

IN THE SUPREME COURT OF JUDICATURE JAMAICA

THE CIVIL DIVISION

CLAIM # C.L.L.053 OF 1999

BETWEEN	WAYNE ANDREW LATTIBEAUDIERE	CLAIMANT
AND	FLAME PRODUCTIONS INCORPORATED LIMITED	1 st DEFENDANT
AND	PATRICK ANTHONY BARRETT	2 nd DEFENDANT

IN CHAMBERS

Ms. Catherine Minto Instructed by Nunes, Scholefield, Deleon and Co. for
the Claimant/Respondent

Ms. Sandra Alcott for the Defendant/Applicant

Heard on 11th June 2008

APPLICATION SEEKING LEAVE TO AMEND DEFENCE

Gayle J (Ag.)

BACKGROUND

On the 2nd July 1999 the Claimant/Respondent filed suit seeking a declaration that the Defendant/Applicant had infringed his copyrights and for damages for such infringement.

On the 10th day of November 1999, the Defendant/Applicant filed his defence. In his defence he denied that he Claimant/Respondent was the composer of the composition. He claimed instead that the second

Defendant/Applicant was the sole composer of the musical composition entitled "*Lalabella*". In the said defence he challenged the originality of the composition as against the "*Forbidden Love*" recording composed by 'Third World' and also counter-claimed for a declaration that the Defendant/Applicant has "full ownership as composer, author and owner of the copyright in respect of the said musical compositions".

On the 10th day of March 2004 the Case Management Conference was conducted by the Honourable Mrs. Justice Norma McIntosh. The preparatory orders were made for trial. The Pre-Trial Review was set for the 9th day of February 2006 and the trial fixed for the 29th day of May 2006 to the 6th day of June 2006.

On the 9th day of February 2006 the Pre-Trial Review was conducted by the Honourable Mr. Justice Hibbert. Unless Orders were made for the parties to comply with the orders made at the Case Management Conference on or before the 28th day of February 2006 and the Pre-Trial Review was adjourned to 28th day of March 2006 at 10:30a.m.

On the 28th day of February 2006 the witness statements were filed. On the 28th March 2006 Pre-Trial was conducted by the Honourable Mr. Justice Anderson at which time the Trial date was vacated and the time for compliance with all Case Management Orders extended to 13th April 2006. An application for a panel of experts to be appointed in respect of the compositions and the Pre-Trial Review were adjourned to the 31st day of May 2006 at 3:30a.m.

On the 31st May 2006 Pre-Trial Review was conducted by the Honorable Mr. Justice Gayle (Ag.). An order was made as to the experts to comprise the panel and that the experts' reports were to be submitted on or before the 29th September 2006. The Pre-Trial Review was adjourned to the 19th October 2006 at 3:30p.m.

On the 19th October 2006 Pre-Trial Review was conducted by the Honourable Mr. Justice Morrison (Ag.). The experts were not yet appointed and the Pre-Trial Review was again adjourned to the 23rd November 2006.

On the 23rd November 2006 Pre-Trial Review was scheduled but was adjourned as the Court's file could not be located. Notice was sent out to the effect that Pre-Trial Review was to be held on the 20th day of November 2007 at 2:00p.m.

On the 20th day of November 2007 Pre-Trial Review was conducted by the Honourable Mr. Justice Gayle (Ag.). The matter was fixed for trial for the 14th and 15th day of July 2008.

THE APPLICATION

On the 27th day of May 2008 the Defendant/Applicant filed a Notice of Application for Court Orders seeking Leave to Amend the defence in particular paragraph 5 of the defence, to allege that the Claimant's composition which the 2nd Defendant/Applicant alleges is his own is not an original composition as it bears similarity to the "*How Can I Leave*" sound recording by Dennis Brown.

The Defendant/Applicant's affidavit in support of this application has stated inter alia that at the time the defence was filed in this case he was not aware of a similarity to the composition "*Forbidden Love*" by 'Third World'. However, it was not until he subsequently instructed Mr. Kingsley Cooper, O.D. Musicologist to listen to examine and assess his song, '*Jah by My side/Lallibella*' that he was aware that the Claimant's composition was actually based on another composition '*How Can I Leave*' by Dennis Brown".

He further deposes that since the issue is one of originality and infringement of copyright, it is humbly submitted that the expert panel ought to be entitled to examine the Claimant/Respondent's composition in comparison with not only the Dennis Brown composition but in comparison with any other pre-existing musical composition.

The Claimant/Respondent in his affidavit of 9th June 2008 say as follows: "I am the author of the musical compositions entitled '*Going Home*' (which was re-titled '*Lallabella*'), '*Africa*' and '*Mama Land*'. ' have been duly registered as author of these compositions by Mechanical Copyright Protection Society Limited and Performing Rights Society Limited and accordingly I am owner of all rights and copyright in the said compositions".

That on July 2, 1999 a suit was filed claiming for, among other things a declaration that the Defendant's have infringed his copyrights and for damages for infringement.

That on November 16, 1999 a defence was filed by the Defendant's denying that he was the composer of the composition and alleging instead that

the second Defendant was the sole composer of the musical composition entitled '*Lallabella*'. By the same defence the Defendants have challenged the originality of the composition as against the '*Forbidden Love*' composed by 'Third World'. A counter-claim was also filed by the Defendants seeking a declaration of "full ownership" as composer, author and owner of the copyright of the said musical composition.

That the Claimant/Respondent opposes the application to amend at this late stage of the proceedings based on the history of the matter.

SUBMISSIONS

The essence of Ms. Alcott's submission on behalf of the Defendant/Applicant is that the amendment should be granted so as to put the Claimant/Respondent and Defendant/Claimant on a level playfield.

Ms. Minto argued for the Claimant/Respondent that the court should not grant Leave to Amend the defence of the Defendant/Applicant in light of the fact that this matter has been before the Court some nine (9) years; in light of the number of trial dates and Pre-Trial Review dates previously set, as well as the fact that a previous trial date was vacated because of a late application by the Defendant/Applicant.

THE LAW

The Civil Procedure Rules as implemented in 2002 barred a party from seeking an amendment after the Case Management Conferences unless the

amendment arose from a new development or change in the circumstances after the Case Management Conferences. This rule was relaxed in September 18, 2006.

According to Rule 20.4(1) an application for permission to amend a statement of case may be made at the Case Management Conference.

Rule 20.4(2) provides that statements of case may only be awarded after a Case Management Conference with the permission of the court.

Rule 20.4(3) states that where the courts give permission to amend a statement of case it may give direction as to:-

- a) amendments to any other statement of case and;
- b) the service of any amendment statement of case

It should be noted that not much guidance is provided in the Rules but the case law does provide some guidance as to application to amend.

In the case of ***Sinclair Investment Holding Ltd v S. Cushnie*** [2006] WL 208996 the Applicant sought to amend its particulars of claim. S applied on the first day of the trial of its action to add a claim against the third and fifth respondents L and W that they dishonestly assisted in or induced an alleged breach of trust by the first respondent C.

S Sought to add a further claim in conspiracy against the same two respondents. L and W who were already facing a claim of knowingly receiving trust property, opposed the amendments which they argued had been sought at an unfairly late stage in the trial process. They contended that they could not be fairly expected to meet the claim straightway and that an adjournment should not

be permitted because the trial had already been adjourned on a previous occasion at S's request.

It was held refusing the application, that an adjournment of the trial would be required if the new claims were to be pursued and so it was necessary to weigh the prejudice to L and W in having a further adjournment imposed on them against the prejudice to S if S were deprived of the chance of pursuing an arguable claim under each of the new head. However, the lateness of the application was a self induced problem for which S was responsible.

If the amendment were to be allowed, it could only be on the basis of an adjournment brought about because of S's incompetence in its trial preparation. The first trial date was lost because of similar incompetence and S was warned then that it would be unlikely to be given any further trial adjournment. Another adjournment would be unfair to L and W and whilst S would be caused prejudice, S had no one to blame but himself.

In ***Woods v Chalef*** [1999] Ch.Y 500. C appealed the grant of permission to W to add further particulars to a libel pleading which raised substantially new issues only six days before trial.

It was held allowing the appeal that the Judge erred in principle in allowing the amendment at such a late stage in the proceedings. In the new climate under the Woolf regime, late amendments would upset the level playing field and would not now be readily allowed especially where as here there is a risk of loss of the trial date.

Post Case Management Conference amendments are still shunned by the courts. The courts are hesitant to grant amendments at a late stage in the proceedings and where it is likely to jeopardize the trial date. The amendments are unlikely to be granted if there was a trial date and it was previously lost on account of the Applicant.

The court is hesitant to grant an amendment where there is no reason or no good reason for failing to amend earlier.

The court is also hesitant to grant an amendment where granting the amendment may result in prejudice or injustice to the other party. In ***Edna Watson v Trevor Office & Joslyn Laing*** Suit No. C.L. W-016 [2002] Supreme Court of Jamaica the second Defendant submitted an application to amend his defence at a late stage in the proceeding. Anderson J. stated at page 11 of the Judgment that “...As I understand it an amendment may always be allowed as long as it does not cause prejudice to the other party”.

The position was restated in ***Jamaica Railway Corp. v Mark Azan*** (Supreme Court Civil Appeal No. 115/05) heard on appeal before the Hon. Mr. Justice K. Harrison, J.A on Feb. 16, 2006. In disposing of the issue of late amendments and referring to ***Clarapede and Co. v Commercial Union Association*** (1883) 32 WR 262 at 263 he considered (page 11 of judgment) the common law principles, that there is a general discretion to permit amendments where it is just and proportionate and that amendments should be allowed if it can be made without injustice to the other side.

DISCUSSION

The Court is mindful of the overriding objectives and the need for matters to be dealt with expeditiously in ensuring that matters do not take up more than its fair share of the resources (Part 1.1(2) of the Civil Procedure Rules 2002).

This application to amend is being made nine(9) years after the suit has been filed; nine (9) years after the defence was filed; nine (9) years after the pleadings have been closed; over four (4) years after the Case Management Conference; six (6) Pre-Trial Review hearings and finally four (4) weeks before the trial dated.

This is a 1999 suit which has not yet reached trial and may never reach trial because of the Defendant/Applicant's continuous ill-timed applications. The last trial date was vacated because of an application filed by the Defendant/Applicant at the second Pre-Trial Review a few months before the trial date.

The application at this late stage would reopen the witness statement as the Claimant/Respondent is permitted by law to lead evidence in relation to all issues on the pleadings. It must be noted that witness statements in this matter were filed on February 28, 2006.

The issues have been joined on the pleadings in relation to one composition "*Forbidden Love*". That is the case the Claimant was told he has to meet and that is the case for which he has spent the last nine (9) years preparing witness statements. To allow the amendment at this late stage of the proceedings would be prejudicial to the Claimant/Respondent

There is no explanation in the supporting affidavit as to why this amendment was not sought at the Case Management Conference or at the first or even the second Pre-Trial Review. The "*How can I leave*" recording is not new. Dennis Brown passed away some years ago. There are no facts before the court to ground an exercise of the Court's discretion to permit an amendment at such a late stage.

CONCLUSION

I find this application to be wholly and inexcusably late. When I take into account:

- a) The proximity of the trial date;
- b) the previous vacating of the trial date in May 2008 because of a late application by the Defendant/Applicant;
- c) the prejudice likely to be caused to the Claimant and
- d) the overall history of the matter

The application for Leave to Amend Defence refused. Cost to the Claimant/Respondent in the sum of \$40,000.