

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISION

CLAIM NO. C.D. 0003 OF 2003

BETWEEN	K & B ENTERPRISES LIMITED	APPLICANT/ CLAIMANT
A N D	NATIONAL COMMERCIAL BANK JAMAICA LIMITED (SUCCESSORS TO MUTUAL SECURITY BANK LIMITED)	RESPONDENT/ DEFENDANT

Lord Gifford Q.C., Sheila Tomlin instructed by Gifford Thompson and Bright for Applicant/Claimant.

Dave Garcia and Kwame Gordon instructed by Myers Fletcher & Gordon for Respondent/Defendant.

Heard: July 3rd. and 6th, 2006

Cor: Rattray, J.

1. The issue before the Court is whether to grant the amendment sought by the Claimant to add to its claim under the heading "Particulars of Damage", details and figures previously omitted from the amended Statement of Claim.
2. The application came before this Court for hearing on the 3rd July, 2006, one week prior to the date fixed for the trial of this action, which was set down for four (4) days. The Civil Procedure Rules permit a party to amend its Statement of Case without the Court's permission at any time before the Case Management Conference. see Rule 20.1. After the first Case Management Conference

however, the Court may not grant permission for such an amendment unless it is satisfied “that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference” - see Rule 20.4 (2).

3. That Rule confers on the Court a discretion to allow an amendment if it is satisfied firstly, that the amendment is required because of some change in circumstances and secondly, that that change in circumstances became known after the first case management conference. Both these tests in my view must be satisfied by an Applicant who seeks the Court's permission for the grant of an amendment after the first Case Management Conference is held.
4. A review of the Court file revealed that the Particulars of Damage as outlined in the Claimant's Amended Statement of Claim as it presently stands, merely read: -

“Further Particulars of Damage will be supplied in the form of report by a court approved expert witness.”

That clause itself was introduced to this claim by virtue of an amendment granted at the Pre-Trial Review held on the 7th July, 2004. On that date, the Court also ordered *inter alia*, that Raphael Gordon, Chartered Accountant from the firm of KPMG be called as an expert witness on behalf of the Claimant and that his report be filed by the 23rd August, 2002.
5. Due to a possible conflict of interest, Mr. Gordon was unable to take up the appointment and on the 10th May, 2005, the Court

granted the application of the Claimant for the appointment of Mr. Dwight Orgill as its expert witness. National Commercial Bank appealed that decision and on the 5th September, 2005, the Court of Appeal set aside the ruling with respect to the Mr Orgill's appointment as an expert witness for the Claimant. It is in these circumstances and in light of the Claimant's pleadings as they presently stand that this application to amend was brought.

6. One final aspect of the narrative which is of some relevance is the fact that the Applicant's original Statement of Claim filed in July, 1999, under the heading "Particulars of Damage" included an estimated loss of revenue in the sum of **\$23,590,000.00** prepared by one A.D.D. Morgan, which estimate was dated the 18th February 1992. This was the state of the Claimant's pleading insofar as its claim for damages was concerned when the first Case Management Conference was held on the 1st day of December, 2003.
7. An examination of the draft Re-Amended Statement of Claim attached to this application discloses that the proposed amendment refers to a Mining Engineering Evaluation carried out by A.D.D. Morgan, as well as his Addendum to that report which had been supplied to the parties. These reports outline projected net returns and export earnings to be derived from the project and form the basis of the proposed claim for damages in the action.
8. The question to be determined is whether the pre-conditions for the exercise of the Court's discretion as set out in Rule 20.4 (2) have been satisfied by the Claimant.

9. K & B Enterprises Ltd. contends in the Affidavit filed in support of its application to amend, that the effect of the ruling of the Court of Appeal which prevented the Claimant from calling the expert witness, resulted in a change of circumstances in this matter since the first Case Management Conference and as a consequence, the Claimant now requires an amendment to fully particularise its damages.
10. Learned Queens Counsel, Lord Gifford conceded that the application was in fact made at a late stage of the proceedings and tendered apologies in that regard, He further admitted that the result of the decision of the Court of Appeal meant that the Claimant no longer had a pleaded case with respect to Particulars of Damages, since by an earlier amendment, the Claimant had deleted the original reference to the report of A.D.D. Morgan in favour of an Expert's Report, which was to have been put before the Court.
11. Counsel went on to indicate that the Claimant has in the proposed amendment relied once again on Mr. Morgan's report, although now set out in more detail, fully outlining projections on which his client intended to rely, which projections had been presented to the Defendant and which were material in the Bank coming to its decision to grant the loan facility, based on its assessment of the projected viability of the scheme. He therefore contended that the Defendant would not be taken by surprise, as the figures sought to be included in the claim had already been known to and considered by the Bank.

12. Lord Gifford further submitted that the overall interest of justice ought to dictate that the Claimant be allowed the opportunity to deal with issue of damages were it to succeed on the question of liability. Due to the lateness of the application, he admitted that if successful the Claimant would have to bear the consequences of the application.
13. Having perused the submissions of Counsel in this matter as well as the authorities referred to, the focal point of this application must be Rule 20.4(2) of the Civil Procedure Rules. It is only in the limited circumstances provided therein that the Court can consider the grant of an amendment after the first Case Management Conference.
14. I am not convinced that on the material before me there has been any change in circumstances, which change became known after the date of the first Case Management Conference and which would merit an amendment to the Claimant's pleadings. I am of the view that any such change in circumstances ought to relate to some aspect of the case not previously known to the party applying, which it now seeks to put before the Court by way of an amendment.
15. In looking at the proposed amendment and after considering Lord Gifford's submissions, it is clear that the information contained in Mr Brown's report was known to the parties and certainly to the Claimant, for some time before the first Case Management Conference. When the Statement of Claim was filed on behalf of

the Applicant in July, 1999, that pleading referred to Mr. Morgan's report dated 18th February, 1992. Counsel quite frankly admitted in his submissions that his client would be going back to Mr Morgan's report, but in more detail. And therein lies the problem. No change in circumstances has been shown by the Claimant, nor has it been disclosed in the evidence before this Court that if such a change did exist, it became known after the first Case Management Conference.

16. I do not find that the decision of the Court of Appeal refusing the Claimant permission to rely on Mr. Orgil's report amounted to a change in circumstances which would necessitate an amendment. The fact is that the information contained in Mr. Brown's report was at one stage in the proceedings being relied on by the Claimant, and now it seeks again to rely on that report.
17. It is not sufficient in my mind for the Claimant in an application of this nature to say that the Defendant will not be taken by surprise by the proposed amendment or that it is prepared to pay the consequences which may flow from the grant of the Order sought. Those are considerations more relevant under the provisions of the former Civil Procedure Code. In that era, the award of costs was the natural consequence of the grant of an amendment, which may also have led to the adjournment of a trial. But costs are no longer viewed as "a panacea for every sore in litigation." That is a relic from a time that has passed. The Civil Procedure Rules mandate that matters be dealt with expeditiously and fairly, minimizing delay. In the present case, the specific requirements of Rule 20. 4 (2) must be complied with for the Court's discretion to

be activated. And even then, had the pre-conditions outlined in that Rule been met, which I do not find, the Court would also have had to consider why it is that after the decision of the Court of Appeal was handed down in September, 2005, no steps were taken to promptly make the application to amend. No reason has been advanced for this nine (9) month delay, leading to this application being made one week before trial.

18. In the exercise of any discretion given by the Rules, the Court must give effect to the overriding objective, which requires that it deals with matters justly. The grant of the amendment applied for at this eleventh hour would prejudicially affect the Defendant's preparation of its case and stir it to take renewed steps in furtherance of the preparation of its Defence, in an action filed over eight (8) years ago concerning an entity no longer in existence.
19. In the circumstances, I am of the view and I so find that the Claimant has not satisfied the Court that the requirements as set out in Rule 20.4 (2) to enable the court to exercise its discretion have been fulfilled. The Application is therefore refused. Costs of the Application awarded to the Defendant. Leave to Appeal granted.