounded on their grandfather, George Gordon Matheson being the paper owner of the property since 14th April 1938. They pleaded that their grandfather devised the property to their mother Madonna Allert and after her death, her husband Prince Allert, gave the Defendant’s father Herbert Matheson permission to occupy the property. The Claimants contend that Herbert Matheson was a licensee and he could not by deed dated 30th December 2010 give the property to his widow which was passed onto the Defendants.
- [6] In the Defendants Defence and Counterclaim filed on 20th July 2012 the only Defendant at that time pleaded at paragraph 12 that Herbert Matheson’s ownership of the property was not based on prescription against the Claimants or their mother, Madonna Allert but rather that Herbert Matheson had purchased the property from the Claimants’ father Prince Allert.
- [7] On 18th September 2012 the Claimants replied specifically taking the point at paragraph 14 of the Reply and Defence to Counterclaim that they rely on the

¹ Sylvester v Faellesje, A Danish Foundation, St Vincent and the Grenadines, Civil Appeal No 5 of 2005, 20 February, 2006.

² Ibid

³ Practice Note – Smith v Cosworth Casting Processes Ltd [1997] 4 All ER 840

⁴ Civil Appeal No. 10 of 2007

specific plea in the Defence that the Claimants are not relying on the Limitation of Action defence of prescription and that by that plea the Defendants are estopped from seeking to rely on it. The Claimants then filed an Amended Defence and Counterclaim on 15th November 2012 seeking to reintroduce the defence of prescription which was expressly abandoned in their Defence and Counterclaim.

[8] In the oral reasons for the Court dismissing the Claimants application to strike out were the Court had accepted the Defendants submission that the amendment was a genuine mistake and there were no mala fides intended; at the Case Management Conference (“the CMC”) the role of the Court is to narrow the issues between the parties and it was more prejudicial to the Defendants, at the CMC to prevent them from relying on a defence which they had originally intended to rely on.

[9] Despite this Court's ruling on the Claimants application to strike out, the test which the Court is to apply for the instant application is realistic prospect of success. Having regard to this test the Court is of the view that the Claimants have a realistic prospect of success on appeal on the basis that the amendment prejudices them for the following reasons:

- (a) Clarity of the Claimants pleaded case. The Claimants clearly pleaded that their claim as the paper title owners of the property is based on their grandfather's deed to the property and that they disputed the Defendants ownership of the property since their father was a licensee. It ought to have been clear to the Defendants the case they had to defend.
- (b) Mala Fides. While this Court accepted that the Defendants demonstrated no mala fides in making the amendment which Counsel for the Defendants stated was a genuine mistake, the Court cannot ignore the timing of the amendment which was coincidentally after the Claimants filed their Reply and Defence to Counterclaim challenging the legality of the sole defence available to the Defendants.

(c) Injustice to the Claimants. In **Weldon v Neal**⁵ Lord Esher was of the view that a party will not be allowed to add a fresh cause of action, even when allowed to amend, after such cause of action had become barred by a limitation statute even when the limitation arose after the issuing of the writ. The effect of the Defendants specifically stating that they were not relying on prescription is they could not rely on it as an available defence which could potentially defeat the Claimants Claim. In **Arnold Celestine v Carlton Baptiste**⁶ the Court of Appeal ruled that sections 49, 12 and 27 of the Limitation Act of Grenada permits a person who has dispossessed a paper owner to rely on a defence of adverse possession against the paper owner whom has been dispossessed. Although this Court was of the view that there was no injustice to the Claimants by allowing the amendment since the Court was hesitant to shut the Defendants out from relying on this defence, I share the Claimants view that they do have a realistic prospect of succeeding on appeal on this ground.

Can costs adequately compensate the Claimants for any prejudice occasioned by the amendment?

[10] In examining whether costs can compensate the injury occasioned by the amendment Esher J in **Steward v North Metropolitan Tramways Company**⁷ said:

“The rule of conduct of the Court in such a case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made.”

⁵ [1887] 19 QBD 394

⁶ HCVAP 2008/011 decision of George-Creque

⁷ (1886) 16 QBD 556

- [11] The Court had ruled that any injury occasioned to the Claimants by allowing the amendment whereby the Defendants can rely on one of their original defences of prescription can be compensated with an award for costs. In this case the costs occasioned by the amendment are costs of the Claimants filing an Amended Reply and Defence to Counterclaim. In my view since the prejudice occasioned by the amendment may potentially weaken the Claimants case and potentially can cause injury to the Claimants, I agree that the Claimants appeal on this ground has merit and a realistic prospect of succeeding on appeal.

Was the amendment made by the Defendants within the “relevant period?”

- [12] CPR 20.1 provides for changes to the Statement of Case. It allows a party to amend its pleading once without the Court's permission, at any time prior to the date fixed by the Court for the first CMC and empowers the Court to give permission to amend a Statement of Case at a CMC or at any time on an application to the Court. However, it fetters the Court's discretion in granting permission to amend where the changes to the Statement of Case comes “after the end of the relevant period”.
- [13] While this was an issue addressed by both parties at the hearing of the instant application it was not one of the reasons set out in the Court's oral ruling for dismissing the Claimant's application to strike out. At the time of the filing of the Amended Defence and Counterclaim on 15th November 2012, although the first CMC had come up for hearing on 30th July 2012, Case Management had not taken place since the Claimants indicated they wished to file a Reply and Defence to Counterclaim and the CMC was adjourned to 26th November 2012. The rules allow a party to amend without leave of the Court once the CMC had not taken place and in any event in the instant case the Defendants sought leave of the Court to affirm the amended Defence and Counterclaim. In my view the Claimants appeal on this ground have little chance of succeeding.

Order

- [14] There were three grounds of appeal in the instant application and there are two grounds which I am of the view the Claimants have a realistic prospect of success on appeal. I therefore grant permission to the Claimants leave to appeal the May 2013 order and a stay of execution of the May 2013 order.
- [15] The Defendants to pay the Claimants' costs of the instant application. I will hear the parties on costs.

Margaret Y. Mohammed
High Court Judge