IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.2000/B249

BETWEEN	ALTON BROWN	CLAIMANT
A N D	THE JAMAICA HERALD LTD.	1ST DEFENDANT
A N D	NEVILLE BLYTHE	2ND DEFENDANT
A N D	CHRISTINE KING	3RD DEFENDANT
A N D	MICHAEL STURRIDGE	4TH DEFENDANT

CLAIM NO. C.L.2000/B250

BETWEEN	ALTON WASHINGTON BROWN	CLAIMANT
A N D	THE JAMAICA HERALD LTD.	1ST DEFENDANT
A N D	NEVILLE BLYTHE	2ND DEFENDANT
A N D	FRANKLYN McKNIGHT	3RD DEFENDANT

Mr. Paul Beswick instructed by Ballantyne and Beswick for the Claimant.

Mrs. Andrea Walters-Isaacs instructed by Palmer and Walters for the 2nd and 3rd Defendants

Mrs. Susan Reid-Jones instructed by Director of State Proceedings for the 4th Defendant.

IN CHAMBERS

29th June & 27th July 2006

PRACTICE AND PROCEDURE - APPLICATION TO AMEND STATEMENT OF DEFENCE AFTER FIRST CASE MANAGEMENT CONFERENCE – ERROR IN PLEADING DISCOVERED – WHETHER A CHANGE OF CIRCUMSTANCES

BROOKS, J.

Mr. Alton Brown is in the unusual position where he opposes Mr. Neville Blythe's attempt to agree with him, in respect of an aspect of his statement of case. Mr. Beswick on behalf of Mr. Brown goes further to say that this court has no jurisdiction to allow Mr. Blythe to amend the latter's pleading to so agree.

On the 29th June when these interesting submissions were completed, I delivered my decision, so as to allow the parties to comply with specific time restrictions placed on them at a Case Management Conference (CMC). At that time, I granted Mr. Blythe's application and I promised then to put my reasons in writing. I now fulfil that promise. It is to my chagrin that the conclusion I have arrived at here does not support that decision.

The Statements of Case

Mr. Brown has sued the Defendants, claiming that they had defamed him in a newspaper publication. The contents of the alleged libel are immaterial for the purposes of the present application. It will be sufficient to set out the relevant portions of the respective statements of case, in order to

identify the issue in dispute in this application. Though there are two claims, the statements of case are identical in this regard.

The relevant part of each of Mr. Brown's Statements of Claim alleged as follows:

> "2. The First Defendant was at the material time the printer and publisher of the Jamaica Herald Newspaper which had wide a (sic) circulation throughout Jamaica.
>
> 3. The Second Defendant was at the material time the Executive Chairman/Publisher of the Jamaica Herald."

The Second and Third Defendants filed a joint Defence in each suit which stated:

> "2. In answer to Paragraph 2 of the Statement of Claim, these Defendants made (sic) no admission as to the width of the circulation of the said newspaper and aver that the printer and publisher was the UGI Group Limited.
>
> 3. In answer to Paragraph 3 of the Statement of Claim, these Defendants aver that the 2nd Defendant was at the material time the Chairman of the Jamaica Herald Limited.

The last paragraph of each joint Defence stated:

> "Save as is hereinbefore expressly admitted or not admitted, these Defendants deny each and every allegation of the Statement of Claim as if the same were herein before set out and traversed seriatim."

The Application

In the present application, Mr. Blythe states, in his affidavit filed on 26th June 2006, that in fact the First Defendant, The Jamaica Herald Limited, was at all material times the printer and publisher of the Jamaica Herald

Newspaper and not the UGI Group Limited, as he had originally and erroneously pleaded. Mr. Blythe deposed that the error was discovered some time after the first CMC. It was discovered when the case was reviewed by Senior Counsel. He also wishes to make it clear that he was not at any material time the publisher of the Jamaica Herald Newspaper though he was the Chairman of Jamaica Herald Limited.

His application is for the court to grant him leave to amend the joint defence in each suit. If the application were granted it would correct the alleged original error in the Defence concerning which entity is in fact the publisher of the Jamaica Herald Newspaper. The amended statement of case would accord, in large measure, with Mr. Brown's pleading and, as proposed, the amended paragraphs would read thus:

2. Save that these Defendants make no admission as to the circulation of the said newspaper, Paragraph 2 of the Statement of Claim is admitted.

3. In answer to Paragraph 3 of the Statement of Claim, these Defendants aver that the 2nd Defendant was at the material time the Chairman of the Jamaica Herald Limited and expressly deny that he was the Publisher.

The portions that I have underlined are the relevant material amendments to the original joint defence.

Mr. Beswick, has correctly asserted that the proposed amendment to paragraph 3 is unnecessary because the last paragraph of the joint defence has already provided that denial, since there was no previous admission in

that regard. The major issue therefore is whether an amendment should be allowed in respect of paragraph 2.

The Opposition

Mr. Beswick, opposed the application. He asserted that the application is governed by rule 20.4 of The Civil Procedure Rules (the CPR), and that that rule does not permit an amendment of the pleadings in the circumstances outlined by Mr. Blythe. Rule 20.4 states:

> "**20.4. Amendments to statements of case with permission**
> 20.4. (1) An application for permission to amend a statement of case may be made at the case management conference.
>
> (2) The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference.
>
> (3) Where the court gives permission to amend a statement of case it may give directions as to -
>
> (a) amendments to any other statement of case; and
>
> (b) the service of any amended statement of case."

On Mr. Beswick's submissions, the situation described by Mr. Blythe does not disclose a change in circumstances or his being made aware of such a change. Mr. Beswick conceded that Mr. Blythe might have been alerted about the discovery of the error after the first CMC, but submitted that that discovery, in order to fall within the ambit of the rule, must have been in respect of a change of circumstances. Mr. Beswick further submitted that

Mr. Blythe's application, being outside the ambit of its requirements, rule 20.4 (2) prevents the court from granting permission to amend. It is noted that the rule uses the term; "may not".

The Law

The purpose of statements of case is essentially to determine what each party says about the case. In his work; *A Practical Approach to Civil Procedure,* 5th Edition, Stuart Sime, at p. 135 outlines the functions of statements of case to include:

> "(a) Informing the other parties of the case they will have to meet. This helps to ensure neither party is taken by surprise at trial.
>
> (b) Defining the issues that need to be decided. This helps to save costs by limiting the investigations that need to be made and the evidence that needs to be prepared for the trial, and also helps to reduce the length of trials.
>
> (c) Providing the judges dealing with the case (both for case management purposes and at trial) with a concise statement of what the case is about."

The fact that the learned author was treating with the UK Civil Procedure Rules does not affect the validity of the quoted statement, in the context of our own CPR. Our rules, in respect of amendments to statements of case, differ however, from those of the UK. The relevant rule in that jurisdiction is rule 17.1 (2), which states:

> "If his statement of case has been served, a party may amend it only-
> (a) with the written consent of all the other parties; or
> (b) with the permission of the court"

The restriction that Mr. Beswick has highlighted in our CPR is clearly absent from the UK rule. At page 146 Sime (*supra*) points out that the UK rule does not state how the court's discretion to amend will be exercised. He goes on to say that:

> "A court asked to grant permission to amend will therefore base its decision on the overriding objective. Generally dealing with a case justly will mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined."

This court is also to seek to achieve the overriding objective (rule 1.2 of the CPR). It is important to bear in mind however, that even the matter of applying the overriding objective has its restrictions. In *Totty v. Snowden* [2001] 4 All E.R. 577 at para. 34 the court said:

> "Rule 1.2 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words...the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'. Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective."

By rule 17.1 (2) a court in the UK has the flexibility, in exercising its discretion whether or not to grant permission to amend, of examining the stage at which the case has reached, the effect on the opposing party and the extent to which costs will be an adequate remedy. These factors were all hallmarks of the exercising of the discretion under the pre-CPR regime, and continue to be applicable in that jurisdiction. This court is however

precluded from pursuing that assessment unless and until the applicant for amendment satisfies rule 20.4 (2).

In dealing with a rule which is very similar to rule 20.4 (2), D'Auvergne J.A. (Ag.) of the Court of Appeal of the Eastern Caribbean States, in an unreported judgment in the case of *Ormiston Ken Boyea and Hudson Williams v. East Caribbean Flour Mills Ltd.* (St. Vincent and the Grenadines High Court Civil Appeal No. 3 of 2004, delivered September 16, 2004) said:

> "The discretion of the court to permit changes to the statement of case has to be considered with reference to CPR 20.1 (3), changes to be made after the first case management conference. It is my view that the overriding objective cannot be used to widen or enlarge what the specific section forbids."

This restriction applies even though it prevents the statement of case from achieving the purposes for which they were designed. It could potentially result in some very harsh and even unjust results. In *Totty v. Snowden (supra)* their Lordships, in addressing such results said (at para. 18 on p. 582):

> "The absence of a discretion in such matters can lead to very harsh consequences for those who act for claimants and make relatively small mistakes in this regard in the conduct of the litigation, but the cases clearly establish that the court has no discretion to alleviate any such harshness, which in any event arises from a failure to observe the rules."

Their Lordships were, at the time, dealing with a different rule, but the principle of the restriction placed by the CPR is what I seek to highlight.

The term "may not", as used in rule 20.4(2) therefore deprives this court of any discretion unless the applicant fulfils the prerequisites of the rule. I find support for this conclusion in the judgment of our Court of Appeal in the unreported case of *Paulette Bailey and anor. v Incorporated Lay Body of The Church in Jamaica and The Cayman Islands in The Province of The West Indies* SCCA 103/2004 (delivered May 25, 2005). At page 18 of the unreported judgment Panton J.A., after referring to the rule, said:

> "The rule clearly states that the court may not give permission to amend a statement of case after the first management conference unless the party seeking the amendment is able to satisfy the court that the amendment is necessary due to some change in he circumstances which became known after the date of the case management conference. Although it is fashionable at times for simple words to be given complicated meanings, this is not possible in this situation."

There was however a more flexible position taken by P. Harrison J.A. (as he was then) in the procedural appeal of *Crown Packaging Jamaica v. Musson Jamaica Ltd.* (unreported decision delivered June 8, 2005). In that case Crown Packaging had filed a claim against Musson for the balance of the price of goods (cans) sold and delivered. Musson's defence initially was that the cans were not of merchantable quality (because they had corroded) and counterclaimed for damages for breaches of the Sale of Goods Act. After the first C.M.C., Musson secured a second expert analysis of the cans and sought, at the Pre-Trial Review to amend its Defence and Counterclaim

to plead the expert's findings as to the cause of the corrosion and to include a claim in negligence against Crown Packaging, based on those findings. The amendments were granted at the Pre-Trial Review and Crown Packaging appealed the order. The appeal was dismissed. The learned Judge of Appeal found that:

> "The visit to Jamaica and the report of (the expert), addressing specifically only then the cause of the corrosion to the cans qualifies as "some change in the circumstances...known after...case management." The case of *Radcliffe v. Pacific Steam* [1910] 1 KB 685, relied on by Daye, J and which decided that new medical evidence qualified as changed circumstances is helpful, despite its apparent antiquity."

Mr. Blythe would not be able to benefit from the window of opportunity that the *Crown Packaging* decision seems to afford. The discovery in his case would not qualify as a change in circumstances, it was merely an error uncovered.

(A discussion of these local cases and that from the Eastern Caribbean can be found in an interesting and thought-provoking article by Mrs. Suzanne Risden-Foster entitled "Amendments to Statements of Case-Post Case Management Conference" dated 18th November 2005, and I would like to acknowledge that I was led to these cases by that article.)

Conclusion

Despite my ruling to the contrary, I find, upon reflection, that I must agree with Mr. Beswick that Mr. Blythe has not activated the jurisdiction of

this court to allow Mr. Blythe to amend the joint Defence. Mr. Brown may therefore properly oppose Mr. Blythe's attempt to agree with him. There has been no disclosure of a change in circumstances. What has occurred since the CMC is that Mr. Blythe's Attorneys-at-Law have discovered, what he says is an error in the pleadings, which he wishes to have corrected. Rule 20.4 (2) therefore prevents the court from considering the justice of the application, which is what I had sought to do in my ruling.

There is no doubt that errors in preparing statements of case will be made from time to time. Some, such as is the instant one, will be relatively simple, others very serious, with potentially catastrophic results for the party pleading. I am therefore confident that the Bar will happily embrace the proposed changes to rule 20.4 (2), which are scheduled to come into force on September 16, 2006. The amended rule is to read as follows:

> "(2) The court may not give permission to amend a statement of case after the case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some circumstance which became known after the date of that case management conference.

It will be seen that the restriction has been eased but not completely removed.