

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO. SLUHCV2007/0619

BETWEEN:

**BERNARD PROSPERE
JUSTIN PROSPERE**

Claimant/Ancillary Defendants/Respondents

And

**ALTHEA LYNCH
MARGARET MARY LYNCH**

Defendants/Ancillary Defendants/Applicants

Appearances:

Leonne Theodore-John for Claimants/Respondents
Horace Fraser for Defendant/Applicants

2008: December 2;
December 9.

DECISION

[1] **GEORGES, J.:** By notice of Application filed on 6th November 2008 the Applicants herein applied to the Court for the following orders:

- (1) That leave be granted to them to amend their Defence and Counterclaim in these proceedings and serve it within 7 days of the order of the Court.
- (2) That leave be granted to them to file their witness statements within 7 days of the order of the Court and for relief from sanctions for not filing their witness statements in accordance with the case management order.

- (3) That paragraphs 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 28 and 29 of the witness statements of the Claimants/Ancillary Defendants/Respondents be struck out on the grounds that they contain matters not pleaded by the Claimants and therefore not part of their case contrary to Part 8.7 of the Civil Procedure Rules 2000.

[2] The grounds of the application as set out in the application are:-

- (a) There were a number of relevant documents to this case coming into the hands of the applicants for the first time after the Case Management Conference was conducted in these proceedings. The said documents throw new light on the case at hand and have in effect substantially changed the applicants' case.
- (b) The Applicants desire to amend their Defence and Counterclaim and required an order of the Court to do so. It would have been impractical for them to file their witness statements in accordance with the case management order in this regard.
- (c) This application could not have been made in a timely manner because Counsel had difficulty in contacting the applicants.

[3] In her affidavit in support of the application the first-named Defendant/Ancillary Claimant on the authority of her mother the second-named Defendant/Ancillary Claimant avers at paragraphs 2, 3 and 4:

2. That the Case Management Order required us to file and serve our Witness Statements by the 31st October 2008 but since it was prudent for us to make this application it would have been impractical to do so and we hereby seek leave of the Court to be relieved from sanctions for not filing our witness statements in accordance with the case management order.

3. That the Claimants in their witness statements in identical paragraphs viz 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 28 and 29 have raised issues which they never pleaded in their Statement of Claim and I am advised by counsel and verily believe that they have not complied with Part 8.7 of the Civil Procedure Rules 2000 and therefore they cannot rely on those matters they now seek to raise.
3. That on the 28th June 2008 case management directions were given by the Court. Subsequent to the conduct of the case management conference we came upon documents: Deeds of Sale and documents coming from Geest Industries (Estates) Ltd. which according to the advice of Counsel, which I verily believe, seem to cast new light on the factual matters of this case.
4. That I am also advised by Counsel and verily believe that the said documents have altered our case in a material particular and therefore in the interest of justice there is a need arising for our defence and counterclaim to be amended to accommodate the new particulars.

[4] That in effect constitutes the gist of the Applicants' application.

[5] The Case Management Order was made on 28th June 2008 and filed on 11th July 2008. By then the Defendants/Ancillary Claimants had on 16th May 2008 filed an Amended Defence and Counterclaim.

[6] Part 10.7 (1) and 10.7 (3) of the CPR states that:

- (1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.

- (3) The court may not give the defendant permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference.

And part 20.1 (3) stipulates that:

- (3) The court may not give permission to change a statement of case 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.

[7] Learned Counsel for the Defendants/Applicants relied on the judgment of Alleyne JA in Grenada Civil Appeal No. 18 of 2002 – Gordon Lester Brathwaite and anor and Anthony Potter and anor which illustrates at paragraphs 11, 12 and 13 what constitutes a significant change in circumstances.

[8] Paragraph 11 reads in part:

11. The precondition to the Court exercising a discretion to allow an amendment to the defence after the first case management conference is that the defendant satisfy the Court that there has been a significant change in circumstances which became known only after the date of the case management conference.

And at paragraph 13 the learned Judge continued:

13. A change in 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 possible defences to the claim made against them.

- [9] The nub of Counsel's application as set out in the supporting affidavit is that subsequent to the case management conference he had come upon certain Deeds of Sale and documents from Geest Industries (Estates) Ltd. which seem to cast new light on the factual matters of the case which would necessitate re-amending his defence and counterclaim to accommodate the new particulars.
- [10] The real issues between the parties to be tried by the Court were not yet before the Court Counsel contended having regard to the state of the pleadings and therefore justice would not be done to decide the case based on the current pleadings before it. The facts had only come to light after the case management conference he added and not having pleaded them they could not be set out in written statements. Because of the way the statement of case was structured a lot things were not pleaded Counsel lamented which put the Defendants/Applicants at a disadvantage he concluded.
- [11] In response learned Counsel for the Claimants/Respondents referring to Note 17.6 of the Caribbean Civil Court Practice at page 184 captioned – **Function of Witness Statements: Facts and Particulars of Facts** relied on Lord Woolf MR's guidance upon the function of statements of case under the new regime as enunciated in **McPhilemy v Times Newspapers Ltd (1999) 3 All ER 775 C.A.** There it is stated that the need for extensive statements of case including particulars should be reduced by the requirement to exchange witness statements. Statements of case should make clear the general nature of a party's case. They were not however superfluous. They were critical to identify the issues and the extent of the dispute between the parties.
- [12] The said Note concludes thus:

The “pleadings should make clear the general nature of the case,” in Lord Woolf’s words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case.

[13] For these reasons I am satisfied that the paragraphs of the Claimants’ witness statements which were filed on 31st October 2008 and served on the Defendants/Applicants ought not to be struck out as they are intended to serve the requirement of providing details and particular of the Claimants case and have not raised issues not pleaded in the statement of case as contended by Counsel for the Defendants/Applicants. They should be allowed to stand accordingly and I so order.

[14] As regards Defendants/Applicants’ Counsel’s contention that subsequent to the conduct of the case management conference Deeds of Sale and documents from Geest Industries (Estates) 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 that per se does not in the light of *Brathwaite v Potter* constitute change in circumstances which is tantamount to a change in the factual circumstances to justify an amendment to the defence since they are public documents access to which could have been gained by a diligent search or inquiry before the time ordered for filing and serving witness statements in accordance with the Case Management Order and ought not to be used as a reason for not filing and serving same on time as ordered and for applying to the Court to further amend the already amended Defence at this later stage. There is nothing such as for example the discovery of fraud or mistake which would constitute a significant change of circumstances and radically alter the factual circumstances of the case so as to warrant an amendment to the defence.

[15] In Counsel's own words the Deeds of Sale and documents coming from Geest Industries - which in any event would have been available before the Case Management Conference at any rate – seem to cast new light on the factual matters of the case.

[16] In the result leave is refused to further amend the amended defence filed 16th May 2008 and it is ordered that Witness Statements of the Defendants/Applicants be filed and served by the 16th December 2008 without sanctions. The Application to strike out paragraphs 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 28 and 29 of the Claimants/Respondents Witness Statements is refused.

Costs of the Application to the Claimants/Respondents in the sum of \$500.00.

EPHRAIM GEORGES
HIGH COURT JUDGE (AG.)