IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 1993 C.L. C. 363

IN CHAMBERS

BETWEEN	CENTURY NATIONAL BANK LTD.	FIRST CLAIMANT
AND	CENTURY NATIONAL MERCHANT BANK TRUST CO. LTD.	SECOND CLAIMANT
AND	JAMAICAN REDEVELOPMENT FOUNDATION INC.	THIRD CLAIMANT
AND	WINDSOR COMMERCIAL LAND COMPANY LTD.	FIRST DEFENDANT
AND	SELVYN SMITH	SECOND DEFENDANT
AND	WINSTON G. CRICHTON	THIRD DEFENDANT

Mr Brian Moodie instructed by Samuda and Johnson for 1st and 2nd Claimants and the Applicant Financial Institutions Services Limited.

Mrs Sandra Minott-Phillips and Ms Ky-Ann Taylor instructed by Myers Fletcher and Gordon for 3rd Claimant.

Ms Carol Davis and Mr Rodrick Gordon instructed by Gordon McGrath for 1st and 3rd Defendants.

Civil Procedure – Application to substitute claimant – Assets of original claimant acquired by applicant – Applicant has since transferred the interest which it acquired - Counterclaim existing against original claimant – Counterclaiming defendant not interested in pursuing the counterclaim against original claimant or applicant - Whether applicant ought to be substituted – Whether original claimant ought to be removed as a party - CPR r 19.2 (4) and (5).

Civil Procedure – Application to amend particulars of claim – Claimant seeking to amend the amount of the claim in order to recover a larger sum – Amendment sought after the expiry of the limitation period – Larger sum was the original sum claimed – Whether amendment should be granted - CPR rr 20.4 and 20.6.

Civil Procedure – Application to approve expert witness – Re-trial ordered – Prospective expert not a witness at the original trial – Whether new expert evidence

may be produced at the re-trial – whether expert evidence is reasonably required to assist the court - CPR r 32.2.

Civil Procedure – Party dying during litigation – Whether representative for party's estate should be substituted – No application for substitution – Court's authority to order substitution - CPR r 21.7 and 21.8.

3, 14 March, 4 and 19 April 2011

BROOKS J

Originally, the court had been asked to adjudicate on three interlocutory applications for court orders, namely:

a. an application to substitute claimants;

b. an application to amend the claimant's particulars of claim, and,

c. an application to approve a witness as an expert.

During the course of the hearing, the sad news of the death of the second defendant, Mr Selvyn Smith, was communicated to the court. He died during the course of the proceedings, but before the commencement of the hearing. The question of whether his estate should be substituted became a fourth issue for the court's consideration. I shall address the issues in turn.

The application to substitute claimants

The first application was made by the Financial Institutions Services Limited (FIS). FIS seeks to be substituted for Century National Bank Limited (CNB) and Century National Merchant and Trust Company Limited (CNM&T) which are the first and second claimants respectively, in the instant claim. According to FIS, the assets of both CNB and CNM&T were vested in it by orders of this court and therefore, it is the proper party to be before the court in place of CNB and CNM&T.

The application is opposed by the third claimant Jamaican Redevelopment Foundation Inc (JRF) and the first and third defendants respectively, Windsor Commercial Land Company Ltd (Windsor) and Mr Winston G. Crichton. JRF opposes the application on the basis that although CNB and CNM&T have been deprived of their respective assets, their liabilities (including any liability pursuant to the defendants' counterclaim against them) remain vested in them. On those submissions, CNB and CNM&T remain the appropriate parties in respect of the counterclaim.

The first and third defendants oppose the application on the basis that FIS has no standing in the matter. They say that whatever interest FIS would have had, pursuant to the vesting orders, has been transferred to JRF pursuant to an agreement between FIS and JRF. They also assert that it would be prejudicial to have the FIS introduced at this stage, as it would have the result of the FIS seeking to enforce a claim outside of the limitation period. In fact, say these defendants, CNB and CNM&T ought to be removed as parties to the claim. They filed an application to that effect and made written submissions in respect thereof. All those submissions by the defendants may be conveniently considered together in this section of the judgment.

The issue to be decided is whether the FIS still has an interest in respect of the subject matter of the claim so as to entitle it to be introduced as a party thereto, albeit by way of substitution for CNB and CNM&T. In addressing the matter, it will be necessary to first outline the background to the claim and the manner in which the claim has proceeded since being filed.

The Relevant Background

The genesis of the claim is the loan by CNB and by CNM&T to Windsor, of various sums of money. The loans were secured by a mortgage of real property owned by Windsor and guarantees by both Mr Crichton and Mr Smith.

CNB and CNM&T alleged that Windsor and the guarantors (herein together called "the defendants") had defaulted in respect of their various obligations. CNB and CNM&T therefore filed the instant claim on 2 November 1993. The defendants denied liability and counterclaimed for the repayment of monies, allegedly overpaid to CNB and CNM&T. CNB and CNM&T joined issue on the defendants' defence and sought to defend the counterclaim.

Some time after the commencement of the claim, both CNB and CNM&T fell into difficulty and on 21 October 1997, the vesting orders, mentioned above, were made. The effect of the orders, in respect of the liability of CNB and CNM&T to third parties, in particular these defendants, is a source of dispute. That dispute will not be assessed here as there were no detailed submissions in respect thereof. Suffice it to say that, by a deed of assignment dated 30 January 2002, FIS assigned to JRF all of its "rights, title and interest in and to all the Assets [including the debts acquired from CNB and CNM&T as allegedly owed by the defendants] and all interest and other monies (if any) now due and subsequently to become due in respect of such Assets TO HOLD (sic) same unto the Purchaser absolutely".

A consequence of that assignment is that JRF sought to be joined as a claimant in the claim. It was apparently successful, as an Amended Defence and Counterclaim alleges, in its naming of the parties therein, that JRF was added pursuant to an order of

Campbell J, made on 3 May 2005. Although no issue has been made of this joinder, and it is noted that JRF's consent to be joined was filed on 5 May 2005, there is no minute of order or formal order to that effect on the court's file. The joinder was effected during the first trial held in respect of this claim.

Campbell J delivered a judgment in the claim on 23 September 2005. The judgment was, however, overturned on appeal and a new trial was ordered to be held. The judgment of the Court of Appeal was handed down on 5 June 2009.

All claimants, including the JRF, were represented by the same firm of attorneys-at-law from that time until 22 October 2010 when a notice of change of attorneys was filed on behalf of CNB and CNM&T only.

The present application was filed on 24 February 2011 by the attorneys-at-law latterly representing CNB and CNM&T.

Having given that background, I now turn to the relevant rules in respect of the application.

The Relevant Rules

Part 19 of the Civil Procedure Rules 2002 (the CPR) addresses the issue of the addition, removal and substitution of parties to a claim. Rule 19.2 (4) of the CPR addresses the removal of a party and rule 19.2 (5) speaks to the substitution of an existing party by a new party. The former states:

> "The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings."

Rule 19.2 (5) states:

> "The court may order a new party to be substituted for an existing one if -

a) the existing party's interest or liability has passed to the new party;
or

b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party."

Analysis

An important element of this analysis is the recognition that CNB and CNM&T each held two capacities in this claim just prior to the vesting orders being made. In the first, they were claimants seeking to recover monies said to be owed to them, and in the second, they were defendants to a counterclaim which alleged that they owed monies to the defendants. There is no dispute that the capacity as claimants was transferred, first to FIS and then by FIS to JRF.

Both FIS and JRF assert that the capacity as defendants to the counterclaim, insofar as liability is concerned, remains with CNB and CNM&T. Whereas the defendants do not accept that assertion, their position, as advocated before me on their behalf by Mr Gordon, is that they are prepared to prosecute their counterclaim against the JRF alone. In his written submissions, learned counsel explained that the introduction of the JRF into the claim, "make[s] the continued role of [CNB and CNM&T] superfluous at best, and a waste of the allocation of judicial time". That position, as taken by the defendants, is also important for the purposes of this analysis.

Mr Moodie, on behalf of FIS, submitted that FIS' participation in the claim, going forward, was necessary because there were aspects of the claim unique to CNB and CNM&T, including the orders concerning costs of the first trial and of the appeal.

Mrs Minott-Phillips, for JRF, made it clear that JRF viewed the liability on the counterclaim as remaining with CNB and CNM&T. On her submission, the proper

parties to the claim were in their appropriate places. Learned counsel cited rule 19.4 (3) (b) of the CPR in support of her submission that the complaint by the defendants, as to the loss of a defence under the Limitation of Actions Act, was baseless. That rule stipulates that a court can consider a substitution of a party necessary, if "the interest or liability of the former party has passed to the new party".

It is, in my view, unnecessary for FIS to be introduced as a party. It is also, I find, unnecessary for CNB and CNM&T to continue as parties to the claim.

As pointed out above, there is no dispute that the capacity of claimant which CNB and CNM&T held in the instant claim has been transferred to JRF. The capacity of defendant to the counterclaim is the subject of dispute. Although JRF asserts that it did not inherit that liability, the defendants are content to proceed against JRF alone, in that regard. In neither capacity, therefore, is FIS a necessary party to these proceedings. Its introduction would only serve to complicate the claim and incur unnecessary costs.

It may be that FIS does have a role to play in the trial. This is, insofar as the admission into evidence of any documentation, concerning the vesting of the assets of CNB and CNM&T, or the transfer of those assets, are concerned. FIS has no other credible role except as a witness as to fact.

It is for the above-stated reasons that I also find that CNB and CNM&T should cease to be parties to the claim. Their presence, in respect of their two-fold capacities, has been rendered otiose by the circumstances mentioned above. There is also a practical aspect to the removal of CNB and CNM&T from the claim. Both have ceased to operate and may well be, as Mr Gordon termed them, "defunct". That situation has consequences in respect of counsel appearing and, not unimportantly, in respect of the question of costs.

The application to amend the particulars of claim

In the second application, JRF seeks to restore, as the sum claimed from the defendants, the amount which was stated to be due by the defendants when the claim was originally filed. That original sum was $36,279,170.48. The original claim also sought "[i]nterest at the rate of 45% per annum from 7 October 1993 until judgment".

The defendants have resisted the application on the bases, on my summary, that:

a. to grant an amendment "almost 20 years after the original Claim was filed" is not consistent with the overriding objective to deal with cases justly;

b. having relied on a PriceWaterhouseCoopers report at the trial and at the appeal, which report stipulated the amount said to be due by the defendants was $11,500,344.00, JRF is estopped from making a claim contrary to the findings of that report;

c. the amendment sought at this late stage would unfairly prejudice the defendants (especially since one of them (Mr Smith), has died);

The background for this application must be set out, in order to make a proper analysis of the issues.

The background

At the time when JRF became a claimant, it was a party to an application to reduce the sum claimed from $36,279,170.48 to $11,500,344.00. This was done by way of an amended form of particulars of claim filed 5 May 2004. JRF, in paragraph 10 of the amended document, sought to explain the reduction:

> "Pursuant to the findings of PriceWaterhouseCoopers that the sum of $11,500,344 is due from the Defendants to CNB and CNM&T under the loan agreements

> being an account rendered pursuant to a consent order herein, the Claimant claims that reduced sum as at October 6, 1993 together with interest thereon at such rate and for such period as this honourable Court deems fit."

The trial proceeded on the basis of the amended particulars of claim. When the Court of Appeal handed down its decision, the essence of the decision in respect of the PriceWaterhouseCoopers ("PWC") report, was that the learned trial judge was in error when he held that the parties intended to be bound by the findings of PWC (mentioned in the above quote). The Court of Appeal also found that the learned trial judge erred in finding that the defendants were estopped from denying that they owed the $11,500,344.00 which PWC had concluded that they owed (per Cooke JA at paragraph 12). Smith JA, who gave the other reasoned opinion in that decision, was of a similar view to Cooke JA. Smith JA said, at paragraph 44:

> "I have therefore come to the view that [the learned trial judge] fell into error in approaching and deciding the case solely on the basis that the conclusions of the PWC report were intended by the parties to be binding on them"

Smith JA went on, at paragraphs 49 and 50 to explain his reservations concerning the PWC report. I need only say that the reservations did not criticise PWC's approach but pointed out that PWC were not given important material.

Analysis

In addition to the points raised in opposition, which were mentioned above, Mr Gordon submitted that the proposed amendment would deprive the defendants of the benefit of a defence under the Limitation of Actions Act. He referred to the length of time that it has taken the JRF to make the application, namely, "almost 2 years after the decision of the Court of Appeals (sic), 7 years after Case Management, and almost 20

years after filing their original claim". Learned counsel submitted that the amendment would cause further delay in bringing to an end this protracted matter.

I do not accept that these submissions are valid. The proposed amendment restores the claim to its original position and that restoration does not, in my view, cause any additional prejudice to the defendants. In addition, the Court of Appeal having found that neither party is bound by the PWC report, it would be wrong to assert that JRF is estopped from seeking to act contrary to its findings. That assertion would fly in the face of the ruling of the Court of Appeal.

I also rely, by way of analogy, on the dictum of Lord Woolf in *Daniels v Walker* [2000] 1 WLR 1382 at page 1387 C-D:

> "Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert or, if appropriate, to rely on the evidence of another expert."

It seems to me, that the party, referred to by Lord Woolf, could also rely on additional evidence, other than that provided by an expert witness. In my view the JRF's situation fits squarely within that extended context.

It will be for JRF to prove its claim at the trial. The amount of its claim will be a matter for the tribunal of fact to resolve. JRF should be allowed the opportunity to prove its claim, if it can. The defendants, on the other hand, will have ample time to prepare their challenge to any evidence which the JRF may produce, in an effort to prove its case. The application to amend should be granted.

The application to approve an expert witness

In the next application, the defendants seek this court's approval of Mr Wayne Strachan as an expert witness in the field of accounting. The defendants disagree with some of the contents of the PWC report and wish to have another expert review the documentation.

Counsel for the JRF, Mrs Minott-Phillips complained that the defendants had not demonstrated to the court that there was any need for any further expert evidence. Learned counsel cited rule 32.2 of the CPR in support of her submission that the defendants had a duty to show that the requested expert evidence "is reasonably required to resolve the proceedings justly". She also cited, in support, the case of *National Commercial Bank Jamaica Ltd v K & B Enterprises Ltd* SCCA 70 of 2005 (delivered 5 September 2005). In that case K. Harrison JA in referring to the requirement of rule 32.2 stated, at page 6 of his judgment, that:

> "…it is incumbent upon the [party applying for expert witness to be admitted] to present evidence before the judge in Chambers, to show that the accounting field could assist the court in projecting the type of profit to be earned or loss sustained, from a project that had not really commenced….Part 32.2, provides that expert evidence should be restricted to that which is reasonably required to resolve the proceedings justly."

In order for the court to grant permission for expert evidence to be adduced, it must be shown that the subject matter of the dispute calls for expertise, that the area must be a generally recognized field of expertise and that the proposed witness is suitably qualified to provide the relevant evidence.

This case involves, in a significant way, the examination of accounts between the contending parties. Substantial amounts are involved. That expert accounting evidence is required in the instant case, was demonstrated at the time when the parties agreed to

commission PWC to render an expert report in respect of the debt owed by one party to the other. That the PWC report has challenges, was referred to by Smith JA, in his opinion, mentioned above. On those facts, I find that the subject matter still requires expertise in the field of accounting. It is beyond question that that field is a recognized and established field of expertise.

Where there has been occasion to disagree with an expert's opinion, another expert may be commissioned. It is permissible to have another expert commissioned, even after a jointly commissioned report has been produced. This was demonstrated in the opinion of Lord Woolf *Daniels v Walker*, quoted above. I accept that opinion, with respect, as good law and applicable to Jamaica.

In my view, therefore, despite opposition by the JRF, there is a very real possibility that another expert may assist the court in resolving the issues which caused difficulties with the PWC report.

The next question is whether Mr Strachan is suitably qualified to be approved as an expert witness. Based on his curriculum vitae, Mr Strachan is fully qualified to carry out the task which the defendants seek to have him perform. He is a chartered accountant, has a Master's degree in Business Administration, is a Fellow of the Institute of Chartered Accountants of Jamaica, is a Fellow of the Association of Chartered Certified Accountants and is entitled to practise as a public accountant in Jamaica pursuant to the Public Accountancy Act. There is also, no hint of any allegation of bias made against Mr Strachan as was the case in respect of another expert witness which the defendants had proposed to call at the first trial, but eventually did not.

I have no hesitation in approving Mr Strachan as an expert witness for the purposes of this claim and the counter-claim.

Another basis on which the JRF has opposed the application is that, since the Court of Appeal has ordered a new trial without any further directions, there should be no new evidence placed before the tribunal conducting the re-trial. On the submissions of Mrs Minott-Phillips, the intention of the Court of Appeal was, "that there be a new trial of the matter on the existing facts as set out in the pleadings, witness statements and expert's report".

Learned counsel cited in support of her submission a definition of a new trial as set out in *Black's Law Dictionary (5th Ed.)* at page 1348:

> "A re-examination in the same court of an issue of fact, or some part or portions thereof, after the verdict by a jury, report of a referee, or a decision by the court."

I do not agree with learned counsel's view of the matter. In my view the definition, cited above, does not support the point counsel advances. The re-examination "of an issue of fact" does not limit the new tribunal to inspecting the same evidence in respect of the issue which was before the previous tribunal. It is also the experience of this court, at least in its criminal law jurisdiction, that fresh evidence is often adduced during re-trials.

In addition, I hold the view that it is this court which has the responsibility for ensuring that the matters which are placed before the trial judge, even on a re-trial, have been so tailored, that the issues and the available evidence are identified to ensure, not only the best use of judicial time, but as far as possible, a fair result. That, with respect, is not the mandate of the Court of Appeal. In my view, to have expected the Court of Appeal to have made case management orders (as Mrs Minott-Phillips intimates that it

could have, but didn't), concerning the re-trial which it had ordered, would be to ask that court to do more than it need do. Undoubtedly, case management is the responsibility of this court.

Based on the above reasoning, I find that Mr Strachan should be approved as an expert witness.

The appointment of a representative for the second defendant

In ensuring the preparedness of the claim and counterclaim for trial, the court has the responsibility to address the issue of the death of any of the parties to the case. Mr Smith's requires the court to examine the provisions of Part 21 of the CPR to guide it in discharging its responsibility. Rule 21.8 stipulates that where a party to proceedings dies, the court may give directions to enable the proceedings to be carried on. The directions may be given with or without an application being made to the court. The possible directions are not stipulated in that rule, but rule 21.7 does provide some guidance to the court. Rule 21.7 (1) states:

> "Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings."

The latter rule suggests to me that the court may appoint someone to represent Mr Smith's estate if he has no personal representative. The person appointed must not have any interest adverse to that of Mr Smith's estate. That person must also be able to fairly and competently conduct the proceedings on behalf of Mr Smith's estate (see rule 21.7 (2).

Where the court appoints a representative in circumstances such as these, a judgment or order of the court would bind the estate (see rule 21.3 (1)). If such a

representative was not appointed and a trial of the claim resulted in a judgment, which was adverse to the defendants, the judgment could not be enforced against Mr Smith's estate. This would be because the principle of natural justice, namely, *audi alteram partem* (hear the other side), would not have been observed. Rule 21.3 (2) of the CPR also stipulates that such a judgment "may not be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the court". I doubt that such permission would be given if Mr Smith's estate had not been afforded an opportunity to be heard.

In the instant case evidence of Mr Smith's death was provided in an affidavit sworn to by Miss Carol Davis on 5 April 2011. It exhibited a copy of a death certificate which showed that Mr Smith died on 11 June 2010. The affidavit did not, however, provide any information as to whether or not Mr Smith died intestate, nor was any indication given that any person was interested in representing his estate.

There is, in my view, insufficient information available to the court, at this time, to make an order appointing a representative for Mr Smith's estate. There are options open to the court in the appointment of a representative; it may appoint the Administrator General for Jamaica; it could consider appointing Mr Crichton or appointing one of the beneficiaries of Mr Smith's estate. The most appropriate appointee would, of course, be the individual who would allow this claim to proceed as quickly as possible. The court has to leave it to the parties to make that decision and to file the appropriate application, bearing in mind, of course, the great age of this claim. In order to ensure that there is some definite end to this hiatus, however, I shall order that the Administrator General be

deemed appointed as the representative, if no application for a representative to be appointed, is filed by 29 July 2011.

Costs

In light of the fact that each party has enjoyed a measure of success in these applications it would be unwieldy to apply the rule that costs follow the event. In the circumstances I find that the appropriate order should be that each party shall bear its own costs.

For the reasons set out in the above analysis, the orders are:

1. The application to substitute Financial Institutions Services as claimant is refused;

2. Subject to their being able to pursue the recovery of any costs to which they are previously entitled, the first and second claimants shall cease to be parties to the claim and shall be removed forthwith, therefrom;

3. The 3rd Claimant is at liberty to file and serve an amended particulars of claim in the terms set out in the draft further amended particulars which is exhibited to the affidavit of Merline Patterson filed herein on 2 February 2011;

4. Mr Wayne Strachan is hereby approved as an expert witness;

5. An application for the court to appoint a representative of the estate of the 2nd defendant Mr Selvyn Smith, deceased, shall be made on or before 29 July, 2011, failing which the Administrator General for Jamaica shall be deemed appointed as such representative as of 1 August 2011;

6. Each party shall bear its own costs;

7. The 3rd Claimant's attorneys at law shall prepare and file the formal order hereof and serve copies thereof on all parties hereto as well as on the Administrator General for Jamaica

8. Leave to appeal is granted.