[2020] JMSC Civ 125

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2012HCV05912

BETWEEN	**NATIONAL RECOVERY LIMITED**	**CLAIMANT**
AND	**ATTORNEY GENERAL FOR JAMAICA**	**DEFENDANT**

IN CHAMBERS

Mr. Lawrence Phillpotts-Brown and Mr. Franz Jobson instructed by Lawrence Phillpotts-Brown & Co. for the Applicant/Claimant.

Mr. Dale Austin instructed by the Director of State Proceedings for the Respondent/Defendant.

Heard: June 10 and July 2, 2020

Civil procedure – Application for permission to amend statement of case – Whether claims to seek damages for breach of contract, and alternatively, damages on a *quantum meruit* basis amount to new causes of action – Whether additional claims are statute barred – Rules 20.4 and 20.6 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES, J (Ag.)

[1] The application before the court for its consideration is an application by the claimant for permission to amend its statement of case pursuant to rule 20.4 of the Civil Procedure Rules 2002, as amended (hereinafter "CPR").

BACKGROUND

[2] On April 4, 2001, the claimant was approved by the Director of Procurement Policy in the Ministry of Finance as an authorised supplier of services to the Government of Jamaica. Pursuant to a letter of intent dated January 23, 2008 and issued to the claimant by the Superintendent of Police for the St. Andrew North Division of the Jamaica Constabulary Force (hereinafter "JCF"), the claimant provided wrecking and storage services to the JCF in that division. No written contract was signed by the parties. The said letter stated that the expenses affiliated with such services provided by the claimant were to be borne by the owners of the vehicles, provided that they were identified. Further, the letter stated that where the owners were not so identified by the end of February 2008, the vehicles would be referred to the necessary authorities for disposal by public auction or private treaty and the costs of the claimant's services would be recovered from the proceeds of sale.

[3] The claimant alleges that over 71 motor vehicles were towed on behalf of the JCF from their Flying Squad Unit and their Constant Spring and Half Way Tree Police Stations in St. Andrew, and subsequently stored at the claimant's storage facility at 7 Malvern Avenue, Kingston. At least 71 vehicles remain unclaimed and the JCF has not sought to dispose of them by public auction or private treaty.

[4] At the heart of the claim is the issue of how the claimant should be compensated for its services rendered. In essence, the claimant now seeks permission to amend its statement of case to seek compensation for damages for breach of contract, or alternatively, damages on a *quantum meruit* basis.

[5] By its amended claim form and its particulars of claim filed on May 3, 2013, the claimant seeks an order for $54,083,400.00 (plus interest), representing wrecking and storage fees arising from services provided to the JCF in respect of motor vehicles towed and stored between January 22, 2008 and March 12, 2013. Additionally, the claimant seeks an order permitting it to dispose of the stored motor vehicles by public auction or private treaty and permitting it to

apply the proceeds of the sale of the said motor vehicles to defray the expenses affiliated with the storage and security of the motor vehicles.

[6] It is observed that the amended claim form and particulars of claim do not seem to be in compliance with rule 8.7(1)(a) of the CPR in that they do not sufficiently particularise the nature of the claim. They are silent as regards the cause of action and the basis for the remedy sought, for example, whether there was an alleged breach of contract by the JCF, or whether the contract was void or frustrated. Further the amended claim form and particulars of claim themselves do not state how the $54,083,400.00 being sought came to be calculated. However, I have gleaned from the documents exhibited thereto, that the storage fees charged for each of the 71 vehicles was $400.00 per day. The defendant did not apply to strike out the claim for inadequate particulars.

THE APPLICATION

[7] As previously indicated, by notice of application filed on March 5, 2018, the claimant now seeks to amend its statement of case to state that there was a breach of contract by the JCF and to seek damages on the basis of this breach of contract, or, in the alternative, damages on a *quantum meruit* basis for the services provided. The claimant now seeks to plead the alleged breach of contract as the failure to pay storage fees when the vehicles were released at the request of the JCF for court purposes, and the failure to take steps to auction the remaining vehicles after February 29, 2008.

[8] The claimant seeks to further amend its claim form and amend its particulars of claim to recover damages totalling $110,800,000.00 from January 22, 2008 up to August 31, 2017, and continuing. This sum is now said to be calculated at the rate of $29,000.00 per day (which is approximately $400.00 per day for the 71 motor vehicles). Further still, the claimant seeks to amend its statement of case to state that it also towed and stored 12 motor bikes. However, it seems that no compensation is sought in addition to that previously sought in respect of the 71 motor vehicles.

[9] It is noted that the notice of application also seeks an extension of the time for compliance with case management orders made on April 25, 2016. Although the matter was initially fixed for trial for four days from May 14 2018, it seems that as at March 5, 2018, many of the case management orders had not been complied with, and the trial dates were vacated. I will address this matter later.

[10] The grounds relevant to the application to amend the claimant's statement of case are as follows: -

> *"1. That Rule 20.4 of the Civil Procedure Rules (CPR) 2002 (as amended) permits the court to grant an order to amend a statement of case;*
> *2. It is an arguable and/or essential part of the Claimant's case that at the material time the Defendant because its servant And/or agent the Commissioner of Police was duty bound to compensate the Claimant for its breach of contract;*
> *3. A further arguable and/or essential part of the Claimant's case is raised by the Defendant's proposed amendments arguable and/or essential part of the Claimant's case is that, alternatively, the Claimant is entitled to be paid on a quantum merit for the services provided which continues to accumulate storage charges;*
> *4. The amendments sought are necessary in determining the real issues in controversy between the parties;*
> *5. The Defendant will suffer neither prejudice nor inconvenience if the order is granted to amend its statement of case;*
> *6. That the Claimant's case would be severely prejudiced if the Claimant was not permitted to amend its statement of case …."*

[11] On June 11, 2020 I heard the application in respect of the amendments sought, and I gave consideration to the submissions made by counsel for the parties.

SUBMISSIONS

[12] Counsel for the applicant/claimant Mr. Phillpotts-Brown submitted that neither of the amendments sought was a new cause of action. He opined that the nature of the case would not change by the proposed amendments and the defendant has had notice of the claim for breach of contract.

[13] Counsel submitted that at the trial it would be only reasonable for a court to find that the parties should be bound by the contract, but even if the contract

was not upheld, it might be that the defendant would be ordered to pay the claimant for its services on a *quantum meruit* basis.

[14] In essence, counsel for the defendant, Mr. Austin, submitted that the court should look to the January 23, 2008 letter of intent in order to determine the terms of any agreed contract between the parties. He opined that the letter clearly stated how the claimant would be compensated for its services, and that there was never any payment obligation indicated in the letter, on the part of the defendant. Instead, the claimant had agreed that the owners of the impounded vehicles should pay the claimant's wrecking and storage fees, or that the vehicles would be sold at public auction or private treaty. Mr. Austin submitted that it was a precursor to an award of damages on a *quantum meruit* basis that there be a payment obligation on the part of the defendant.

[15] Further, Mr. Austin submitted that the proposed amendments that the claimant should be compensated on a *quantum meruit* basis, or be compensated at a rate of $29,000.00 per day, would be based on distinct facts from those stated in the letter, and these proposed claims were statute barred. Mr. Austin further submitted that the underlying set of facts to base the amendments were non-existent or not apparent within the proposed pleadings.

THE ISSUES

[16] There are two proposed amendments. The first proposed amendment relates to the claim for damages in respect of an alleged breach of contract. The issue in relation to this proposed amendment is whether it constitutes a new cause of action, which is also statute barred, or whether it seeks to better particularise the original claim as regards an alleged breach of contract.

[17] The second amendment proposes to add a claim for compensation on a *quantum meruit* basis. The issue in relation to this proposed amendment is whether it arises from the same facts and cause of action in the original case, or whether it constitutes a new cause of action which is statute barred.

THE LAW

[18] 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. Although rule 20.6 of the CPR applies to amendments to a statement of case after the end of the relevant limitation period, it offers no guidance in relation to the matters that the court must take into consideration when determining whether to permit a proposed amendment after the end of a limitation period. CPR rules 20.4 and 20.6 provide: -

> *"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.*
>
> *20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.*
> *(2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was -*
> *(a) genuine; and*
> *(b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."*

[19] Guidance however, can be found in pre-CPR and post-CPR decisions of the Court of Appeal, which state that an amendment of a statement of case might be permissible after the claim is statute barred, provided that the amendment does not amount to an entirely new or distinct cause of action. A careful assessment must be conducted to determine whether that which has been added or is proposed to be added, is a new claim, or whether it substantially arose from the same incident as the cause of action previously pleaded.

[20] In ***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."

[21] In ***The Attorney General of Jamaica and Aaron Hutchinson v Cleveland Vassell*** [2015] JMCA Civ 47, the Court of Appeal held that though new causes of actions of false imprisonment and malicious prosecution were added to the original claim, such causes of action were permitted as they arose out of substantially the same facts which gave rise to the cause of action for assault, previously pleaded, and it was in the interests of justice to allow the amendment. The Court of Appeal gave consideration to the cases of ***Lloyds Banks Plc v Rogers*** (1996) The Times, March 24, 1997, ***Savings and Investment Bank Ltd v Fincken*** [2001] EWCA Civ 1639, and ***The Jamaica Railway Corporation v Mark Azan*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered on February 16, 2006. At paragraphs 17 and 22, Dukharan, JA promulgated the following guidance: -

"17. In assessing whether a proposed amendment in fact amounts to a new cause of action, it is necessary to consider the statement of case as a whole. To determine whether a proposed amendment introduces a new cause of action for the purposes of the Act, it is necessary to examine the duty alleged, the nature and extent of the breach alleged and the nature and extent of the damage claimed. If the new plea introduces an essentially distinct allegation, it will be a new cause of action….

"22. …

a. *If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.*
b. *Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition of a new remedy, there is no addition of a new cause of action.*

c. *A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded."*

[22] In addition, in the ***Mark Azan*** case (supra), Harrison, JA stated at paragraph 28 that in determining whether or not to grant an application to add a new cause of action after the end of a limitation period, a court ought to apply the overriding objective and the general principles of case management.

[23] To identify the limitation period in respect of simple contracts, regard must be had to section 46 of the **Limitation of Actions Act** and to section 3 of an old English Act incorporated by way of reference in section 46 of our Act. Section 46 makes reference to the United Kingdom Statute 21 James I. Cap. 16, entitled "An Act for limitation of actions, and for avoiding suits in law", and section 3 of that English Act stipulates the limitation period for simple contracts. **Halsbury's Laws of England**, Volume 9 (1), paragraph 618 states that a "simple contract" includes all contracts which are not contracts of record or contracts made by deed and a simple contract may be express or implied or partly express and partly implied. **Halsbury's Laws of England**, Volume 28 at paragraph 662 also states that in an action for breach of contract, the cause of action is the breach. Consequently, the action must be brought within six years of the breach. Section 3 of the English Act provides: -

> *"…all actions of debt grounded upon any lending or contract without specialty…, shall be commenced and sued within the time and limitation hereafter expressed and not after… within six years next after the cause of such action or suit and not after…"*

ANALYSIS

[24] The right to file suit in respect of the services rendered under a contract in this case would have accrued whenever the defendant failed to permit the vehicles to be sold at public auction, provided that there was no good reason preventing such sale. As this could be classified as a simple contract, the cause of action would have accrued after the expiration of a reasonable period after February 29, 2008. This means that a claim for compensation for the services rendered ought to have been filed within six years, by 2014. The

claimant's application therefore appears to have been filed four years after the end of the relevant limitation period. Notwithstanding, if the proposed claim is not a new cause of action from the original claim, and if there is likely to be no injustice to the defendant, the amendments might be permitted.

[25] In the instant case, the claimant's current statement of case does not expressly identify a cause of action nor explain how the damages sought came to be calculated. It is noted that the documents exhibited to the pleadings, for example, exhibit NRL3 indicates the daily storage fees. However, what remained unclear in both the pleadings and the exhibited letters requesting payment (exhibits NRL4 and NRL5), was why the claimant asserted that payments were due to be made by the defendant.

Should the amendment seeking damages for breach of contract be permitted?

[26] In its proposed amended statement of case, the claimant now makes it clear from the proposed amendments that damages are sought for breach of contract on account of the defendant's alleged failure to take steps promptly after February 29, 2008 to arrange for the vehicles to be sold by public auction or private treaty and to address storage fees when the vehicles were released for court purposes. In paragraphs 9, 10 and 11 of the proposed amended particulars of claim, the claimant states that because the JCF delayed in taking the necessary steps to obtain authorisation to have the vehicles sold at public auction or private treaty, the vehicles deteriorated significantly, thus reducing the sums available to pay for the storage fees, and the claimant suffered loss.

[27] It is clear that the amendments are sought based on the alleged breach of contract, namely, the alleged failure of the JCF to make arrangements for some vehicles to be sold at public auction or private treaty by the end of February 2008. The claimant seems to be alleging is that through the default of the JCF (and/or other government agency), the contract became commercially unviable and was discharged, and that the claimant should now be compensated by the defendant for its storage services, instead of by the owners of the vehicles, who were never identified. On neither the claimant's nor defendant's case, is an explanation offered for the inability of the

defendant to dispose of the vehicles by public auction or private treaty over a 4-year period between 2008 and 2012, when the claim form was filed. This is an issue for the consideration of the court at a trial.

[28] The claimant seeks to amend its statement of case to state that it also towed and stored 12 motor bikes, though no additional compensation seems to be sought in addition to that previously sought in respect of the 71 motor vehicles. The cause of action in respect of the storage of the bikes arises out of the same facts which gave rise to the cause of action in respect of the storage of the 71 cars. This amendment is therefore permissible.

[29] I am satisfied that the claim for damages for breach of contract arises out of the facts of the original case, albeit that the claim was not clearly pleaded. The proposed amendment to the claimant's statement of case now seeks to better particularise the original claim as regards an alleged breach of contract, and is not a fresh or distinct cause of action.

[30] I see no prejudice or injustice to the defendant in permitting the amendment. The first proposed amendment sought is necessary in the determination of the issues between the parties. I am satisfied that permitting the amendment is in keeping with the overriding objective of enabling the court to deal with cases justly and expeditiously.

Should the amendment in respect of the *quantum meruit* claim be permitted?

[31] The claimant also seeks to amend its statement of case to seek as an alternative remedy, damages on a *quantum meruit* basis for the services provided. It is not clear from its pleadings whether the claimant's claim for damages on this basis is contractual or restitutionary in nature.

[32] The expression *quantum meruit*, means "as much as he earned". Where there is a contractual claim, and the contract defines the work but does not fix a price, or where work is carried out at the express or implied request of an employer, a court may award a reasonable sum in respect of the work carried

out[1]. Similarly, an award may be available where the claim is restitutionary in nature, such as where work is carried out in anticipation of a contract which does not materialise[2], or where a contract is subsequently discovered to be void or unenforceable[3].

[33] While it might not be necessary to specifically plead whether the claim is contractual or restitutionary in nature, it might be necessary to plead what reasonable sum the claimant alleges that it is entitled to recover by way of *quantum meruit*, and the basis for the calculation. The award by the court will be based on the value of the gain received by the defendant, valued at the time when it was received by the defendant. The starting point in valuing the enrichment is the objective market value, or market price, of the services performed by the claimant[4].

[34] The claimant in this case seems to be relying on the letter of intent as the basis for an alleged contract between the parties, or, as the basis for compensation for services rendered. A request for work to be done coupled with work being done in compliance with the request, will usually lead to the inference that a contract has been concluded between the parties. However, this is a matter for the court at trial to determine, depending on its interpretation of the words used and terms expressed in the letter of intent.

[35] Mr. Phillpotts-Brown submitted that a remedy should be available based on the defendant's request for, and acceptance of the claimant's services and the breach of an implied term of the contract that the defendant would pay the claimant for its services. Counsel submitted that damages on a *quantum meruit* basis should be awarded pursuant to an implied contract. Counsel

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[1] See **Encyclopaedia of Forms and Precedents**, Vol. 5 (Building and Engineering) at page 67, paragraphs 226 – 227, citing ***British Steel Corporation v Cleveland Bridge and Engineering Co Ltd*** [1984] 1 All ER 504.

[2] Supra, citing ***Trollope & Colls Ltd and Holland, Hannen & Cubitts Ltd (t/a Nuclear Civil Constructors (a firm)) v Atomic Power Constructions Ltd*** [1962] 3 All ER 1035.

[3] Supra, citing ***Craven-Ellis v Canons Ltd*** [1936] 2 KB 403, [1936] 2 All ER 1066; and ***Rover International Ltd v Cannon Film Sales (No 3)*** [1989] 3 All ER 423.

[4] See ***Benedetti v Sawiris*** [2013] UKSC 50, [2013] 4 All ER 253.

further submitted that this alternative relief sought arises from the same facts of the case, and therefore the amendment is permissible.

[36] Counsel Mr. Austin submitted that the proposed amendments were distinct from the current claim and required the introduction of a new set of facts, and such claims were time barred. He submitted that the amendments sought by the claimant should not be permitted as the letter dated January 23, 2008 does not factually support a claim for compensation on a *quantum meruit* basis, or, for damages in the sum of $29,000.00 per day for the period from January 22, 2008 to March 12, 2013. This letter indicated how the claimant's wrecking and storage fees were to be paid, and did not stipulate that the JCF would be obliged to pay the claimant.

[37] I am not persuaded by Mr. Austin's submissions. It is accepted on the claimant's and the defendant's cases that the claimant was an approved and authorised supplier of services to the Government of Jamaica from April 4, 2001, approved by the Director of Procurement Policy in the Ministry of Finance. The letter dated January 23, 2008 issued by the Superintendent of Police engaged the claimant's services to tow and store vehicles in the JCF's St. Andrew North Division from that date. However, the letter of intent seemingly did not disclose some essential terms of engagement.

[38] Although the letter stated that where the vehicle owners were not identified, the costs of the claimant's service would be recovered from the proceeds of sale via public auction or private treaty, the letter did not state when, after February 2008, the first set of vehicles would be referred to the necessary authorities for sale, or what that referral and authorisation process involved. Neither did the letter state a timeframe for any other vehicles, impounded after February 2008, to be referred for public auction or private treaty.

[39] The letter of intent was silent in respect of the date or period by which vehicles would be sold at public auction or private treaty. I have noted that among the proposed exhibits is a document seemingly prepared by the police, indicating that there were relatively old vehicles (manufactured from as early as 1990)

which were seized on suspicion of theft as far back as 2004. It is not clear if this was known to the claimant as at January 23, 2008, or before or after that date. However, what is clear is that there was no term in the letter to stipulate what should happen if such older vehicles could not be sold at public auction or private treaty.

[40] Further, the said letter from the Superintendent of Police did not state on what basis the vehicles would have been impounded by the police. Consequently, the letter did not state how the claimant would be compensated if the impounded vehicles were determined to have been stolen and if a court subsequently ordered the release of the said vehicles to the lawful owners. The letter was silent as regards how the claimant would be compensated in instances where the vehicle owners bore no legal obligation to pay storage and wrecking fees to the claimant.

[41] The issue of whether and how the claimant should be compensated are central issues in the original claim, to be determined at trial. Where the terms of a contract are in issue, the resolution of a contractual dispute would usually turn on the interpretation or construction of those terms, as contained in the contract itself or other documents such as a letter of intent. 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 claimant if it could be shown that the defendant had been unjustly enriched.

[42] Even if a court were to determine that there was no contract between the parties, or that there was no payment obligation, as the defendant alleges, damages on a *quantum meruit* basis might be awarded as a restitutionary response to any unjust enrichment by the defendant at the claimant's expense. In this case, I am satisfied that as there seem to be many issues surrounding the operation of the contract, the issue of compensation by way

of *quantum meruit* might be a matter for the court's consideration in the original suit in any event.

[43] In ***Sandals Resorts International Limited v Neville L Daley and Co Limited*** [2016] JMCA Civ 35, the Court of Appeal stated that a claim for compensation on a *quantum meruit* basis may be used as an alternative to a claim for damages. In ***Mark Azan*** (supra), K Harrison JA said at paragraph 29: -

> *"[w]here the only difference between the original case and the case set out in the proposed [amendment] is … the addition of a new remedy, there is no addition of a new cause of action".*

[44] Applying the principles in the aforementioned cases, I am satisfied that, in the circumstances of the case, it is appropriate and just to permit the proposed amendment to the claimant's statement of case to add an alternative remedy. I am satisfied that the defendant would not be prejudiced by the amendment and that permitting the amendment is in keeping with the overriding objective of the CPR.

DECISION AND FURTHER DIRECTIONS

[45] The claimant's application for permission to file a further amended claim form and amended particulars of claim is granted. I now make the following orders:-

1. Order granted in terms of paragraph 1 of notice of application filed on March 5, 2018.
2. The claimant is permitted to file a further amended claim form and amended particulars of claim by July 10, 2020.
3. The defendant is permitted to file an amended defence by September 16, 2020.
4. The time for compliance with the Case Management Conference Orders made on April 25, 2016 is further extended to November 30, 2020.
5. The Pre-Trial Review remains fixed for January 19, 2021.
6. The trial remains fixed for May 25, 26 and 27, 2021.
7. No order as to costs.
8. The claimant's Attorney-at-law is to prepare, file and serve this order.