[2020] JMSC Civ 226

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2014HCV01583

BETWEEN	**BALDWIN ATKINS**	**1ST CLAIMANT**
AND	**HUGH GEORGE ATKINS**	**2ND CLAIMANT**
AND	**GEORGE BAILEY**	**1ST DEFENDANT**
AND	**DONOVAN SCOTT**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Lemar Neale instructed by Nea | Lex for the Applicant/1st Defendant.

Ms. Kemilee McLymont instructed by PeterMc and Associates for the Respondents/Claimants.

Heard: October 5, 6 and November 6, 2020.

Civil procedure – Application for permission for 1st defendant to amend statement of case – Whether proposed amendment to defence raises a different case than that originally pleaded – Whether amendment would prejudice the claimants – Whether 1st defendant's statement of case is prolix and ought to be struck out – Rules 20.4(2), 26.3(1)(d) and 26.2(2) of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

INTRODUCTION

[1] The parish of St. Ann is perhaps the most beautiful parish in the island of Jamaica. The subject property in this suit is located in that parish, at Lot 32 Shaw Park, St. Ann. The defendants are the registered proprietors of the property which is contained in certificate of title registered at Volume 1068 Folio 581 of the Register Book of Titles. The 1st defendant had a grand idea to develop the property into town houses and apartments. However, he had no money to bring his idea to fruition. The 1st defendant mortgaged the property to a bank and, in order to avoid losing the property, he subsequently sought and received financial assistance from the claimants to clear the debt owed to the bank. When the relationship between the parties soured, the claimants filed the claim seeking recovery of the sums paid to the bank. The nature of the assistance rendered is at the heart of this case. The claimants say that sums were loaned to the defendants, while the 1st defendant says the claimants were investors.

[2] Before the court is an application by the 1st defendant to amend the defence filed six years ago. The Notice of Application was filed on September 29, 2020 and is supported by an affidavit sworn to and filed on the same date. The application was filed after new counsel was instructed to represent the 1st defendant. The application is being made approximately nine weeks before the trial is due to commence, on December 8, 2020.

[3] In determining the application, the main issues for this court's consideration are:

1. whether the proposed amendment seeks to change the substance of the defence filed or merely to better particularise the defence;
2. whether there is good reason for the amendments;
3. whether the 1st defendant has a real prospect of successfully arguing his case based on the proposed amendments;
4. whether the amendment would prejudice the claimants; and
5. whether permitting the amendment would be in keeping with the overriding objective of enabling the court to deal with cases justly and expeditiously.

BACKGROUND

[4] In 2007, the defendants obtained a mortgage from Jamaica National Building Society ("JNBS") to secure the sum of US$84,000.00. By early 2011, JNBS sought to sell the property by private treaty, due to the defendants' failure to honour the obligation to pay the mortgage sums. On April 18, 2011, JNBS wrote to the defendants offering them a 25% discount on the principal mortgage balance and the opportunity to refinance or settle the mortgage account within 30 days, in order to avoid transfer of the property by sale to a third party.

[5] It is accepted by the parties that the 1st defendant had discussions with one Clinton Atkins regarding obtaining financial assistance, and that this assistance came from the claimants. It appears that it is accepted by the parties that the 1st defendant represented himself and the 2nd defendant during the course of his negotiations with Clinton Atkins. The sum of US$57,713.66 was paid by the claimants to JNBS to liquidate the debt and secure the release of the certificate of title.

[6] In order to determine whether or not to permit the amendment sought, it is necessary to examine the parties' cases outlined in the pleadings, review the nature of the proposed amendment and explanation for it, and assess whether the amendment is necessary to assist the court to decide the real issues in controversy between the parties. This court must also consider the timing of the application and any consequences which might flow, including additional work to be done by the parties and the possible effect on the trial date.

[7] The pleadings in this case suggest that there is a dispute between the parties as regards whether or not there were two distinct agreements in this matter. One issue for a court to determine is the effect of these alleged agreements. The claim form and particulars of claim filed on April 2, 2014 refer to one agreement between the parties. The defence and counterclaim were filed on July 16, 2014 by the 1st defendant, as a litigant in person. Annexed to the defence is a document titled

"Evidence Submission File". Therein, he sought to respond in more detail to the claim. However, the 1st defendant appears to refer to two agreements.

[8] It is in issue whether or not there was an agreement between the defendants and the claimants for the debt owed to JNBS to be refinanced by a loan from the claimants. The 1st defendant alleged that the sums were invested as part of a joint venture agreement and not as a loan. At the trial, the court must also determine whether or not there was an agreement for a mortgage, and whether terms of the alleged agreement between the parties are clear and enforceable.

[9] Further, it seems that at trial the court must determine whether or not there was a second agreement between the defendants and Clinton Atkins for the latter to provide additional funds, and if so, what is the effect of his failure to do so. The 1st defendant alleged that there was a breach by Clinton Atkins of a joint venture agreement between himself and the 1st defendant, and that the breach was such that it entitled the defendants to terminate their agreement with the claimants.

[10] The claimants rely on email correspondence dated June 21, 2011, between the 1st defendant and Clinton Atkins. The email purports to show that the 1st defendant accepted an offer for financial assistance, and that seven matters were agreed between the parties. Although the claimants were not specifically named in the email, it seems to be accepted by the parties that Clinton Atkins was the claimants' agent during the negotiations.

[11] First, it was agreed that the sum of US$57,713.66 would be paid to JNBS to clear the JNBS mortgage. Secondly, the email states that a mortgage in favour of the claimants would be registered on the certificate of title for the sum of US$92,070.17. Thirdly, reference is made to 10% of any profits realised from the development of the property being paid to the financiers, in addition to the sum of US$92,070.17. Fourthly, the email states that it was agreed that the property was to be transferred by the defendants, with the consent of the claimants, to LifeStyle

Homes Property Development Company Limited ("the company"), and that the mortgage in favour of the claimants would then be registered on the title.

[12] Further, the email dated June 21, 2011 purports to show that the company would be used to execute the development of the property into several units consisting of town houses and apartments. It was also agreed that an additional JMD$1,000,000.00 would be provided to the defendants to assist with preliminary development costs such as architects' drawings, and securing sub-division approvals, and that additional agreed capital would be provided "*to achieve optimal results from the site*". However, this sum was to be supplied by Clinton Atkins. Whether this arrangement between the defendants and Clinton Atkins in his personal capacity amounts to a separate contract would seem to be a matter to be determined at trial. Finally, the email purports to show that it was agreed that any profits realised from the development of the property would be shared on an equal basis between the financiers and the 1st defendant.

[13] The claimants and Clinton Atkins were allocated shares in the company and became company directors. However, the property was never transferred to the company and no Instrument of Mortgage was executed by the parties.

[14] On the face of the said email, it appears that some of the terms of the alleged agreement were not finalised, including precisely what the difference between US$92,070.17 and US$57,713.66 (US$34,356.51) represented. This is now claimed as "the costs for the refinancing arrangement". The timescale for repayment of the sum of US$92,070.17 was not finalised. Likewise, the timescale for the execution of the Instrument of Mortgage was not stated. Further there appear to be no conditions in respect of the alleged joint venture agreement to develop the property.

[15] On June 21, 2011, an email was also sent by the 1st defendant to an Attorney-at-Law giving instructions for a written agreement between the 1st defendant and

Clinton Atkins to be drafted reflecting the matters agreed in the earlier email. Further, the claimants allege that the same Attorney-at-Law was subsequently given instructions to draft the Instrument of Mortgage. The sum of US$57,713.66 was paid to JNBS on July 15, 2011 but no written agreement was ever executed by the parties.

[16] By May 2012, the relationship between the parties broke down, seemingly due to the 1st defendant seeking an unsecured loan to further the planning process in relation to the development of the property. The 1st defendant never obtained additional funds or other investors, and no development ever took place. In December 2012, the 1st claimant, Clinton Atkins and one Ms. Joyce Gayle indicated that they wished to resign as directors and secretary to the company. No mortgage deed was signed and no mortgage was registered on the certificate of title in favour of the claimants. As the sums allegedly loaned were not repaid, the claimants lodged a caveat against the property claiming an equitable interest in same.

THE CLAIM

[17] The claimants seek the following orders:

1. An order for recovery of USD$92,000.00 along with interest from January 1, 2012 to March 31, 2014 at a rate of 11.75% per annum, being USD$24,285.80;
2. Damages for breach of contract;
3. An order for the sale of property contained in certificate of title registered at Volume 1068 Folio 581 owned by the defendants.
4. An order that the proceeds of sale of the aforesaid property be applied to the debt due to the claimants and the balance is paid over to the defendants.
5. Interest and/or such other remedy as the court deems fit.

[18] The claimants allege that a mortgage was to be registered on the certificate of title in their favour for the sum of US$92,070.17. The alleged breach of contract is the failure of the defendants to execute the instrument of mortgage, and to repay the sums loaned. It is unclear whether or not the certificate of title was deposited with the claimants for a mortgage to be endorsed on it. However, I have noted that the 1st defendant sought to file a Fixed Date Claim Form on December 10, 2019 against the claimants and Clinton Atkins, for the return of the "title documents", for removal of the caveat, and for damages for breach of contract[1]. Whatever the nature of the claim, it is clear that the claimants assert that there was an agreement for a loan and that a mortgage was to be registered on the certificate of title as security for the loan.

THE DEFENCE AND COUNTERCLAIM

[19] The only defence before the Court is that which was filed by the 1st defendant, in which he denies that there was a loan. He alleges that the claimants were investors in a joint venture agreement to develop the property. However, at paragraph 2 of the defence, the 1st defendant alleged that he offered the claimants security for the sums paid to JNBS. Though he did not state what that security was, he annexed several emails to his defence, including an email dated June 14, 2011 in which reference was made to the property being used as security.

[20] In the defence and a document annexed to the defence titled "Evidence Submission File", the 1st defendant stated that the defendants did not take a loan from the claimants. Instead, the 1st defendant alleges that sums were paid to JNBS pursuant to a joint venture agreement to develop the property, and that the claimants and Clinton Atkins became part of the company which was to develop the property. He said that in return for the funds invested, the claimants were given 50% of the shares in the company and since the land would be an asset of the

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[1] This document bears the same suit number as this matter (2014HCV01583) and is not properly filed.

company, the claimants would be part owners of that asset. Further, the 1st defendant indicated that the claimants were to receive a return on their investment from the sales of townhouses and apartments. The 1st defendant further alleges that Clinton Atkins refused to perform an obligation to pay further sums to the project designer, and as a result, he treated the contract as repudiated and no money is now due to the claimants. In his counterclaim, the 1st defendant indicated that he was seeking damages for loss of earnings based on projected earnings, costs and expenses.

[21] In the document titled "Evidence Submission File", the 1st defendant sought to set out his defence in greater detail. He indicated (at paragraph 4) that Clinton Atkins "*was to secure the property from Jamaica National and contribute funds to get the project into planning then we would find finance to carry out the development and refund his investment*". He also indicated (at paragraph 5) that a lawyer was instructed to draft an agreement between the parties and once the title was collected from JNBS, the lawyer was to transfer the title to the development company and "*register their interest at the same time*". The 1st defendant also indicated (at paragraph 6) that it had been agreed that a lien would be registered in the name of the company, but not in the names of the defendants. No explanation is offered for the failure to transfer the title to the company or to have a mortgage registered on the title. Finally, the 1st defendant stated that he is willing to refund the claimants' investment but the project must first be approved by the parish council for any investors to come on board.

THE APPLICATION

[22] The 1st defendant seeks to amend his statement of case pursuant to rule **20.4(2)** of the Supreme Court of Jamaica Civil Procedure Rules 2002, as amended (hereinafter "CPR"). The reason for the application is that he was acting in person at the time he completed the defence form and he did not know that he was supposed to respond to each paragraph of the particulars of claim. Further he stated that his previous Attorneys-at-Law did not advise him that he needed to

amend his defence. The 1st defendant avers that it was only after consulting with his current Attorneys-at-Law that he realized that his defence needed substantial amendments. He further stated that the proposed amendments seek to give particularity to his previous defence, are necessary and will allow the court to deal with the real issues in controversy between the parties. The 1st defendant avers that the proposed amended defence is arguable and has a real prospect of success, and that the claimants will not be prejudiced by the amendment as they will have an opportunity to reply to the amendment. The proposed amended defence maintains that the sum of US$57,713.66 was not a loan.

[23] Aside from addressing each paragraph of the particulars of claim, the proposed amended defence differs from the defence in the following respects:

1. It sets out the background as regards the loan from JNBS and the 1st defendant's plan for property development and how he met Clinton Atkins and the 1st claimant.
2. It states that following discussions, there was a joint venture agreement for Clinton Atkins' monetary investment to be used to pay off the existing JNBS mortgage and for JMD$1,000,000.00 to be allocated towards costs affiliated with seeking planning permission. While specific mention is made of Clinton Atkins as a financier, no mention is made (in paragraph 10) of the claimants' monetary investment.
3. There is now no reference made to offering the claimants security for the sums invested.
4. Further, paragraph 15 of the proposed amended defence states that "*there was no intention on the part of the 1st defendant to register or have a mortgage registered against the property in favour of the claimants*".
5. The 1st defendant now claims privilege in respect of the draft Instrument of Mortgage prepared by his Attorney-at-Law in 2012, and a letter dated November 2, 2012, written by his then Attorney-at-Law and addressed to counsel Ms. McLymont. These documents are relied on by the claimants.

6. Finally, the 1st defendant denies that the claimants are entitled to any relief claimed. He therefore no longer states that he is willing to refund the claimants' investment.

SUBMISSIONS

[24] It should be noted that this application was not fixed for hearing on October 5, 2020, having been filed on September 29, 2020 and served some time thereafter. An application which was filed on April 1, 2019 and fixed to be heard on October 5, 2020 was withdrawn and an oral application made that the current application be heard in its stead. The court ordered that time for the service of this application be abridged and, having regard to the fact that the trial is fixed for December 8 and 9, 2020, the court proceeded to hear this application.

[25] Due to the industry and preparedness of counsel, the court had the benefit of written submissions filed by Mr. Neale and oral submissions made by Ms. McLymont. I thank counsel for these submissions and for their diligence.

Submissions on behalf of the applicant/1st defendant

[26] Counsel Mr. Neale submitted that the proposed amendment was sought to better particularise the original defence pleaded and more clearly sets out the defence without the prolixity observed in the original defence. It was submitted that providing greater particularity to 1st defendant's case will assist the court to determine the real questions of controversy between the parties. Counsel submitted that the 1st defendant's case, as currently framed, would not assist the court to adjudicate upon the real dispute justly.

[27] Mr. Neale cited Stuart Sime's text, A Practical Approach to Civil Procedure, 5th Edition, at page 135, in which the functions of a statements of case were outlined:

> *"(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."*

[28] Counsel further submitted that the application of the rule is governed exclusively by the overriding objective, and relied on dictum of Sykes J (as he then was) in ***Peter Salmon v Master Blends Feeds Ltd*** (unreported), Supreme Court, Jamaica, Suit No. CL 1991/S 163, judgment delivered on October 26, 2007. Mr. Neale also cited Sime at page 146, where he said:

> *"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."* (My emphasis)

[29] Mr. Neale also relied on the dicta of Peter Gibson LJ in ***Cobbold v London Borough of Greenwich*** (unreported August 9, 1999) where the judge said:

> *"The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."*
> (My emphasis)

[30] Counsel Mr. Neale further submitted that there are two competing factors in this application. First, it is desirable that the 1st defendant be allowed to advance every point he reasonably desires to put forward, and if any damage is suffered by the claimants, they may be compensated by costs. Secondly, consideration should be given to whether granting the application would interfere with the administration of justice and the interests of other litigants who had cases waiting to be heard. Mr. Neale further submitted that the scale is tipped in favour of the grant of the application and permitting the amendments.

Submissions on behalf of the respondents/claimants

[31] Counsel Ms. McLymont submitted that the proposed amended defence sought to introduce a different case than that originally pleaded. Counsel submitted that the 1st defendant was seeking to withdraw admissions previously made in the document titled "Evidence Submission File", which could be read in conjunction with the defence as his statement of case. In essence, counsel submitted that the application to amend the defence was being made in bad faith, and ought not to be permitted.

[32] Ms. McLymont submitted that when the 1st defendant stated at paragraph 2 of the defence, that he offered the claimants "*security for the funds*", he made an admission that a mortgage was to be registered on the certificate of title. Likewise, Ms. McLymont submitted that it was noteworthy that at paragraph 5 of the document titled "Evidence Submission File", the 1st defendant made an admission that an Attorney-at-Law was to "*register their interest*". However, the proposed amended defence makes no mention of this security, and instead, states that "*there was no intention on the part of the 1st defendant to register or have a mortgage registered against the property in favour of the claimants*". Ms. McLymont submitted that this was a significant change in the defence.

[33] Counsel opined that it was significant that the 1st defendant now seeks to claim legal professional privilege in respect of documents which purport to show that a mortgage deed was prepared by the 1st defendant's Attorney-at-Law in 2012. These documents were not challenged by him in 2014 when the defence was filed.

[34] Counsel Ms. McLymont submitted that permitting the defence to be amended at this time would cause the impending trial dates to be vacated, and this would result in hardship to the claimants.

THE ISSUES

[35] I have identified the main issues for this court's consideration at paragraph 3. In summary, I have to decide whether or not the proposed amendment radically changes the substance of the defence originally pleaded and has a real prospect of being established at trial, and whether permitting the amendment would be in keeping with the overriding objective of the CPR. Further, I am asked by Mr. Neale to consider whether or not the document annexed to the defence titled "Evidence Submission File", is prolix in its current form, and ought to be struck out.

THE LAW AND ANALYSIS

[36] Rule 20.4 of the CPR provides for amendments to a party's statements of case after a case management conference with the permission of the court. CPR rule 20.4(2) does not indicate the factors which the court must take into consideration when determining whether to permit a proposed amendment after a case management conference. CPR rule 20.4 provides: -

> *"20.4 (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.*
> *(3) Where the court gives permission to amend a statement of case it may give directions as to –*
> *(a) amendments to any other statement of case; and*
> *(b) the service of any amended statement of case."*

[37] Prior to the amendment of the CPR on September 18, 2006, the old rule 20.4(2) provided:

> *"The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the amendment is necessary because of some change in circumstances which became known after the date of the case management conference."*

[38] While it is not clear what necessitated the change in CPR rule 20.4(2), it seems clear that the two conditions which were previously required to be met, restricted the court's discretion when considering an application to amend a statement of case at, or after, the case management conference. Since the 2006 amendment

to the CPR, the foremost consideration for the court is the overriding objective of achieving fairness between the parties.

[39] Although the rule itself offers little guidance in relation to the matters that the court must take into consideration, guidance can be found in pre-CPR and post-CPR decisions of the Court of Appeal.

[40] In the pre-CPR decision of ***Moo Young and another v Chong and others*** (2000) 59 WIR 369, Harrison JA said at pages 375 to 376:

> *"In the instant case, the amendment granted may be permissible if:*
> *(1) it is necessary to decide the real issues in controversy, however late,*
> *(2) it will not create any prejudice to the appellants, and is not presenting a 'new case' to the appellants,*
> *(3) is fair in all the circumstances of the case, and*
> *(4) it was a proper exercise of the discretion of the trial judge on the state of the evidence.*
> *However late may be the application for amendment, it should be allowed in the above circumstances if it will not injure or prejudice the applicant's opponent. Different considerations, however, govern each case, and it is a matter in the discretion of the trial judge."*

[41] In delivering the judgment of the court, Harrison JA said at page 380 that a proposed amendment should not be allowed "*if it is in conflict with and contrary to a specific allegation of fact previously made*". However, citing Lord Pearce in ***Rondel v Worsley*** [1967] 3 All ER 993 at 1017, he observed that it was a significant guiding principle that:

> *"Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may fairly be tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account."*

[42] One issue to be determined in this case is whether this application appears to be made in good or bad faith.

What is the purpose of the proposed amendments to the statement of case?

[43] I have considered the reasons proffered by the applicant/1st defendant for the application to amend his statement of case. The primary reasons are that the proposed amendments would properly set out the 1st defendant's case and permit him to respond to each paragraph of the particulars of claim as required by rule 10.5 of the CPR. Rule 10.5 provides:

> *"10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
> *(2) Such statement must be as short as practicable.*
> *(3) In the defence the defendant must say –*
> *(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;*
> *(b) which (if any) are denied; and*
> *(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
> *(4) Where the defendant denies any of the allegations in the claim form or particulars of claim*
> *(a) the defendant must state the reasons for doing so; and*
> *(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.*
> *(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –*
> *(a) admit it; or*
> *(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.*
> *(6) The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.*
> *(7) A defendant who defends in a representative capacity, must say-*
> *(a) what that capacity is; and*
> *(b) whom the defendant represents.*
> *(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12."*

[44] It is clear that the proposed amended defence is more structured and clear, and properly responds to each paragraph of the particulars of claim. However, I am mindful that the amendment also seeks to remove relevant statements made by the 1st defendant. While I make no determination as to whether some statements made in the original defence constitute an admission, it is useful to consider guidance on how to treat with admissions and applications to withdraw same.

[45] The editors of Blackstone's Civil Procedure 2012 state at paragraph 34.29:

> *"Admissions may be formal or informal…. Admissions made in a statement of case are one example of formal admissions, which have the effect of establishing the facts admitted without the need to call evidence, and which can only be withdrawn with the permission of the court…. Informal admissions, on the other hand, are merely items of evidence and may be disproved or explained away by other evidence at trial."*

[46] Rule 14.1(6) of the CPR provides that the court may allow a party to amend or withdraw an admission but there is no guidance regarding the factors to consider. In England, prior to April 6, 2007[2], in deciding whether to give permission to withdraw an admission, the courts would have regard to the guidance given by Sumner J in ***Basildon and Thurrock University NHS Trust v Braybrook*** [2004] EWHC 3352 (Fam). There, it was indicated that the court should seek to give effect to the overriding objective, consider whether the application to withdraw an admission is made in good faith, consider whether any party has been the author of any prejudice he might suffer, and consider the need to avoid satellite litigation and the disproportionate use of court resources.

[47] I am also guided by the decision in ***Index Communications v Capital Solutions and others*** [2012] JMSC Civ. No. 50, where Mangatal J considered whether an amendment of the claimant's statement of case was to be disallowed on the basis that it was made in bad faith or amounted to "backtracking on allegations of fact". In summary, Mangatal J considered the following:

1) the original pleadings, previous amendments, and the nature and number of proposed amendments;
2) whether an explanation was offered for the proposed amendments;
3) whether the amendments served some useful purpose;

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[2] This is the date from which Practice Direction 14 came into force. It sets out factors which a court must consider before permitting a party to withdraw pre and post action admissions.

4) whether a reason was offered as to why the claimant should be allowed to make the proposed (further) amendments; and
5) whether the claimant put forward evidence that would lead to the view that it had a real prospect of successfully arguing its case based on the proposed amendments.

[48] The learned judge concluded that by virtue of the proposed amendments, the claimant was presenting an "entirely different case" (paragraph 58), and that this was quite disingenuous and insincere (paragraph 65). Applying the principles discussed in ***Moo Young and another v Chong and others*** (2000) 59 WIR 369, she found that the amendments had no real prospect of succeeding at trial, and that they were not necessary in order to decide the real issues in controversy between the parties, and they would have an adverse effect on the defendants. Mangatal J said at paragraph 49 that an application to amend a statement of case "*to plead something contrary to a specific allegation of fact previously made… [was] impermissible and …. [A] court will not countenance an application for an amendment not made in good faith*".

[49] In the instant case, I am satisfied that the proposed amendments would serve no useful purpose at this time. Even though the 1st defendant has not set out his defence as eloquently and in a structured manner as the proposed amended defence now seeks to do, the defence adequately responds to the particulars of claim on the whole. The issue of privilege is one which might be addressed by the trial judge once it becomes more apparent how the claimants obtained a copy of the unsigned Instrument of Mortgage. I am not satisfied that the amendments are necessary in order to decide the real issues in controversy between the parties. In fact, certain statements made in the defence and documents annexed thereto are relevant to the real issues in controversy between the parties, and they ought not to be removed at this juncture. The proposed amendments would constitute a "backtracking" on statements made by the 1st defendant in his defence regarding the offering of "security" and the registering of a mortgage on the title and would

alter the substance of the defence filed. Applying the principles in the cases of ***Moo Young*** and ***Index***, it does not seem appropriate to permit the 1st defendant to amend his defence in circumstances where the application or parts of it, appear not to have been made in good faith.

Do the proposed amendments have a real prospect of success?

[50] I make no pronouncement as regards whether or not the statements made at paragraph 2 of the defence and at paragraph 5 of the annexed document are admissions. However, they are clearly relevant. The issue at the heart of the case is whether or not the parties intended that the sum of US$57,713.66 be a loan, and intended that a mortgage be endorsed on the title. The claimants allege there was such an agreement. Any reference made by the 1st defendant in his defence to the offering of "security" or to the registering of a mortgage on the title, ought to be considered by the trial judge when determining the matter.

[51] In assessing whether the amendments have a real prospect of success, it seems appropriate to give consideration to the claim, the nature of the proposed amended defence, issues of the case, and also to briefly examine the law regarding the presumption that arises when a third party pays off another's mortgage. At paragraph 658 of Halsbury's Volume 32, 4th Edition, it is stated:

> *"658. Equitable rights of person paying mortgage debt – Although there has been no actual transfer of the mortgage, a person who advances money for the purpose of paying it off, and whose money is thus applied, becomes an equitable assignee of the mortgage and is entitled to keep it alive for his benefit. Similarly, an assignee of the mortgaged property is a trustee for the person. who finds the money to pay off the mortgage. If he advances the money at the mortgagor's request in order to prevent the equity of redemption from being fortified, this result is assisted on the ground of salvage, and he is subrogated to the mortgagee's rights; but the doctrine is not confined to such cases. Although there is no question of salvage, and even though the mortgagor is not a party,* ***a stranger who pays off a mortgage is presumed to intend to keep it alive for his own benefit, and effect is given to this intention****. The result is the same notwithstanding that he contemplated taking a different security, in which case he is entitled to the benefit of the old mortgage until the new security is given …"*
> (My emphasis)

[52] The law is clear that there is a rebuttable presumption that a third party who pays off another's mortgage, does so with the intent of creating a new security for himself. To determine whether or not the presumption is rebutted, the trial judge will look at the conduct of the parties, and this includes conduct such as the collection and retention of the defendants' certificate of title, the preparation of a mortgage instrument for signing, and the lodging of a caveat by the claimants.

[53] It should be noted that even if this court permitted the amendments sought, similar references to "*security*" and putting "*a lien on the title*" are contained in the email correspondence between the 1st defendant and Clinton Atkins during the negotiations. In the absence of a written contract, the trial judge will look for the intention of the parties in the words used by them during negotiations and other written correspondence, and the court will also consider the conduct of the parties.

[54] I have assessed whether the proposed amendments have a real prospect of success in light of the evidence currently before the court, including the words used by the parties in their emails during negotiations. In this case, I find that the amendments sought, including the removal of the references in the defence to the offering of "security" to the claimants, have no real prospect of succeeding at trial.

Would the amendment prejudice the claimants?

[55] There is obviously a need to conduct litigation efficiently. If the 1st defendant's application were granted, the court would have to permit the claimants the opportunity to amend their statement of case. This is to ensure that the parties are on an equal footing. The amendment of the defence weeks before the trial is likely to cause the trial dates to be vacated. The amendment could not be permitted without delay being incurred, and this very late amendment would require the trial date to be pushed back by years, given the current fixtures in the Supreme Court.

[56] This matter has not progressed to trial for six years. The possible prejudice to the claimants if the trial dates were vacated is obvious. Although there is no affidavit

evidence to guide me as to the ages of the parties, I recall that when the parties appeared before me on June 8, 2020 in relation to another application, the 1st defendant and the claimants appeared to be elderly. With the passage of time, memories fade, or it might be difficult to locate witnesses, or witnesses might die. It is clear to me that permitting the amendment of the defence would have an adverse effect on the claimants, particularly as they are unlikely to secure a trial date before 2025.

[57] A late amendment ought not to be permitted if it would cause an injustice to the other party by virtue of a delay in the progression of the proceedings and if an order for costs cannot adequately address any prejudice or injustice likely to be caused. In this case, having regard to the age of the matter and the apparent ages of the claimants, I do not believe that an order for costs could adequately address any prejudice caused. Injustice or hardship would arise where the amendment would cause significant delay in the progression of the matter.

Would permitting the amendment be in keeping with the overriding objective?

[58] The overriding objective of the CPR requires that the court dispense justice by resolving issues between the parties in a manner which saves time and expense. However, it has also been said repeatedly in cases that Courts must be reluctant to deprive a litigant of the opportunity of having the case determined on the merits. Blackstone's Civil Procedure 2012 at paragraph 1.27 states:

> *"The main concept in the overriding objective (CPR, r. 1.1) is that the primary concern of the court is to do justice. Ultimately the function of the Court is to resolve issues between the parties…. Shutting a litigant out through some technical breach of the rules will not often be consistent with this, because* ***the primary purpose of the civil courts is to decide cases on their merits****, not to reject them for procedural default." (My emphasis)*

[59] A litigant ought not to be deprived of the right to pursue his case. At the same time, the court must ensure that cases are progressed in a timely manner. It seems apparent that one reason for the requirement of permission to amend a party's statement of case after the case management hearing is that a late amendment

often has the effect of putting one party at an unfair advantage. Further, a late amendment might result in an adjournment of the trial.

[60] I have noted that the 1st defendant was a litigant in person at the time he filed the defence in 2014. However, it is also noted that by 2017 he was represented and at that time, an application for summary judgment was filed on his behalf. Counsel instructed by the 1st defendant in 2017 must be presumed to have reviewed the defence filed as well as any other document filed which would have been relevant to the summary judgment application. The 1st defendant's counsel subsequently filed an application to remove the firm's name from the record and that application was granted on June 8, 2020. During of the three-year period leading up to June 2020, no attempt was made to amend the defence.

[61] I am mindful of the guidance of the Court of Appeal in ***Merlene Murray-Brown v Dunstan Harper & Winsome Harper*** [2010] JMCA App 1, where Phillips JA said:

> *"In the interests of justice, and based on the overriding objective, the peculiar facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended."*

[62] Counsel Mr. Neale was only instructed by the 1st defendant in September 2020. Upon his review of the papers, it was observed that the defence ought to be better particularised. However, the three-year period in which the 1st defendant was represented is a significant matter for this court's consideration. Rule 1.3 the CPR provides that it is "*the duty of the parties to help the court to further the overriding objective*" of enabling the court to deal with cases justly and expeditiously. It seems to me that counsel previously instructed could have made the current application in 2017. The application having been made two months before the trial, now forebodes an adjournment of the trial to a date in 2025. In the circumstances where the parties are elderly, securing a new trial date in year 2025 in order to permit the amendment would not be in keeping with the overriding objective of the CPR.

[63] I am satisfied that the defence need not be better particularised and that any uncertainty created by the drafting of the defence by the 1st defendant as a layman, may be remedied by careful construction of the witness statements. Further, the case is likely to be determined based on the interpretation of the terms of the alleged contract, as contained in the email correspondence, which might show the intent of the parties. The court will examine the parties' words and conduct. Where essential terms of the contract were not agreed, the court has to determine whether there was a binding contract. Despite vague or uncertain terms, a term might be implied by the court and the contract might be deemed binding depending on the intention of the parties, where they have acted upon their agreement. Alternatively, the law of restitution might assist the claimants if it could be shown that the defendants have been unjustly enriched by the claimants' actions in furtherance of the alleged contract.

[64] In the circumstances, the issue of whether there was a joint venture agreement or a loan agreement will be resolved at trial after the court has had regard to the contents of the email correspondence and any other relevant document. There is not much point in seeking to amend the defence when the court is able to construe the documents already relied on by the parties.

Whether the court should strike out parts of the defence if it appears to be prolix.

[65] Rules 26.3(1)(a) and 26.3(1)(d) of the CPR state that:

> *"26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings …*
> *(d) that the statement of case is prolix or does not comply with the requirements of Parts 8 or 10 of the CPR."*

[66] Rule 26.2(2) of the CPR provides that if the court is minded, of its own initiative, to order a document or portion thereof to be struck out, the court is obliged to give the party a reasonable opportunity to make representations. The court may also give seven days' notice of its intention to take such a step (see rule 26.2(4)).

[67] Having regard to the fact that the 1st defendant purportedly drafted it himself, without the benefit of legal advice, I do not find that it is necessary for me to strike out the document titled “Evidence Submission File” on the grounds of prolixity. In the preparation of his case for trial however, I would expect that the 1st defendant’s witness statement would be more carefully drafted, with the assistance of counsel.

DECISION AND FURTHER DIRECTIONS

[68] Having regard to the age of the matter before the court, the nature and merits of the defence and proposed defence and the likely prejudice that may be caused to the claimants by an adjournment of the trial, I do not believe that it is in the interest of justice to permit the proposed amendment sought. In this case, I am satisfied that refusing the 1st defendant’s application will not have the effect of depriving him of the opportunity to have his case heard on the merits. The application for permission to file an amended defence is refused.

[69] I now make the following case management orders:-

1. Application to amend the defence of the 1st defendant is refused.
2. The trial remains fixed for December 8 and 9, 2020.
3. The time for compliance with the Case Management Conference Orders made on December 8, 2017 is extended to November 27, 2020.
4. The claimant is to prepare and file a Core Bundle on or before December 1, 2020 and is to serve the Index to the Judge's Bundle on the 1st defendant's Attorneys-at-Law on or before December 1, 2020.
5. The parties are to file and serve Skeleton Arguments and a List of Authorities on or before December 4, 2020
6. Application for leave to appeal refused.
7. Costs to be cost in the claim.
8. The claimant’s Attorney-at-law is to prepare, file and serve this order.