

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0090/2009

BETWEEN:

SIR EMILE RUDOLPH GUMBS
By his Lawful Attorney
CATHERINE ORCHARD

Claimants/Applicant

And

SHEFFIELD HOLDINGS LTD

Defendants/Respondent

Appearances:

Ms. Nicola Byer for the Applicant/Defendant

Mr. Courtney Abel and Ms. Eustella Fontaine for the Defendant/Respondent

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2010: December 13
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DECISION

- [1] **BLENMAN, J:** This is an application, by Sir Emile Rudolph Gumbs suing by his Lawful Attorney Ms. Catherine Orchard, to amend the Statement of Claim after the first Case Management Conference has been concluded.
- [2] The application is vigorously opposed by Sheffield Holdings Ltd on the basis that it does not fall within the requirements of CPR 2000.

Background

- [3] Sir Emile Rudolph Gumbs is the proprietor of property situate at Registration Section Block 08412B Parcel 174. In 1979 he leased the property to Mariners Hotel for a period of 99 years. The property consists over 8.5 acres of land and has several cottages and buildings for rental.
- [4] Sheffield Holdings Ltd is a company registered in Anguilla. In 1996, Sheffield Holdings Ltd took over the lease of the property from Mariners Hotel, upon the same terms and conditions.
- [5] On 11th August 2009, Sir Emile Gumbs through his daughter Catherine Orchard and Lawful Attorney filed a Statement of Claim against Sheffield Holdings Ltd for breach of a Lease Agreement on the alleged basis that Sheffield wrongfully leased the property to a local promoter.
- [6] It appears that paragraph 4 of the lease provides:

“Within one month after every assign, assent, transfer or under lease other than by way of mortgage, or relating to the demised land or any part thereof the Lessee shall give notice thereof in writing to the Lessor.”

- [7] Paragraph 5(b) of the lease provides:

“If the Lessee's covenants are not performed or observed then and in any such case the Lessor may at anytime thereafter re-enter upon the demised land or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the Lessor's rights to sue the Lesser for breach of the covenant.”

- [8] Sheffield Holdings Ltd filed its Defence and Counter Claim on the 15th October 2009 in which they deny breaching the Lease Agreement or sub leasing or assigning.
- [9] Sheffield Holdings Ltd says that it granted the local promoter a licence to use the pool and reception area. They never sub-leased the property.

- [10] The case went through Case Management and a Case Management Conference which was held on January 2010.
- [11] The Pre Trial Review hearing was stated for 21st January 2010. The matter was on that date referred to mediation. It appears that during the mediation hearing the parties agreed as part of that process, to visit the site. This occurred some 5 months after the Case Management Conference. During the site visit, Sir Emile Gumbs through his attorney, apparently became aware of certain information and has applied to the court to amend the Statement of Claim in order to place that information before the court.
- [12] Indeed, Ms. Orchard in the above mentioned capacity seeks the court's leave on the ground that during the site visit she saw persons living on the property and that this was in breach of the provisions of the Lease Agreement. She wants to be able to amend the Statement of Claim in order to place this information before the court. In support of the application, she says that over the years they heard rumors but could never get the evidence to substantiate it since neither herself nor her father has visited the property since 2007. She says that these new matters would further substantiate the claim for breach of the Lease Agreement.
- [13] Sheffield Holdings Ltd objects to the amendment on several bases which will be referred to in its submissions.
- [14] In the claim, Sir Emile Gumbs, through Ms. Orchard, contends that in breach of the covenants, Sheffield Holdings Ltd permitted the usage of the pool and reception areas for the hosting of entertainment events by local entertainers. He further complains that this amounts to the creation of a sublease by Sheffield and that it is in breach of the lease.
- [15] In opposition to the application for leave to amend the Statement of Claim, Dr. Louis Bardfield on behalf of Sheffield Holdings Ltd states that the Case Management Directions were given on the 26th October 2009, Pre Trial Review hearing was held on the 21st January 2010 and the matter was referred to Mediation. It was during the Mediation Session that the parties agreed to have a site

visit. The parties visited the site on 29th March 2010. The Mariners Hotel premises are open to the public and any time prior to 29th March 2010, Sir Emile or his representative could have gained access to the premises. He says that the matters of which Sir Emile is now seeking the leave of the court in order to introduce could have been ascertained through a site visit prior to the filing of the claim. Further, Dr. Bardfield complains that in any event the information obtained during the Mediation Session is without prejudice and cannot be used by Sir Emile so as to launch a new attack.

[16] Dr. Bardfield maintains that the allegation made by Sir Emile whether or not the property was rented, assigned or sublet by the alleged permission granted to a local promoter to use the pool and entertainment area is distinct from the new information which Sir Emile is seeking to introduce.

[17] Dr. Bardfield states that in 1996, Sheffield Holdings Ltd purchased the 82 years remaining on the lease for EC\$6,480,000.00 and paid EC\$913,680.00 in taxes to the Government of Anguilla. The property was once a very thriving property known as the Mariners Hotel. It catered to overseas tourists visiting Anguilla. He has had to put the re-development of the property on hold due to this pending litigation. Any further amendment at this case would prejudice Sheffield Holdings Ltd unduly and delay the hearing of the matter.

Issue

[18] The sole issue for the court to resolve is whether the court should grant Sir Emile Gumbs permission to amend his Statement of Claim after the Case Management Conference.

Claimants/Applicant's Submissions

[19] In support of the application Learned Counsel, Ms. Byer relied on Part 20.1 (3) CPR 2000:

"The court may not give permission to change a Statement of Claim after the first case management conference unless the party wishing to make the change can satisfy the

court that the change is necessary because of some change in the circumstances which became known after the date of that Case Management Conference.”

[20] Ms. Byer urged the court to grant the amendment sought on the basis that Sir Emile only became seized of the information some 5 months after the Case Management Conference.

[21] Learned Counsel Ms. Byer argued that the amendment should be granted if it could cause no injustice to the other party. Ms. Byer referred to ***Virgin Islands Entertainment Council v The Attorney General et al*** BVIHCV2007/0185.

[22] In the original claim, by way of emphasis, Sir Emile says that Sheffield Holdings Ltd has subleased the property in breach of the covenant by allowing persons to use the reception area and the pool facilities. His main contention is that Sheffield Holdings Ltd by permitting a local entertainer to utilize the pool and reception area amount to a breach of the covenant in the lease.

[23] Further, Ms. Byer stated that if the amendment does not affect the substance of the claim or the relief sought; the court should therefore allow the amendment. See ***Ominston Ken Boyea et al v East Caribbean Flour Mills Limited*** Civil Appeal No. 3 of 2008 St. Vincent and the Grenadines.

[24] Ms. Byer, also argued that however late the proposed amendment is the court should allow it once it is made without injustice to the other side. Learned Counsel Ms. Byer posited that the amendment if allowed would enable the court to have all relevant matters before it. Learned Counsel Ms. Byer implored the court to grant the amendment.

Defendant/Respondent's Submissions

[25] Learned Counsel Mr Courtney Abel urged the court to strike out Sir Emile's application on the primary basis that it improperly seeks to introduce in the claim matters that arose during Mediation Session. These are matters that arise during without prejudice negotiations and cannot properly form the basis of a claim. Mr. Abel said that matters that arise during mediation are so done without prejudice.

[26] Alternatively, Learned Counsel Mr. Abel urged the court not to grant Sir Emile's leave to amend the Statement of Claim since there has been no change in the circumstances since the filing of the Statement of Claim. Mr. Abel referred the court to Part 20.1 (3) CPR 2000 and stated that there has been no change of circumstances which became known after the date of the Case Management Conference. In support of his argument he referred the court to **Ormiston Ken Boyea and Hudson Williams v East Caribbean Flour Mills Limited** *ibid*.

[27] Learned Counsel Mr. Abel also relied on **Gordon Lester Braithwaite and David Henderson v Anthony Piper** Civil Appeal No. 18 of 2002. In that case Alleyne JA stated that on the facts of the case there has been no change of circumstances far less a significant change of circumstances. Alleyne JA was very clear in saying that:

"a change of circumstances in the context of these rules is a change in the factual circumstances, not as appears to be suggested by the Respondents, a change in the parties' awareness or understanding of their legal rights, or of the existence of the possible defences to the claim made against them."

[28] Mr. Abel relied on the case of **Bernard Prospere and Justin Prospere v Althea Lynch and Margaret Lynch** SLUCV0619 of 2007 in which leave to amend a Statement of Claim after the Case Management Conference was refused.

[29] In that case, Georges J at paragraph 14 of his judgment stated:

*"As regards the Defendant/Applicant counsel's contention that subsequent to the conduct of the Case Management Conference, Deeds of Sale and documents from Geest Industries (Estate) Ltd came to their attention which seem to cast new light on the factual matters of their case. I fully agree with the Claimants/Respondents' counsel that per se does not in the light of **Braithwaite v Potter** constitute change in circumstances which is sufficient to amount per se to a change in the factual circumstances to justify an*

amendment to the defence since they are public documents access to which would have been gamed by a diligent search or inquiry.”

- [30] Mr. Abel advocated that there has been no change of circumstances or for that matter significant change of circumstances since the Case Management Conference which would justify the court granting leave to Sir Emile to amend the Statement of Claim.
- [31] Mr. Abel posited that, in any event, the matters which Sir Emile is now seeking to introduce by way of an amendment to the Statement of Claim do not go to the root of the matter. They cannot assist the court in determining one way or the other whether the cottages have been assigned, assented, transferred or under-leased to amount to a breach of the lease. He says that it would be a waste of costs, time and resources if the court were to allow the amendment.
- [32] In any event, it would cause irreparable damage to Sheffield Holdings Ltd since at this late stage it would now be required to amend its Statement of Defence and expand on its witness statements. The court should not allow the amendment since by virtue of the terms of Agreement whether or not the cottages are rented, Sir Emile would receive the annual rental.
- [33] Mr. Abel reiterated that Sheffield Holdings Ltd urged the court not to grant the amendment; if the court were to do so it would cause serious prejudice to it since the matter is merely awaiting Pre-Trial Directions in order to have a hearing date set for the trial. Any amendment at this stage would further protract the matter by having an amended Defence and Counter Claim filed.
- [34] More importantly, Sheffield Holdings Ltd would suffer serious financial loss since as a result of this impending litigation it has put the development of the Mariners Hotel on hold.

Court's Analysis and Conclusion

- [35] The court has reviewed the pleadings in the matter and has given deliberate consideration to the very helpful submissions of both Learned Counsel.

- [36] Part 20-1(3) of CPR 2000 clear and unambiguous. The court has no discretion to allow an amendment of the Statement of Claim after the conclusion of the Case Management Conference unless the claimant can bring its claim within the parameters of rule. See ***Ormiston Ken Boyea and Hudson Williams v East Caribbean Flour Mills Ltd*** *ibid*.
- [37] In seeking to determine whether the court should grant the leave it is imperative that the court pays regard to the chronology of events in relation to the matters leading up to the application. It is indisputable that the Case Management Conference was held at least five months before Sir Emile's application to amend the Statement of Claim was made. Of great significance is the fact that the matter had progressed to the Pre-Trial Review hearing and it was at that stage that the application for leave to amend was made.
- [38] At the very highest, Ms. Orchard seems to be saying that it was only at the site visit which was held several months after the conclusion of the Case Management Conference that she was able to confirm her suspicions. This is in my considered opinion, very distinct from her saying that it was only during that period that she became aware of the alleged occupation by other persons.
- [39] In any event the basis of the claim as filed is the alleged unlawful renting out of the pool and entertainment area to a local promoter several months ago as distinct from the alleged wrongful leasing of the cottages.
- [40] It is clear that Sir Emile in the proposed amendment to the Statement of Claim seeks to introduce an entirely new and distinct basis upon which to further ground the claim. To put another way an allegation of wrongful leasing of the pool and entertainment area is quite dissimilar to an allegation that Sheffield Holdings Ltd leased the cottages in breach of the Lease Agreement. Unless the claimant can satisfy the court that there has been a significant change of circumstances which became known of the Case Management Conference, the court would be unable to accede to the request of Sir Emile.
- [41] Upon a close review of the uncontroverted evidence, Sir Emile has not led any evidence on which the court can properly conclude that there has been a change of the factual circumstances which

became known after the Case Management Conference more so any significant change. At its highest, the proposed amendment would serve to place before the court information which may well have been available before the filing of the Statement of Claim but which was only confirmed during the site visit. Quite apart from addressing the fact as to whether it is appropriate to utilize information obtained during the mediation process as the basis of a claim. The court makes no comment on this issue since there was no authority provided to the court on this matter.

[42] The more significant matter is for the court to seek to determine whether Sir Emile has reached the threshold of the requirement of Part 20.1(3) of CPR 2000.

[43] Having reviewed the application in its totality, the court is far from satisfied that Sir Emile has reached the threshold of the statutory provisions of Part 20.1(3). He has failed to place before the court cogent evidence of a change of the factual circumstances which became known after the Case Management Conference. There is no evidence presented which points to a change in the circumstances since the Case Management Conference more so a significant change of circumstance. See **Gordon Lester Braithwaite and David Henderson v Anthony Piper** *ibid.* **Bernard Prospere and Justin Prospere v Althea Lynch and Margaret Lynch** *ibid.*

[44] The court is therefore not of the considered opinion that Sir Emile has reached the required threshold in order to trigger the application of Part 20.1(3). This is fatal to the application.

[45] For the sake of completeness, the court is not of the view that it would be fair or just, at this stage, to allow an amendment of the Statement of Claim to be made in order to launch a new claim. Any change of the Statement of Claim at this stage is likely to adversely affect the time table of the case; it may well result in amendments having to be made to the Defence and Counterclaim. The court must also take into account those factors together with any likely effect that an entirely new claim would have on the progress of the matter which is at the Pre-Trial Review stage.

Conclusion

- [46] In view of the totality of circumstances, the application of Sir Emile Rudolph Gumbs suing by his Lawful Attorney Catherine Orchard to amend the Statement of Claim after the Case Management Conference is refused.
- [47] Costs are awarded to Sheffield Holdings Ltd in the sum of US\$500.00.
- [48] The matter is fixed for the continuation of the Pre-Trial Review hearing on the 19th January 2011.
- [49] The court gratefully acknowledges the assistance of both Learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla

