



[2013] JMSC Civ. 166

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2010 HCV 00380**

BETWEEN	REAL ESTATE BOARD	CLAIMANT
A N D	VICTOR MCCAULEY SPENCE	1ST DEFENDANT
A N D	KES DEVELOPMENT COMPANY LIMITED (IN Liquidation)	2ND DEFENDANT
A N D	CAPITAL AND CREDIT MERCHANT BANK LIMITED	3RD DEFENDANT
A N D	JENNIFER MESSADO & CO.,	4TH DEFENDANT

AND BETWEEN

A N D	CAPITAL & CREDIT MERCHANT BANK LIMITED	ANCILLIARY CLAIMANT
A N D	REAL ESTATE BOARD	ANCILLIARY DEFENDANT

AND BETWEEN

A N D	CAPITAL & CREDIT MERCHANT BANK LIMITED	ANCILLIARY CLAIMANT
A N D	ROGER ALLEN DAUNETTE ALLEN	2ND DEFENDANT TO THE COUNTERCLAIM

-Ms. Gillian Burgess for Claimant

-Ms. Annalisa Lindsay instructed by John G. Graham & Co. for its 1st defendant

-Mr. Abe Dabdoub and Mr. Jalil Dabdoub instructed by Dabdoub & Dabdoub for 2nd defendant

-Mrs. Georgia Gibson-Henlin, Mr. Marc Jones and Ms. Taneisha Brown for 3rd defendant instructed by Henlin Gibson Henlin

-Ms. Carol Davis for 4th defendant

-Ms. Indira Persuad instructed by Brady & Co. for 2nd defendant to the counterclaim

HEARD: 11th January 2012, 8th February 2012, 11th April 2012, 4th July 2012, 17th July 2013, 24th October 2013 and 5th November, 2013

APPLICATION TO AMEND STATEMENT OF CASE – STATUTE OF LIMITATIONS – REAL ESTATE (DEALERS AND DEVELOPERS) ACT – TRUSTEE ACT PART 2.4(2)

**BERTRAM-LINTON
MASTER-IN-CHAMBERS (AG.)**

[1] The claimant in the matter, the Real Estate Board has applied, at this juncture in the case, to amend the claim form and particulars of claim first filed on January 28, 2010 and February 1, 2011 respectively.

[2] In the course of the development of this matter the 3rd defendant filed an ancillary claim and counter claim on March 16, 2010 and all other parties have filed their defences in anticipation of trial dates which were fixed for July 26 – July 29, 2011 at the second of two case management conferences.

[3] It would seem that the court could not accommodate the matter and it was put off. Since that time those dates were vacated to facilitate the hearing of this application.

[4] By Amended Notice dated and filed on 22nd December 2011 the Real Estate Board seeks permission to:

1. “particularize the claim against the Third and Fourth Defendants”
2. Such further or other relief as this Honourable Court deems just
3. Cost to be costs in the claim thereafter the grounds are stated as follows:
 - i. The 4th Defendant acted as Attorney-at-Law with carriage of various Agreements for Sale.
 - ii. Those Agreements for Sale are Prepayment contracts within the definition of the Real Estate Board (Dealers and Developers) Act Section 2.

- iii. The Act provides that all amounts received under prepayment contracts in development scheme must by virtue of the Act, be held on Trust for the benefit of the purchasers from whom amounts are received.
 - iv. The Fourth Defendant acting on behalf of the First and Second Defendants collected over US\$475,000,000.00 and Jamaican \$16,332,644.81 under prepayment contracts in respect of the development scheme at 33 Jacks Hill Road.
 - v. The Fourth Defendant as Attorney with carriage of sale knowingly collected these sums in respect of prepayment contracts.
4. The Fourth Defendant has entered into arrangements to pay over the monies collected under prepayment contracts to various persons including the 1st, 2nd and 3rd Defendants in breach of the statutory trust.
 5. That the actions of the **Second**, **Third** and **Fourth** Defendants constitute unlawful interference with the statutory trust and/or render the Fourth Defendant a trustee de son tort.

[5] The Application is supported by the Affidavit of Sandra Watson filed on December 22, 2011. The major thrust as is relevant to the proceedings herein is that a statutory trust was created by virtue of the Real Estate (Dealers and Developers) Act Section 24 when the First, Second and Fourth Defendants either collected funds or had them collected on their behalf during the course of the transaction. It is this trust that the Claimant sees as inimical to the pleadings and which they say the Amendments will capture so as to, "better aid the Court to identify the issues before the court and will save time and expense." (Per paragraph 5 Affidavit of Sandra Watson filed on December 22, 2011)

[6] On July 22, 2011 an Amended Fixed Date Claim Form was filed but the proposed Amended Particulars of Claim was the only thing attached to Ms. Watson's affidavit detailing the issues as to the trust created and the breaches for which the Third and Fourth Defendants were accused. As could be anticipated these issues raised were markedly more extensive in the alleged scope of involvement of the Third and

Fourth Defendants and the document now extended to four and a half pages where it had been previously approximately two and a half.

[7] Ms. Burgess in her submissions makes the point that the issues outlined in the amendment were not new but a mere detailing of allegations already raised in the original fixed date claim form. She comments to the court the principles enunciated and approved in **NATIONAL HOUSING TRUST v Y.P SEATON & ASSOCIATES COMPANY LIMITED CLAIM NO. 2009HCV05733 delivered March 31, 2011**. This was a case concerned with amending a Statement of Claim after Case Management Conference pursuant to Rule 20.4(2) CPR much the same as in our circumstances herein.

[8] There at paragraphs 21-23 Fraser J cited and adopted the principles that have been applied by the Jamaican Court of Appeal in adherence to the dissenting opinion in the dictum of **BOWEN LJ in CROOPER v SMITH (1884) 26 Ch. D 700**.

Bowen LJ expressed,

“Now I think that it is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights, speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know no kind of error or mistake which, if not fraudulent or intended to overreach the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right...”

[9] Miss Burgess further argues that the over-riding objection demands that for justice to be done the true issues must be placed before the court. The amendments she says will allow for this to happen without any injustice to the parties since they already got notice of what was being alleged based on the claim itself.

THE AMENDMENTS PROPOSED

[10] The proposed Amendments to the Particulars of Claim are exhibited to the Affidavit of Sandra Watson who speaks as the Chief Executive Officer of the Claimant.

[11] Paragraphs 5 and 16 are quite extensively, supplemented, and Miss Burgess says that these new recitals complement claims that were already made in her Amended FDCF filed on June 27, 2011, and are as follows:

“5. The moneys collected under prepayment contracts are, by virtue of the Real Estate (Dealers and Developers) Act, trust moneys and there are specific requirements before they can be utilized. The following conditions must be met:

The moneys must be paid into a trust account until completion or rescission unless it is paid-

(a) In satisfaction of stamp duty or transfer tax in respect of that prepayment contract; and

(b) Partial reimbursement of cost of material supplied or work done in the construction of any building or works which is the subject of the contract provided that:

i. the moneys withdrawn shall not exceed ninety percent of the amount certified by a qualified quantity surveyor or architect or other person having such qualification as the Board may prescribe for the purposes of this section (not being a person in the employment of, or having an interest in the business of, the vendor or the developer) as being properly due for work already done and materials already supplied in the construction of the building or works and not previously paid for; and

ii. the owner of the land on which the building or works is being constructed has executed and lodged with the Registrar of Titles a charge upon the land in accordance with subsection (4) of the Act.

16. The Third and Fourth Defendant have intermeddled in the statutory trust and consequently aren constructive trustees or trustees de son tort and are liable to account to the Board and repay whatever amounts are due to the Board consequent upon their unlawful

interference with the statutory trust and whatever further or other relief the Court deems just. The particulars of the breach of trust are:

PARTICULARS OF BREACH OF TRUST OF THE THIRD DEFENDANT

- (a) Co-mingling moneys dispersed and received in relation to this development with other developments*
- (b) Knowingly making arrangements for moneys under prepayment contracts to be paid to them in contravention of the Act in their loan agreement for the satisfaction of their loan agreement knowing that the agreements were prepayment contracts*
- (c) Knowingly procuring an undertaking from the fourth defendant to pay out monies she received under prepayment contracts*
- (d) Failing to give a proper account*
- (e) Knowingly breaching the terms of the Real Estate (Dealers and Developers) Act*

PARTICULARS OF BREACH OF TRUST OF THE FOURTH DEFENDANT

- (a) Paying out monies collected under prepayment contracts to persons other than the vendor or the purchasers*
- (b) Knowingly paying out monies collected under prepayment contracts knowing that there was no report of an independent architect or qualified quantity surveyor approved by the Board or willfully closing their eyes to same*
- (c) Knowingly paying out monies collected under prepayment contracts in excess of ninety percent of the amount certified as due for work already done by a quality surveyor*
- (d) Giving a professional undertaking to pay out monies received under prepayment contract to the Third defendant for the satisfaction of the Loan Agreement.*
- (e) Knowingly paying out money collected under prepayment contracts otherwise than in accordance with the Act.”*

THE 3RD DEFENDANT’S SUBMISSIONS

[12] Attorney for the Third Defendant Capital and Credit Merchant Limited Mrs. Gibson-Henlin has provided written submissions to substantiate her objection to the proposed Amendments.

[13] The changes proposed she says must be looked at in terms of their merits and a full explanation needs to be given for the delay in making the changes, if as Miss Burgess argues, she is coming with nothing new but simply supplementing assertions already contained in the original claim. In this regard the dictum of **RIX LJ in SAVING AND INVESTMENT BANK v FINKEN [2004] 1 ALL ER 1125 para 79** as cited by Mrs. Gibson-Henlin is quite helpful.

[14] That case was one where a liquidator sought to rescind a settlement with an insolvent debtor on the ground that the debtor's financial position had been misrepresented. The liquidator applied to amend the claim to place additional allegations of misrepresentation before the court.

RIX LJ said

"In my judgment, however, the amendments should not be permitted... SIB's case is derived entirely from the documents which for all the court knows have always been in the liquidator's possession...no explanation has been given for the liquidators' sitting on their hands in those respects..."

[15] Mrs. Gibson-Henlin stands in doubt of the claim of 'particularisation' and instead suggests that a new cause of action is being introduced, that of breach on a statutory trust in sharp contrast to the previous 'blanket' allegations which had contemplated the claimant's charge ranking in priority to the 3rd defendant's. She insists that the accusations of intermeddling leveled against the 3rd defendant who is now being placed in the position of a trustee de son tort, introduces new issues attendant to the Real Estate (Dealers and Developers) Act which were not previously before the court. She directs us in her written submissions page 7 paragraphs, 28 and 29 (footnote 12 to Judge's Bundle filed on July 18·2011 paragraph 6).

[16] That reference takes us to the particulars of claim filed on February 1, 2011 which says

"6. On September 20, 2006 a charge was registered on the Certificate of Title at Volume 962, Folio 209 for the said land in favour of the Claimant in respect of all monies received under prepayment contracts pursuant to the

provision of Section 31 of the Act. A copy of the Certificate of Title marked SW3 is attached hereto.”

[17] Mrs. Gibson-Henlin also suggested in her very spirited objection to the amendments that there was no merit to them since some vital preconditions were not established or pleaded and this would run afoul of Rule 8.9A.

Rule 8.9A “The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

In addition she says none of the current witness statements filed by the Claimant supports the case being put forward in the amendment.

THE 4TH DEFENDANT’S SUBMISSIONS

[18] Attorney for the 4th defendant Ms. Carol Davis is also opposed to the claimant’s application. She points out quite succinctly that the application, even though on its face is suggesting that both the claim form and particulars are to be amended no amendments are outlined relating to the claim form and no Amended Claim form is attached to the application. Her attack focuses on the argument also raised by Mrs. Gibson-Henlin that a new cause of action is being introduced Breach of Trust at least against her client and this would, if allowed after the limitation period, has expired, be depriving the defendant of a defence.

[19] She cites Rule 26.1 of the CPR and commends to the court the general principle accepted by the Jamaican Court of Appeal as far back as 1960 in **CHARLTON v REID (1960)3 WIR, 33**. In that case the Claimant tried to amend the statement of claim to add that a police officer had acted without reasonable and probable cause. The Court of Appeal said in that instance’

“it is wrong to permit an amendment the effect of which will be to deprive the defendant of a legal defence otherwise available to him.”

[20] The relevant limitation period she parts would be six (6) years and as such whatever allegations relating to her client in this regard would have been made in 2005

in relation to a letter of undertaking given to the 3rd defendant and putting her client on the matter if pleaded at a distinct disadvantage.

THE LAW

[21] The Civil Procedure Core delineates in Rule 2.4 (2) that

“statements of case may only be amended after a case management conference with the permission of the court.”

This rule confers on the court as very wide discretion with no preconditions and may be interpreted as being governed purely by the over-riding objective per **RIX LJ**

THE ISSUES RAISED

[22] Should the claimant be granted the permission sought for the amendment? In deciding this point the court would need to resolve the following:

- a) Whether the issues being raised on the amendments represent new allegations and thus a new cause of action.
- b) Whether the delay in the application has been sufficient to make the granting of the application so prejudicial that it would be on injustice to proceed.
- c) Whether there is merit in the proposed amendments so as to make them inimical to the court’s ability to decide the real matters in controversy between the parties.

(a) Is There a New Cause of Action Being Raised?

[23] In the claim filed on January 28, 2010 the major issue raised whether the claimant’s charge ranks in priority to the third defendant. There is also the issue as to the accounting for sums received and paid out and the request for Orders for the rendering of accounts in relation to them.

[24] Two Case Management Conferences were held one by Mr. Justice McIntosh in October 2010 and another before Mr. Justice Rattray on 27th January 2011. Permission was granted for the filing of the Particulars of Claim, and this was complied with on 1st February 2011 and all parties filed their documents in preparation for trial on July 25 - 29, 2011.

[25] The Claimant has however produced an amended fixed date claim form filed on June 27, 2011. There is no evidence before the court that permission was granted for the Fixed Date Claim Form in the matter to be amended approximately one month before trial and so the 3rd defendant concern about its legitimacy is well founded especially since the subsequent application to amend the Fixed Date Claim Form and Particulars of Claim the instant application gives no indication that it is being relied upon. The application before exhibits and speaks to particularization contained in the Affidavit of Sandra Watson in support of the application to amend the Particulars of Claim.

[26] These proposed Amendments to the particulars of claim must then be assessed in light of their connection to the Original FDCF which commenced the proceeding.

[27] The Claimant says that it was always contemplated on the original claim that the trust existed and that it was breached by the 3rd and 4th defendants.

[28] A look at paragraphs 2-4 of the grounds stated in Fixed Date Claim Form filed on January 28th 2010 would seem to support this point, as does the Particulars of Claim which speaks to *"The Act under which the obligations arise."* This is in my view a raising of the issues based on the information contained in the February 2, 2011 Particulars of Claim also.

[29] I would in this regard agree with the submission of Miss Burgess that no new cause of action has been created by the proposed amendment. In making this observation I am mindful that as the 3rd and 4th defendants have argued the real issue to be decided is the Claimants assertion of its charge ranking in priority to that of the 3rd defendant. It would appear that the factual substratum of the claim has not changed. There is no dispute as outlined in the defences filed by these parties that prepayment contracts came into being and I feel that based on the provisions of the Act this triggered certain other inevitable procedures to be followed. It is for the trial court however to decide whether or when any trust was created and if it was breached and by whom. Certainly, however on the documents before the court the claimant has always alleged these matters.

[30] The proposed Amendment would then seem to be supplying details in relation to this point and should have been so enunciated from the beginning.

[31] The defendants and in particular the 4th cannot be said to have been taken by surprise as to the Claimants assertion of a trust be created pursuant to the Real Estate (Dealers and Developers) Act.

(b) The Effect of the Delay in Making the Application

[32] Mrs. Gibson-Henlin spoke directly to the issue of delay and the role it should play in the application of the over-riding objective. Quite significant is the fact that the matter was ready for trial for sometime before this application was made. Various orders and exchange of pleadings and evidence have been gone through. It is true that this application is coming late in the day.

[33] However having decided that the Amendments assist in fleshing out the issues among the parties it would be undesirable for the court to refuse the application on the ground that it has been too long in coming. Put another way, if the Amendments are useful and inimical to deciding the real issue of controversy between the parties then it is valuable that the matter never proceeded to trial without the specific now being proposed in the Particulars of Claim

[34] Consequent on the decision of the court that no new cause of action is being introduced would be that the issue of the statute of limitations is not relevant as no new allegation is made and so the 'doctrine of relation back' to the original date of the fixed date claim form would not apply.

(c) The Merits of the Amendment

[35] Mrs. Gibson-Henlin also raised the consideration of the merits of the amendment as a factor in the application of the overriding objective. She posits that there must be an arguable claim raised otherwise the granting of the amendment would be undesirable, coupled with the obvious delay in putting it forward.

[36] She is correct that no reasons were given for the delay. The court is also mindful of an extract from **BLACKSTONE'S CIVIL PRACTICE, 2005 at paragraph 31.4** which says

"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. 476, LTL 1/4/2004)

[37] Upon review of the Collier case cited and the authority cited by Mrs. Gibson-Henlin I am of the view that this means there must be an arguable factual basis for the Amendments being proposed.

[38] It is a fact in this case that the Claimant is relying on the trust in alleges from day one was created by the dealings under the Act to substantiate its claim of a priority for its charge on the title. This is the basis as well for the seeking of the accounts from the 3rd and 4th Defendants. The decision on the priority must then hinge on whether the relationship it alleges existed between the parties pursuant to the Act and its dictates.

[39] Having examined these issues the court therefore is of the view that the Amendments should be allowed to the Particulars of Claim as requested.

[40] This decision is further supported by **CHATSWORTH v RELAY ROADS LTD [1999] 4 ALL ER 397** a case reviewed and approved by **Brooks J** in the case of **NATIONAL HOUSING DEVELOPMENT CORPORATION (NHDC) v DANVILLE CONSTRUCTION LTD, WARREN SIBBLES AND DONOVAN HILL [2004] HCV 361 & 362 delivered May 4, 2007.**

[41] Here it was highlighted that on an application to amend a statement of case for which permission is required, assessment of the merits of the case must be done. It was said that it is always desirable that a party is allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. Additionally the court would consider

whether the services of an application to amend would interfere with the administration of justice and the interests of the other litigants.

[42] I adopt this reasoning in the instance case. I therefore find as follows:

1. That the Application of Amendment to the Particulars of Claim even though coming late in the day really does seek to particularize the claim in relation to the 3rd and 4th Defendants as originally set out in the Fixed Date Claim Form.
2. The Amendments in all the circumstances and bearing in mind the over-riding objective will enable the Claimant to put all its possible argument before the court and assist in deciding the real issues between the parties.
3. In keeping with the balancing of interests, and even though it is not a primary consideration the 3rd and 4th defendants are entitled to costs to compensate for any prejudice that may be occasioned by the orders herein.

[43] Let me end by thanking all Counsel in this matter for their forbearance and in particular the very helpful submissions which made the synopsis less onerous in a case which has seen copious paperwork.

[44] It is therefore ordered as follows:

1. The Claimant's Amended Particulars of Claim is to be filed within fourteen (14) days hereof and the matter is to proceed to Case Management on 27th February 2014 at 11:30am for one (1) hour.
2. Costs for this application and costs thrown away are awarded to the 3rd and 4th defendants to be agreed or taxed.
3. Leave to appeal is granted to the 3rd defendant based on its request.