IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NOS. 2004 HCV 000361 & 2004 HCV 000362

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| BETWEEN | NATIONAL HOUSING DEVELOPMENT CORPORATION | CLAIMANT/ RESPONDENT |
| A N D | DANWILL CONSTRUCTION LIMITED | 1ST DEFENDANT/ APPLICANT |
| A N D | WARREN SIBBLES | 2ND DEFENDANT |
| A N D | DONOVAN HILL | 3RD DEFENDANT |

Miss Tameka Jordan and Mr. Patrick Peterkin instructed by Jacqueline Samuels-Brown for the 1st Defendant/Applicant.

Mr. Kevin Powell instructed by the Director of State Proceedings for the Claimant/Respondent.

The 2nd and 3rd Defendants were, by permission, not present or represented.

IN CHAMBERS

**26th April & 4th May, 2007**

Practice and Procedure – Application to amend Statement of Defence after first Case Management Conference – Principles guiding application – Application for order to deliver further information

**BROOKS, J.**

The extensive amendments made in 2006 to the Civil Procedure Rules 2002 (CPR) have resulted in a welcome change to the provisions concerning applications to amend a party's statement of case after a first Case Management Conference. In this two-part application Danwill Construction

Limited has, firstly, applied to amend its statement of defence. It wishes, it says, to state more particulars in its defence. The application is opposed by the National Housing Development Corporation ("the NHDC") which has brought this claim against Danwill. The NHDC's attorney, Mr. Powell submitted that the amendments sought, do not raise any new arguable claim and ought to be refused under the court's guiding principle of seeking to deal with cases justly.

The questions which arise are firstly, what principles guide the court in assessing such applications, in the context of the amended CPR, and secondly, how should these principles be applied to these circumstances.

**The factual background**

Danwill had separate contracts with two developers to construct houses and infrastructure works on lands which the developers controlled. The NHDC was the developer's financier in each case. The construction contracts were terminated and this claim by the NHDC seeks to recover a total sum in excess of $200,000,000.00 it says it has paid to Danwill on behalf of the developers.

The NHDC alleges that the payments were induced by fraudulent misrepresentations made by Danwill and the other Defendants in the context of an unlawful conspiracy between the Defendants to injure the NHDC.

The alleged misrepresentations are claims for payment for and certification of, work said to have been done by Danwill, when that work was in fact either not done, or was significantly overvalued. Danwill denies the allegations made against it, and says that it has provided value for money.

It is significant to note that there was no contract between the NHDC and Danwill.

**The Statement of Case**

Danwill's original defence, asserted four general positions:

a. It was not aware of the arrangements between the NHDC and the individual developers.

b. It proceeded with the construction, and claimed payments in respect of work done, on the basis of specific engineering designs and bills of quantities and in accordance with the "internationally accepted "Conditions of Contract for works of Civil Engineering Construction of the Federation International DES Ingenierus-Consuls" ".

c. There were variations to the project because of faulty and inadequate design plans, additional requests made by the developer, natural occurrences and unexpected

characteristics in the project lands. These increased the cost of the work done.

d. The NHDC improperly interfered in the contract between Danwill and each developer, wrongly sought to terminate the contracts on behalf of the developers and failed to afford the parties to each contract the opportunity of proceeding to arbitration, as was stipulated by the contract.

**The Application**

The application to amend the defence touches on four areas:

a. Specifying what was provided for in the bills of quantities (paragraph 8A)

b. Specifying what was provided for in the contract between Danwill and each developer (paragraphs 16A and 21A).

c. Presenting an alternative offer by Danwill to perform all its obligations under the contract (paragraph 18A).

d. Alleging the NHDC's failure to follow the terms of the contract concerning discrepancies and overpayments (paragraph 21A).

Some of the proposed amendments are quite lengthy and I do not think it is necessary to set them out in full.

The affidavit in support of the application is sworn to by Mr. Danhai Williams, the Managing Director of Danwill. He asserts that Danwill was obliged to prepare and file its statement of defence within a time limit, which in the circumstances, did not allow for all the relevant documentation to be located. Since that filing, "numerous additional documents" have been located which provide Danwill, "with more precise and particular means by which to defend the claim…". The preparation and filing of the document were done after the first case management conference and therefore Danwill did not have an opportunity to amend its statement of defence without permission, as is provided for in the CPR. Mr. Williams asserts that the NHDC will not suffer any prejudice as a result of the proposed amendments.

**The Law**

The relevant provision of the amended CPR concerning this application is rule 20.4. It states, in part, as follows:

> "(1) An application for permission to amend a statement of case may be made at the case management conference.
> (2) Statements of case may only be amended after a case management conference with the permission of the court.

Apart from the overriding objective, there is no guidance provided in the rules in respect of the principles governing the grant or refusal of permission to amend. The relevant rule which existed prior to the amendment of the CPR was quite restrictive, as it provided that the court

could not give permission unless the applicant could show some change in circumstances since the date of the Case Management Conference. That restriction produced some hardship and even some curious results. The amended rule gives the court far more latitude, but of course, there should be some guiding principles which will allow for parties and their legal representatives to proceed with a degree of assurance as to the likely outcome of such applications.

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,* 7th Edition, Stuart Sime, at p. 134 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 amended rule 20.4 is now very similar in import to its UK equivalent. 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"

At page 145 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).

The UK rule 17.1 (2) and our own rule 20.4 give the court 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 exercise of the discretion under the pre-CPR regime, and continue to be applicable in the UK. Miss Jordan, for Danwill, in support of her submissions, cited *Charlesworth v Relay Roads Ltd. and Others* [2000] 1 WLR 230. In that case Neuberger J. held that the court, in administering justice must take into account that the 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 timing of the application for amendment will be of great concern to the court in its efforts to deal with cases justly. Neuberger, J. pointed out in *Charlesworth* that there may be cases where a very late application may cause irremediable prejudice to the other side. The *Charlesworth* case is cited with approval in *Blackstone's Civil Practice 2005* (at paragraph 31.4), by Sime (*supra*) at page 145 and in this court by Jones, J. (Ag.) (as he then was) in *Collins v Bretton* E. 227 of 2002 (delivered May 26, 2003).

Mr. Powell, in opposing the present application referred to a portion of paragraph 31.4 of *Blackstone (supra)*. It states:

> "The court has a general discretion to permit amendments where this is just and proportionate. If no arguable claim is raised by a proposed amendment, permission will be refused (*Collier v Blount Petre Kramer* [2004] EWCA Civ 467, LTL 1/4/2004)."

He submitted that Danwill's proposed amendments raised no arguable claim and so they ought to be refused. The proposed amendments, he

submitted, "do not impinge on the issue" and in particular Danwill's alleged readiness to complete its obligations, "do(es) not offer a defence to the claim, nor does it join issue with any of the allegations of the claimant".

Mr. Powell's interpretation of the passage in *Blackstone* seems to be that only amendments which raise new causes of action or grounds of defence will be allowed. A reading of the *Collier v Blount Petre Kramer* case cited by the learned authors does not support that interpretation. In that case there was an application on appeal to amend the claimant's pleadings in respect of the form of conspiracy he alleged against the defendants. Their Lordships ruled that the amendments proposed by the claimant, were not viable, in that they were not supported by the factual situation. Hence Mance, LJ said at paragraph 20:

> "Thirdly, and still more fundamentally, even if there was any breach of duty by Mr Isaacs as solicitor or former solicitor, or by Mrs Collier as an employee, there is nothing whatever to show or establish that there was any conspiracy between all three proposed defendants to injure Mr Collier by way of any such breach of breaches of duty. If there was any plan to injure him at all, it must have been, as far as Miss Collier was concerned, to rely on her legal title to deprive him of the use and enjoyment or proceeds of the properties. There is nothing in the draft pleading, or in common sense, to suggest that, as far as she was concerned, that plan required either Mr Isaacs or Mrs Collier to commit any breach of duty to anyone. Hence, no doubt, the fact that the complaint as pleaded is that Mr Isaacs and Mrs Collier cancelled and/or procured Miss Collier to deny Mr Collier the use and enjoyment of the properties. I have already pointed out the difficulty of understanding the suggestion of a conspiracy consisting in two parties counselling or procuring another alleged conspirator to act."

At paragraph 22, his Lordship went on to say:

> "At (sic) to conspiracy, I do not read the revised pleading as making any allegation that Miss Collier planned with them for them to breach their duties in any respect. The proposed addition at the end of the paragraph of an allegation of unlawful combination consisting of breaches of duty by Mr Isaacs and Mrs Collier, is notably lacking in any such statement or in any particulars which could involve Miss Collier in any such plan."

My reading of the excerpt from *Blackstone* is that there must be an arguable factual basis for the proposed amendment. That interpretation, in my view, is more in keeping with the myriad cases in which amendments, minor and major, have been allowed over the years, without the addition of a cause of action or ground of defence.

In applying the principles guiding the court, to the instant application, I accept the submission by Miss Jordan that the amendments sought by paragraphs 8A, 16A, and 21A provide particularity to the original statement of defence. I agree with Mr. Powell that the proposed paragraph 18A introduces an element not raised in the particulars of claim. Paragraph 18A is nonetheless relevant in the context of the aspect of the defence, which alleges that the contracts were improperly terminated and that the agreed termination processes were ignored by the party purporting to terminate.

In the circumstances I find that the amendments will assist the court, "in determining the real questions in controversy between the parties". It is also to be noted that this case is scheduled to be tried in September of 2008. The application therefore cannot be said to be late. In addition, a plausible

explanation has been given for the failure to initially plead the details. Finally, it has not been alleged that the amendment would cause any embarrassment to the NHDC. Costs therefore would be a suitable remedy.

**Application for further information**

The second aspect of this application for court orders is a request made by Danwill for further information on the NHDC's particulars of claim.

Mr. Powell contested the application on two bases. The first is that no request for information was served on the NHDC prior to the making of the application. He relied on rule 34.1 (2) and rule 34.2 (2) of the CPR. In this complaint, Mr. Powell is correct. The relevant rules in Part 34 state:

> **Right of parties to obtain information**
> 34.1. (1) This Part contains rules enabling a party to obtain from any other party information about any matter which is in dispute in the proceedings.
>
> (2) To obtain the information referred to in paragraph (1) the party seeking the information must serve a request identifying the information sought on (sic) other party.
>
> **Orders compelling reply to request for information**
> 34.2 (1) Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.
>
> (2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.
>
> (3) When considering whether to make an order the court must have regard to -
>
> (a) the likely benefit which will result if the information is given;
>
> (b) the likely cost of giving it; and

> (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.
> (Emphasis supplied)

A fair reading of rules 34.1 (2) and 34.2 (1) would lead to the conclusion that the request for the information and a refusal to comply are prerequisites for an application for an order to compel compliance with the request. Danwill has not stated that these prerequisites have been satisfied.

Should the application be therefore dismissed out of hand? I shall consider two factors. Firstly, the parties are already before the court in respect of the issue of the application to amend. Secondly, the stance of the NHDC as outlined above, indicates a likelihood that a request pursuant to rule 34.1 (2) would not be complied with. Should the parties be sent away in these circumstances? There seems to be no specific provision restricting the court from considering an application in the circumstances of such a failure. Indeed, rule 34.2 (2) includes a restriction along the lines of saving costs. Similarly rule 34.2 (3) (b) and (c) also require the court to consider the issue of costs when considering such an application. Additionally the court is empowered in exercising its general powers of management to "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective" (rule 26.1 (v). The court may also rectify procedural errors in accordance with rule 26.9.

Taking all these factors into account, I am of the view that it would not be consistent with the overriding objective to dismiss this aspect of the application purely because of a procedural defect. To do so, would quite likely only result in a postponement of the application, an inefficient use of the court's resources and increased cost to the parties. This is not to condone a flouting of the rules, and I trust that it will not be viewed as a precedent for those who seek to disregard the requirements of the CPR.

I now turn to the substance of the application. After alleging substantial discrepancies between the value of the work certified against that done, the relevant parts of the particulars of claim state as follows:

> "13. …the Defendants and each of them and other parties that are unknown to the (NHDC), unlawfully conspired together with the sole or predominant purpose to injure the (NHDC) by inducing the (NHDC) to pay to (Danwill) through the (developer) substantial sums as particularized hereunder in respect of work not done by (Danwill) or for work done the payments for which far exceeded the value of the said work resulting in (Danwill) being justly enriched."
>
> 14. The 2nd and 3rd Defendants had a fiduciary duty to ensure that they only certified sums which were in fact due, and that in breach of those duties, they certified sums not due."
>
> 16. Further or in the alternative, having knowingly participated in a fraudulent and dishonest design against the (NHDC), the Defendants became constructive trustees for the (NHDC) of all moneys received by them…"

Danwill requests that the NHDC provides it with the details of the acts of conspiracy and fraud of which the NHDC accuses it. Danwill also asks that the court orders the NHDC to provide details of the valuation which it carried out, in connection with the termination of the contract.

The second basis of Mr. Powell's complaint is that the application for further information is premature, since it could properly await the exchange of witness statements. He relied on the judgment of McDonald-Bishop, J. (Ag.) in *Noel King and others v Commissioner of Customs and another* 2005 HCV00120 (delivered June 19, 2006). In that case the learned judge commended the position that the regime which requires the exchange of witness statements before a trial reduced the need for providing particulars. The reasoning being, that witness statements prevented parties from being taken by surprise at trial.

I am of the view that the principle upheld by McDonald-Bishop, J. (Ag), is distinguishable from a case such as this, where the NHDC has based its claim on allegations of fraud and conspiracy committed by Danwill and others. The authorities have established that fraud must be particularized in pleadings. In *The Supreme Court Practice 1997* the learned editors state at paragraph 18/8/8, that "[a]ny charge of fraud or misrepresentation must be pleaded with the utmost particularity…", and at paragraph 18/12/7, "[f]raudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".

In *Thomas v Morrison* (1970) 12 JLR 203, the Court of Appeal cited cases (at page 209-10) in which it was held that "general allegations,

however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud (of) which any court ought to take notice", and also that "a vague allegation of fraud is not sufficient and evidence of acts of fraud is not admissible". In that case there was an application to amend pleadings to particularize allegations of fraud. In the instant case it is the defendant which has sought the particulars. The request may well be a boon to the NHDC.

In my view, the further information will assist the court in identifying the issues between the parties and the request should be granted.

**Conclusion**

Danwill's application to amend its statement of defence should be granted on the following bases:

a. It is not made at a late stage of the proceedings,

b. It will not unduly embarrass the NHDC, and so costs will be an adequate remedy

c. It provides particulars of the defence which will clarify the issues between the parties.

The application for further information, although not made in accordance with the provisions of Part 34 was considered because of the specific circumstances of this case. The application is granted because

allegations of fraud should never be of a vague and general nature. Danwill, instead of waiting until the trial to complain about the alleged deficiency, has requested the particulars at an early stage and it ought not to be denied.

Since Danwill failed to follow the correct procedure, it ought not to be awarded any costs, despite its success on the issue of the application for further information. The NHDC would have been entitled to costs on the application to amend the statement of defence.

It is therefore ordered that:

1. The defences to the claims be amended in terms set out in the draft Amended defences filed with the application for court orders dated 1st May, 2006,

2. The First Defendant shall file and serve the amended defences on all other parties hereto on or before 11th May, 2007,

3. The Claimant provides on or before 31st May, 2007, the further information to the First Defendant as set out in the aforementioned application.

4. Costs to the Claimant in the sum of $8,000.00 to be paid on or before 31st May, 2007.