IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 02956

BETWEEN	ROBERT CARTADE	1ST CLAIMANT
AND	JACK KOONCE	2ND CLAIMANT
AND	SHIRLEY SHAKESPEARE	3RD CLAIMANT
AND	WESTERN CEMENT COMPANY LIMITED (In receivership)	4TH CLAIMANT
AND	PAN CARIBBEAN FINANCIAL SERVICES LIMITED	1ST DEFENDANT
AND	NATIONAL INVESTMENT BANK OF JAMAICA LIMITED	2ND DEFENDANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC.	3RD DEFENDANT

Mr. John Vassell Q.C. and Mr. Courtney Bailey instructed by DunnCox for Claimants

Mr. Gordon Robinson and Mr. Jerome Spencer instructed by Miss Lynda Mair of Patterson, Mair Hamilton for the 1st Defendant

Mr. Charles Piper and Miss Kanica Tomlinson for the 2nd Defendant

Mrs. Sandra Minott-Phillips and Mr. Gavin Goffe instructed by Myers, Fletcher and Gordon for the 3rd Defendant

IN CHAMBERS

Practice and Procedure - Application to strike out claim as disclosing no cause of action- Principles guiding court- whether Claim has any real prospect of success

Practice and Procedure – application to amend Particulars of Claim –whether insincere

28th April, 7th May, 18th and 19th June, 23rd July, 19th September and 15th October 2008

BROOKS, J.

Western Cement Company Limited and some of its shareholders, namely Robert Cartade, Jack Koonce and Shirley Shakespeare have brought this claim against the Defendants to recover losses said to have been suffered by Western Cement and its shareholders. The losses are said to have arisen from a failure to pay to Western Cement a sum of money said to be due to it as a result of an insurance claim.

The Defendants; Pan Caribbean Financial Services (PCFS), National Investment Bank of Jamaica Limited (NIBJ) and Jamaica Redevelopment Foundation Inc. (JRF) have accepted that the monies were not paid. They have, however, all denied any liability to the Claimants; Western Cement and its shareholders.

The claim has come before me for the holding of the Case Management Conference. The Defendants have each made an application to strike out the claim. Several bases were advanced for the various applications. In the face of the applications, the Claimants' counsel applied to amend the Particulars of Claim. The Defendants have strenuously resisted the application to amend, and assert that the claim should be struck out.

The first question which the court ultimately has to decide is whether the proposed amended claim has a real prospect of success. If it does, the court should also decide whether the Claimants should be allowed to proceed with the amended claim or be denied that opportunity and left to file a new claim if so advised. Some subsidiary questions arise for adjudication to assist in determining the main questions. They may be tabulated as follows:

1. whether Western Cement, having been placed in receivership, is incapable of bringing this action without the leave of the receiver;

2. whether the shareholders, being defendants to a counterclaim brought by NIBJ, are entitled in this claim to claim for loss suffered as guarantors of the loan to Western Cement and/or a declaration that they are respectively discharged from their guarantees;

3. whether the amendment, if granted, would deprive any of the Defendants of the benefit of a defence based on the statute of limitations.

I bear in mind that this exercise is not a trial of the claim. The court must decide in assessing the issues, whether the claim is frivolous and vexatious or an abuse of the process of the court. I must also remember that unless the law pertaining to the issues is well established and conclusive of those issues, the claim should be allowed to go to trial. (See *Olint Corp. Ltd. v National Commercial Bank* SCCA 40/2008 (delivered 18/7/08).) This

is so that the issues can be determined in light of all the facts. (per Moore-Bick L.J. *Diamantis Diamantides v JP Morgan Chase Bank and others; JP Morgan Chase Bank and others v Polhux Holding Ltd.* (2005) EWCA Civ. 1612 at paragraph 43)

Background

In 1995 Western Cement Company Limited secured a loan from a consortium of banks, for which Trafalgar Development Bank (TDB) was the lead bank. The loan was guaranteed by some of the shareholders including Messrs. Cartade, Koonce and Shakespeare.

On June 8, 2002 Western Cement suffered a major set-back when its kiln was damaged during torrential rains. Its insurer declined to indemnify it for the loss, but agreed to pay a sum of US$325,000.00 as an *ex gratia* payment. On June 18, 2002 Western Cement requested TDB to instruct the insurer pay the sum over to Western Cement to enable the repair of the kiln but that request was denied. The sum was paid to TDB, pursuant to a Debenture used to partially secure the loan.

By letter dated June 24, 2002, TDB stated, in its capacity as lead banker, that it would pay the sum over, on certain conditions. As previously mentioned, the sum was never paid to Western Cement. TDB has since been absorbed into Pan Caribbean Financial Services (PCFS). The portion of the

loan debt held by TDB and another bank was assigned to National Investment Bank of Jamaica Limited (NIBJ) and the remainder was eventually acquired by Jamaica Redevelopment Foundation Inc. (JRF), but by a series of assignments. Thus it is that none of the original lenders are defendants in this claim.

The Claim

In the original claim, Western Cement asserts that because TDB failed to make the payment, the kiln was not rehabilitated. Western Cement claims that, as a consequence, it incurred loss because of its failure to meet contracts for the supply of its products; it lost commercial opportunities, and was unable to service its debts. The shareholders assert that they suffered the loss or diminution in the value of their shareholding in Western Cement consequent on that company's plight. The sum of US$8,928,500.00 is claimed as damages.

The Attack

The Defendants launched their attack on the claim from four main positions.

Shareholders have no independent cause of action

The first criticism is that the shareholders have no cause of action which is independent of Western Cement's and therefore the shareholders'

claim should be struck out. The case of *Tudor Grange Holdings et al v Citibank NA et al* [1991] 4 All E.R. 1 was cited in support of the submission. The decision in *Tudor Grange* is, in part, exemplary of the rule in *Foss v Harbottle* (1843) 2 Hare 461, which prevents a member of a company from instituting personally, a claim concerning the affairs of the company. Additionally, Mrs. Minott-Phillips, for JRF, submitted that Western Cement's shareholders had no independent right of action, for the diminution of their shareholding, against a party allegedly perpetrating a wrong against the company. Counsel cited the case of *Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No. 2)* [1981] Ch. 257 in support.

Mr. Vassell Q.C., acting for the Claimants, accepted that the criticism that was based on *Foss v Harbottle* was valid. This led to one aspect of the application to amend the Particulars of Claim. I shall deal with that aspect below.

PCFS was improperly joined as a defendant

A second criticism of the claim was that it was improper to bring a claim against PCFS. The Particulars of Claim alleged that PCFS had assigned all its rights, duties and **obligations** to NIBJ. On that basis therefore, the submission ran, by virtue of the assignment, it is NIBJ and not PCFS, which owes the Claimants the obligation. A similar complaint was

made in another claim involving some of these parties and I am informed that that aspect is the subject of a reserved judgment in the Court of Appeal.

Although the point was not conceded, the Claimants, perhaps out of an abundance of caution, have sought to amend the Particulars of Claim to meet this criticism. I shall also look at that aspect below, under the heading of "the amendment".

Western Cement improperly joined as a Claimant

A third criticism of the claim is that Western Cement, having been previously placed in receivership, is not permitted to institute a claim without the consent of the receiver. The *Tudor Grange* case, cited above, was also prayed in aid in respect of this submission.

It is to be noted that in *Tudor Grange* the learned trial judge took the view that since an indemnity could have been provided in respect of the possible costs of the defendants to the claim he would not have struck out the claim on the basis that it had not been brought by the receiver (see p. 11 b-c). The principle seems to be that if the assets of the company are not at risk then the claim may be brought in the name of the company without the consent of the receiver.

Mr. Vassell sought to show that Western Cement's assets were not at risk. He asked to make reference to an affidavit to that effect. Mr.

Robinson, on behalf of PCFS, objected to a reference to affidavit evidence where an application to strike out was being considered. Mr. Robinson's objection cannot be upheld. It would be unfair to Western Cement to say that it has brought the action improperly, that is, without the permission of the receiver and without ensuring the security of its assets, while excluding evidence to the effect that the assets would be secured.

The evidence in question was an affidavit from Mr. Cartade sworn to on 7th December, 2007 in which he stated that he was "prepared to indemnify [Western Cement] against the costs of this action". This may not amount to an actual indemnity but demonstrates that one can be secured.

Abuse of the process of the Court

A fourth criticism of the claim was raised by Mr. Robinson. He submitted that the claim was an abuse of the process of the court because there had "been a failure to reveal a previous claim with contradictory pleadings". Mr. Vassell pointed out that PCFS was not a party to that claim.

I accept Mr. Vassell's submission and further point out that whereas NIBJ was a defendant to that claim (*David Wong Ken and others v National Investment Bank of Jamaica and others* 2006 HCV 1847) the substance of that claim was, on the whole, very different from the present. I accept that the aspect of the non-payment of the monies received from Western

Cement's insurer was a factor in that claim, but the allegation was then made against NIBJ. In any event, that claim has not yet been adjudicated and so the matter is not *res judicata;* nor does an estoppel apply.

The Amendment

Having heard the criticisms levelled at the claim the Claimants have applied to amend the Particulars of Claim, the Reply to the Defence of the first Defendant and the Defence to the Counterclaim and Claim to set off of the 2nd Defendant. It is probable that a whole new round of statements of case may be triggered, if this application were granted. However, an important factor to be considered is that Western Cement made its request to TDB for the payment out of the insurance monies on June 18, 2002. The possibility that a Limitation of Actions defence may be raised, if the Claimants were ordered to start their claim anew, if so advised, cannot be ignored. I make no pronouncement as to that aspect and therefore I will not consider that rule 20.6 of the Civil Procedure Rules 2002 (CPR), concerning amendments after the end of a relevant limitation period, is applicable.

The first aspect of the application to amend is to allow the Claimants to refer to instruments of guarantee, whereby "the 1st, 2nd and 3rd Claimants each agreed to personally guarantee payment to TDB of [Western Cement's] indebtedness in respect of the Consortium Loan Agreement...". Based on

the alleged actions of TDB (on behalf of the Consortium) and NIBJ the first three Claimants claim a declaration that they are discharged from their obligations under the respective instruments of Guarantee.

The second aspect of the proposed amendment is to remove the allegation that NIBJ had been assigned the obligations of TDB and PCFS set out in the Consortium Loan Agreement. The resulting averment is that it was the rights alone which were assigned. Mr. Vassell spoke to "a misreading" of the Deed of Assignment as leading to the original pleading.

The third aspect of the proposed amendment is to claim in the alternative that JRF had received, as part of the assignment, from two of the members of the consortium, a "crystallized liability for the breach of contract", committed by TDB on behalf of the consortium.

The Analysis

If the application to amend the Particulars of Claim is successful, the claim would have been saved from the fate requested by the Defendants in their respective applications to strike it out. The criterion for allowing an amendment in the face of an application to strike out is that there must be a real prospect of establishing the amended case. Mr. Vassell submitted, in support of the application to amend, that the amendment would "define the real issues in controversy between the parties and will allow the Claimants

to put forward their true case". He referred to rule 20.4 of the CPR as well as to the *Diamantis Diamantides* case, cited above. There, Lord Justice Moore-Bick said, at paragraph 16:

> "On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again."

That principle was not contested here. Counsel for PCFS submitted, that the amendment concerning the assignment of the loan agreement, resulted in the presentation of a claim that fundamentally contradicts the original claim. Mr. Robinson described the application as "completely insincere". He submitted that the matter went beyond being a mistake by the Claimants' counsel in the interpretation of the deed of assignment.

Despite Mr. Robinson's strong language, I find that the issue is not one that is so clear-cut. The Deed of Assignment contains wording which requires judicial interpretation to ascertain the true effect of the document. Premise "D" of the document speaks to the "Lenders" (two members of the consortium) agreeing to sell to NIBJ "all the Lender's rights, title and interest", and presumably, for NIBJ "to assume all the Lenders (sic) obligations and liabilities under the Debts". At clause 2, however, the document reveals that the Lenders assigned to NIBJ "all its (sic) right, title and interest in the Debts". No mention is there made of the obligations of

the Lenders. Mr. Robinson sought to refer to affidavit evidence concerning the assignment and to the effect of notice thereof being given to the Claimants and their consent thereto. In my view these are properly matters for resolution by a trial judge.

The question of correcting a mistake in a party's statement of case was dealt with in *Charlesworth v Relay Roads Ltd. and Others* [2000] 1 WLR 230. There, Neuberger J. held that the court, in administering justice must take into account that the civil procedure system is not immune from error. He went on to say, at page, 235

> "When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoiner and non-joiner of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted."

His Lordship then referred to the case of *Clarapede & Co. v Commercial Union Association* (1883) 32 W.R. 262 at page 263 where Brett, M.R. said:

> "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..."

The fact that the original pleading remained in place for two years is not sufficient to prevent amendment. Amendments may come at a late

stage. Here the application is being made at the first Case Management Conference. I do not consider that there will be injustice to the Defendants in allowing the amendment.

Before leaving the aspect of the assignment, I should also address another point. Mr. Robinson observed that portions of the proposed amended Particulars of Claim run contrary to the new position which the Claimants now propound. The Particulars of Claim still seek to assert that liabilities were acquired by JRF, while the thrust of the new position is that the liabilities remained with the members of the consortium. Mr. Vassell has accepted the criticism and seeks leave to further adjust the amended pleadings to clarify that aspect, in the event that leave to amend is given.

Mr. Robinson also complained that the proposed amended Particulars of Claim failed to correct a blatant deficiency in the original claim. That deficiency, learned counsel submitted, is that Western Cement gave no consideration for TDB's undertaking to pay on certain conditions and that the claim does not allege that the conditions requiring payment ever materialized. I find that those are questions of law and fact which have to be resolved at trial.

On one aspect of her opposition to the application to amend, Mrs. Minott-Phillips approached the matter on the principle that the court will not

allow an amendment where the purpose is to supply a deficiency in the pleadings. Such an application, counsel submitted, would be considered an abuse of the process of the court. Learned counsel relied on the case of *Moo Young and another v Chong and others* (2000) 59 WIR 369. In that case an application to amend the Defence, during the course of the trial, to plead something contrary to a specific allegation of fact, previously made, was ruled to be impermissible. The Court of Appeal further held that "the applicant should not be allowed to raise an entirely new case by way of an amendment" (see page 369 h).

The *Moo Young* case is completely dissimilar to the instant one, and the reference to it is unfortunate. In the instant case, not only is the application to amend being made at the first Case Management Conference but there is no backtracking on allegations of fact. What the claimants have done is to seek to advance an interpretation of a document, which interpretation is contrary to that previously advanced by them. That is a wholly different case from the situation in *Moo Young*, where P. Harrison, J.A. (as he then was), after reviewing some of the Defendants' attempts to change course, was moved, at page 378 d to quote the words of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 711:

> "I reserve to myself the right to consider how a case should be dealt with where there has not merely been a mistake but due attempt to mislead."

I am not of the view that the words of Bowen LJ apply to this case.

At paragraph 14.3 of *A Practical Approach to Civil Procedure*, 9th Ed. author Stuart Sime outlines the way the court should go about assessing applications to amend:

> "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 is a correct and concise statement of the applicable law. In applying it to this case I find that the Claimants have raised issues which are not frivolous and vexatious. There have been errors made in pleading those issues and it is necessary to allow them to make the necessary corrections. It is not too late to allow the corrections and they will enable the real matters in controversy to be determined.

Still, as has been admitted by Mr. Vassell, all is not well. Further adjustments to the Particulars of Claim will have to be made. The Defendants will have an opportunity to assess them.

Conclusion

Although there were defects in the original pleadings which could have led to a successful application to strike out the claim, the Claimants have made out a proper case to allow for an amendment of their Particulars of Claim. The amendment will enable the real matters in controversy to be

determined. There are substantive issues to be tried and the application to amend is being made at a relatively early stage of the claim. It would not work injustice to the Defendants.

The application to amend JRF's application to add an application for summary judgment would be inappropriate in the context of the application to amend. It is true that the JRF's application preceded the Claimants' but having heard all the submissions I am of the view that the Claimants should be given an opportunity to put forward their case to allow for adjudication, at trial, of the substantive issues on which their claim is based.

The Defendants are entitled to the costs of the application and the costs of and occasioned by the amendment. The application to amend is not so late as to require the onerous costs which Mr. Robinson submitted were appropriate. Extensive arguments by experienced counsel featured in the applications to strike out and to amend and I am grateful to counsel for their industry and the clarity of the submissions.

The orders are as follows:

1. The applications by the 1st 2nd and 3rd Defendants respectively to strike out the Claimants' claim are refused;

2. The Claimants shall be at liberty to prepare, file and serve on or before 31st October 2008, an amended Particulars of Claim in terms of that appended to its amended notice of application for court orders filed July 22, 2008 with such further amendments as regards the issue of the Deed of Assignment as it deems necessary;

3. The Defendants shall be at liberty to respectively file and serve, on or before 17th November 2008 an amended Statement of Defence with or without a Counterclaim as they are respectively advised;

4. The Claimants shall be at liberty to file and serve replies and/or defences to counterclaims, if so advised, on or before 28th November 2008;

5. The Claim by the Fourth Claimant may only proceed if there is filed on or before the 31st October 2008, either an undertaking to indemnify the Fourth Claimant for the costs it will incur in this claim and for any costs which it may be ordered to pay the Defendants herein or the consent of the Fourth Defendant's receiver for the claim to be prosecuted. In the event that neither the indemnity nor the consent is provided the Fourth Defendant's claim shall stand as struck out;

6. The Case Management Conference is adjourned to a date to be agreed between counsel and the Case Management Judge, being not later than the 16th December 2008;

7. Costs of the application to strike out, the application to amend the particulars of claim and the costs of and occasioned by the amendment shall be paid by the Claimants to the Defendants;

8. Special costs certificate granted.