IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 01012 OF 2005

BETWEEN	ALBERT SIMPSON	CLAIMANT
AND	ISLAND RESOURCES LIMITED	DEFENDANT

Gillian Mullings instructed by Patrick Bailey and Company for the claimant
Kipcho West instructed by Kipcho West and Company

February 27, 28 and April 24, 2007

APPLICATION TO AMEND STATEMENT OF CASE, RULE 20.4 OF THE CIVIL PROCEDURE RULES

SYKES J.

1. On February 28 I granted the application of Miss Gillian Mullings. These are the reasons for my decision.

2. Albert Simpson leased premises located at shops 11 - 15 Island Plaza, Ocho Rios in the parish of St. Ann from Island Resources Limited. He claims that there was a breach of the lease agreement which precipitated this claim. The breach alleged is of an implied term that the shop would be water tight so that if rain fell the shop would not be flooded. It is alleged that there were heavy rains in May 2002 and the lack of water tightness resulted in damage to property and loss of income and loss of profit.

3. Miss Mullings has applied to add the words and figure *in the sum of $7,500,000.00* to the particulars of claim as the sum representing loss of income. According to her this was an oversight.

4. Rule 20.4 of the Civil Procedure Rules ("CPR") says:

> *(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

5. This rule is the amended rule which came into effect on September 18, 2006. Rule 20.4 (2) of the amended rule replaces the old 20.4 (2) which reads:

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

6. The old rule did not have much scope for flexibility and the rules committee was of the view that it should confer upon the judge greater discretion to deal with amendments after case management conference.

7. Miss Mullings cited the case of ***Bhanmat Santokie v Guyana Transport Services Ltd. and another*** (1984) 33 W.I.R. 139. In that case there was an application to amend the statement of case but the trial judge rejected the application because he concluded that the application would deprive the defendant of the statute of limitations defence. He was reversed on appeal. The Court of Appeal held that the amendment would not have the effect thought by the trial judge. In coming to its decision, the court cited passages from the 1965 Annual Practice ("White Book") which, to summarise, states that amendments ought to be granted unless it cannot be done without injustice to the other party. The passage also stated that courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. The authority for this was said to be the judgment of Bowen L.J. in ***Cropper v Smith*** (1884) 26 Ch D 710, 711.

8. Miss Mullings also cited ***Charlesworth v Relay Road Ltd*** [2000] 1 W.L.R. 230 a decision of Neuberger J. where he had to consider an application to amend a statement of case after judgment but before the formal order was drawn up. She placed reliance on passages from various judgments cited by Neuberger J. The thrust of the passages, according to Neuberger J. was that first, since the rules provide for corrections in case of misjoinder, non-joinder and amendments and taking into account that litigation is a human activity then the court should favour amendments (per Millet L.J. in ***Gale v Superdrug Stores Plc*** [1996] 1 W.L.R. 1089, 1098 - 1099). Second, never mind how careless or negligent or however late the proposed amendment, it should be granted provided it can be done without injustice to the other side and further, there can be no injustice if the other side can be

compensated by costs (per Lord Brett M.R. in ***Clarapede & Co. v Commercial Union Association*** (1883) 32 W.R. 262).

9. Neuberger J. felt that these two principles represented fundamental assessments of the functions of a court of justice which have a universal and timeless validity.

10. His Lordship did note that considerations such as the unfair strain of litigation, legitimate expectation of litigants, the efficient conduct of the case and the interest of other litigants whose cases are waiting to be heard are valid concerns if the application to amend succeeds. He cited a number of cases where these views were expressed (see ***Worldwide Corporation Ltd v G.P.T. Ltd*** (Civil Division) Transcript no 1835 of 1998 (delivered December 2, 1998); ***Ketteman v Hansel Properties Ltd*** [1987] A.C. 189, 220 per Lord Griffiths).

11. I should note that these considerations have found expression in part 1 of the CPR. Neuberger J.'s did not indicate in his analysis whether these considerations identified in the twentieth century cases were sufficient in any given case to lead to deny the amendment. There are some passages which now cite, also cited by Neuberger J. which, in my view, do indicate that despite the two principles identified by him, there are cases where a denial of the amendment is the just decision.

12. I would cite the judgment of Peter Gibson L.J. who said (referring to Millet L.J. in ***Gale***) in ***Worldwide Corporation Ltd***:

> *"We share Millett L.J.'s concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-...-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice, for the sake of doing justice both to his opponent and to other litigants."*

13. I would also refer to the judgment of Waller L.J. also in ***Worldwide Corporation Ltd***:

> *Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business would be conducted efficiently.* ***We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in***

a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of thee proceedings. (My emphasis)

14. Waller L.J. also said:

Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie suggested, applies in the instant case is that without amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it"

15. The passages from Lords Justices Peter Gibson and Waller were pre-CPR cases but they nonetheless capture important considerations that have now been given pride of place in the CPR. If these considerations were rising to prominence before the CPR then they should be given even greater weight now that the CPR has expressly stated that allocation of resources, saving expense and dealing with cases expeditiously and fairly. Fairness cannot mean only what one side wants. The courts are under an explicit mandate to consider the allocation of the courts resources to the particular case before the court and other cases pending before the courts.

Application to case

16. The amendment of the rules as stated above is not a licence for negligence or extreme carelessness. I now proceed to examine the factors in this case. In the case before me the claim for loss of profit and income are not new. They were stated in the statement of claim some time ago. What was missing was the quantification of the loss. It was not entirely inconceivable that an amendment would be made at some point. On the other hand there is a marked difference between not knowing the quantum being claimed for loss of income and profit and facing a claim for $7,500,000.00 on the day of trial, particularly if the claimant is also seeking interest. There is also the fact that the defendant was not ready to

proceed and would have needed an adjournment if the matter had commenced. There was also non-compliance with the disclosure orders made while the case moved from filing to trial. In effect, the trial dates became case management dates because neither side was ready to proceed. In these circumstances, I do not see any injustice that would be caused to the defendant. It has enough time to contemplate the amendment. Admittedly, the defendant will now have to sterilise a significant sum of money to meet this now known exposure which it did not have to do before. This will undoubtedly affect its operations and possibly insurance premiums, if it is insured against these risks. The amendment is also being applied for before the commencement of the trial. I therefore conclude that the amendment should be granted and I so order.