

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No. 2023/CLE/gen/00226

BETWEEN:

PALM CAY DEVELOPMENT COMPANY

Claimant

AND

ALLWORTH MERLIN PICKSTOCK

Defendant

Before: The Honourable Mr. Justice Leif Farquharson

Appearances: Mr. Dion Smith for the Claimant
Ms. Al-Leecia Delancy for the Defendant

Hearing date: Heard on the papers

RULING

1. Before me are two applications to amend the pleadings in this matter. The first is moved by the Claimant and seeks permission to amend the Statement of Claim filed on 24 March 2023. The second is moved by the Defendant and seeks permission to amend the Defence and Counterclaim filed on 4 May 2023.
2. I have decided to allow both applications. These are my reasons for doing so.

Factual Background and Procedural History

3. This action was commenced by Standard Claim filed on 24 March 2023. According to the Statement of Claim included therein, the Claimant is the developer of Palm Cay Subdivision in eastern New Providence ("***Palm Cay***"). The Defendant is the owner of a 40-foot vessel which he previously kept at the Claimant's marina pursuant to the terms of a slip lease. At some stage the vessel sank. On or about 29 September 2022, the

Defendant removed the vessel from the water and attempted to tow it out of the marina facility and away from Palm Cay. During this process, the Defendant allegedly caused damage to a portion of one of the subdivision's private roadways. According to the Claimant, the area damaged measured approximately 3,220 square feet. The damage was attributed to the collapse of the trailer upon which the Defendant's vessel was being towed, resulting in the vessel's propeller(s) coming into direct contact with the asphalt surfacing and the substrate, essentially leaving the area scarified as the Defendant and/or his driver proceeded nonetheless in seeking to tow it away. After unsuccessfully seeking to have the Defendant pay for the necessary repairs, the Claimant hired personnel to repave or restore the impacted area. In doing so, it allegedly incurred costs of \$14,490.00 (inclusive of labour and materials), for which it seeks compensation.

4. By his Defence and Counterclaim, the Defendant denies all liability to the Claimant. Notably, he admits that while removing the material vessel (named "*Chardenae*") from the marina on or about 29 September 2022, its propeller caused damage to a portion of the Claimant's roadway. However, he maintains that the impacted area measured no more than approximately 500 square feet, and not 3,220 square feet as alleged by the Claimant. He further says that he immediately offered to pay the reasonable costs of repairing the damaged roadway, which he asserts amounted to no more than \$1,200.00.
5. Significantly, the Defendant counterclaims against the Claimant for "*wrongfully and without lawful authority seiz[ing] the vessel...preventing the Defendant from removing it from the marina*". In this regard, he alleges that on four (4) occasions in 2022 and 2023 he attended Palm Cay with a view to transporting the vessel away. On each occasion he was denied entry or otherwise prevented from removing the vessel. In one instance, the Claimant's servants or agents purportedly seized the lowboy trailer he brought to facilitate removal of the vessel. In the circumstances, the Defendant claims damages for conversion and/or wrongful and unlawful detention of the material vessel and lowboy trailer, which he seeks to set-off against any sums he may be held liable to pay the Claimant. Importantly for present purposes, the counterclaim includes a prayer for (*inter alia*) the sum of \$78,200.00, representing the value of the material vessel.
6. By way of Reply and Defence to Counterclaim filed on 13 July 2023, the Claimant responded to a number of the averments included in the Defence and Counterclaim. In this regard, the Claimant denied that it hindered or prevented the Defendant from retrieving or using his vessel or lowboy trailer, asserting that the vessel was derelict and awaited pick up for a period of several months. The Claimant also reiterated that the cost of repairing the damage to its roadway totaled \$14,490.00.
7. A case management conference was held before Fraser, Sr. J. (as she then was) on 5 March 2024, during which the usual pretrial directions relative to disclosure, inspection, the filing of witness statements and the like were issued, with trial being fixed for 30 and 31 October 2024. The CMC Order reserved 8 August 2024 for the Court to hear any outstanding interlocutory applications. Presumably pursuant to this direction, the Claimant and the Defendant filed their respective notices of application seeking permission to amend. By subsequent Orders dated 19 September 2024 and 9 October 2024, the original CMC Order was varied, with new dates being set for the remaining pretrial directions to be complied with, deadlines set for the filing of evidence and the laying over of submissions with respect to the pending amendment applications, and a new trial date of 21-22 October 2025 provided.

8. The Claimant's Notice of Application was filed on 2 August 2024 and seeks permission to amend its Statement of Claim pursuant to Part 20 of the *Supreme Court Civil Procedure Rules, 2022* (the "**CPR**"). The proposed amendments, for the most part, appear to consist of minor typographical changes and a few deletions of references to the Claimant's general manager. As far as I can discern, the only proposed amendment of any substance relates to the replacement of the reference in the claim form to the sum of \$14,490.00 being claimed as damages, with the figure of \$22,150.00 claimed as special damages.
9. The Defendant's Notice of Application was filed on 8 August 2024. A number of the proposed amendments also appear to consist of typographical changes or corrections, and other seemingly inconsequential changes. The main changes of substance appear to include (as shown in red hereafter): a proposed change to delete the reference to the value of the material vessel, which is stated to be "78,200.00", with a reference instead to an "**estimated replacement cost of \$828,500.00**"; a proposed change to paragraph 22 of the Defence and Counterclaim, namely, "**The Defendant was further prevented from use of the vessel as well as use of the low boy, which generated income from for the Defendant. Further and/or alternatively, during the period in which the vessel has been converted and/or unlawfully detained by the Claimant, the vessel was not maintained and allowed to suffer from prolonged water damage, diminishing the value of the vessel**"; the inclusion of the "**repair cost of the vessel**" in the prayer of the counterclaim, which the Defendant says is "**To be assessed**"; the inclusion of the words "**To be assessed**" in relation other heads of loss referred to in the prayer; and the inclusion of claims for "**aggravated damages**" and "**exemplary damages**" in the prayer.
10. The respective applications to amend were to be determined on the papers by the previous judge. This did not occur. The file was subsequently transferred to me, coming on for hearing for the first time on 20 March 2025.

The Affidavit Evidence of the Parties

11. The Claimant filed two affidavits in relation to the applications to amend, both of which were sworn by Shandika Morley, an employee in the firm of Dion D. Smith & Co. The first was filed on 3 October 2024 and was relied on in support of the Claimant's application. In summary, Ms. Morley indicated therein that the sum of \$14,490.00 originally claimed by the Claimant was based on an estimate (or quote) provided by a contractor for the cost of repaving the damaged roadway. However, the actual cost incurred was \$22,150.00, comprised of \$15,000.00 by way of labour and \$7,150.00 for asphalt or other materials. The proposed amendment was thus intended to facilitate recovery of the actual cost incurred by the Claimant. The increased sum was stated to be borne out by the exhibits to the affidavit, including an invoice from the contractor who performed the labour dated 1 January 2023, and an invoice (although the document itself is stated to be an estimate) from an asphalt supplier dated "01/02/2023". The affidavit also annexes a draft of the proposed amendments, which have been discussed already.
12. Ms. Morley's second affidavit was filed on 17 October 2024 and was relied on in opposition to the Defendant's application to amend its Defence and Counterclaim. In this regard, Ms. Morley indicated that the Claimant obtained a marine survey report with respect to the vessel "*Chardenae*", prepared by Cyril E. Morley, a marine surveyor and ship inspector, which is exhibited to the affidavit. This contained a very detailed assessment of the condition of the vessel, indicating (among other things) that its market value was \$19,000.00 and its replacement value was \$175,000.00. On a close reading, the report

itself does not appear to be dated; however, it indicates the survey date was 4-7 October 2024.

13. In support of his application to amend, the Defendant relied on two affidavits. The first was sworn by him and filed on 8 August 2024. The second was sworn by Timoya Walton, an employee in the firm of Tanlaw Associates, and filed on 9 October 2024. The majority of the Defendant's affidavit addresses factual matters to ground an application for an extension of time for compliance with the CMC Order and relief from sanctions, which Fraser, Sr. J. acceded to on 19 September 2024. In relation to the issue of amendment, the Defendant essentially indicates that he made numerous efforts to have an expert review and provide a report on the vessel. His efforts were either rebuffed by the Claimant and/or he experienced difficulty in gaining access to Palm Cay, where the vessel remained. His expert was eventually afforded access to the vessel and produced a report, which was provided to him on 21 July 2024. This, he says, necessitated the current application to amend.
14. Ms. Walton's affidavit simply indicates that the Defendant obtained a marine surveyor's report with respect to the vessel "*Chardenae*", dated 18 July 2024 and prepared by Capt. Albert Armbrister, which she exhibits. The report itself indicates (among other things) that the estimated market value of the vessel as at the date of the survey on 9 July 2024 was \$60,145.00 and its estimated replacement cost was \$828,500.00.

Analysis and Disposition

15. The general principles of law relating to the grant of permission to amend were not disputed by the parties. In short, the power to grant permission to amend is discretionary. In exercising this power, the Court should in general be guided by the principle that amendments should be allowed where they are necessary to ensure that the real question in controversy is determined, provided that such amendments can be made without causing injustice to the other side and can be compensated in costs (*Halsbury's Laws of England*, Vol.11 (2020), para.353; *Brantley v. Cozier* SKBHCVAP 2014/0027 (ECCA)). This, however, must be tempered in light of the overriding objective and the need to ensure that the wider public interest in the administration of justice is not significantly harmed.
16. When considering whether to grant permission to amend a statement of case, it may also become important to distinguish cases where there is an entirely new case or cause of action being sought to be advanced, particularly where limitation may be in issue, as opposed to amendments which only seek to provide further detail to existing allegations. Relatedly, a new head of loss may readily be added by amendment where the loss is a consequence of facts already pleaded (see e.g. *Harland & Wolff Pension Trustees Ltd. v. Aon Consulting Financial Services Ltd.* [2009] EWHC 1557 (Ch); *Berezovsky v. Abramovich* [2011] 1 WLR 2290 (CA); *Denise Violet Stevens v. Luxury Hotels International Management and Ors.* Claim No.SKBHC 2013/0069 (ECSC)).
17. The power to grant permission to amend in The Bahamas is addressed in CPR Rule 20.1, which provides in material part:
 - "(2) *The Court may give permission to amend a statement of case at a case management conference or at any time on an application to the Court.*
 - (3) *When considering an application to amend a statement of case pursuant to paragraph (2), the factors to which the Court must have regard are —*

- (a) *how promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make;*
 - (b) *the prejudice to the applicant if the application was refused;*
 - (c) *the prejudice to the other parties if the change were permitted;*
 - (d) *whether any prejudice to any other party can be compensated by the payment of costs and or interest;*
 - (e) *whether the trial date or any likely trial date can still be met if the application is granted; and*
 - (f) *the administration of justice.”*
- (Emphasis supplied)

18. Rule 20.1(3), quite understandably, does not indicate the relative weight to be accorded to each of the factors listed.

19. Guided by the general principles referred to, I now address both applications to amend by reference to the factors identified in Rule 20.1(3).

The Claimant's Application to Amend

20. It is worth noting that the Defendant's opposition to the Claimant's application to amend was not vigorously pressed. No submissions were laid over opposing the application. The opposition (such as it was) seemed perfunctory and perhaps intended to serve some perceived strategic benefit.

(i) How promptly the applicant has applied to the Court after becoming aware that the change was one which it wished to make

21. The Statement of Claim was filed on 24 March 2023. According to the first affidavit of Ms. Morley, the two invoices showing the actual cost incurred by the Claimant in effecting repairs to the roadway were dated 1 January 2023 and "01/02/2023", respectively. The application to amend, however, was not filed until 2 August 2024. The affidavit is silent as to when the discrepancy between the sum stated in the Statement of Claim and the sum now claimed by the proposed amendment was discovered, or when the Claimant became aware that it wished to amend. It appears therefore that there was some delay on the part of the Claimant in seeking permission to amend the sum claimed by way of special damages.

22. Otherwise, as indicated, the other proposed amendments are largely typographical or clerical in nature.

(ii) The prejudice to the applicant if the application was refused

23. The Claimant's proposed amendment is intended to enable it to recover the sum actually spent in effecting repairs to the roadway as special damages. It is well settled that special damages must be specifically pleaded and proved (see e.g. *Gilbert v. BH Riu Hotels Ltd.* SCCiv App 23 of 2019). If permission to amend is not given, the Claimant may therefore be prejudiced in its ability to secure full recovery.

(iii) The prejudice to the other parties if the change were permitted

(iv) Whether any prejudice to any other party can be compensated by the payment of costs and or interest

24. Conversely, there is no evidence of any prejudice the Defendant would suffer if the Claimant is granted permission to amend. The substance of the Claimant's case would

remain unchanged. Relatedly, there is no evidence of prejudice which is not compensable by the payment of costs.

25. *(v) Whether the trial date or any likely trial date can still be met if the application is granted*
Both counsel expressed confidence that the two amendment applications will not jeopardise the new trial date and they have been working towards meeting the same. The loss of the previous trial date, whilst unfortunate, predated my involvement in the matter and has been overtaken by events.

26. *(vi) The administration of justice*
As stated, the Claimant is seeking permission to amend to enable it to obtain full compensation for the losses it allegedly suffered at the hands of the Defendant. Such amendments are routinely granted. The refusal of permission may potentially leave the Claimant out of pocket. The Claimant is, of course, still ultimately required to prove its case, with the Defendant having an opportunity to be heard thereon.

27. In all the circumstances, the overriding objective (which entails dealing with cases justly and fairly) and the administration of justice, in my view, fully support the grant of permission to amend.

The Defendant's Application to Amend

28. The Claimant's opposition to the Defendant's application to amend was more forcefully pressed. Mr. Smith acknowledged that a number of the proposed amendments appear to be typographical or clerical in nature, and no issue was seemingly taken with these. However, he opposed permission to amend being given to enable the Claimant to assert that prolonged water damage diminished the value of the material vessel; that the replacement value of the vessel was \$828,500.00, as opposed to the market value of \$78,200.00 as originally pleaded; that damages for loss of use of the vessel and the low boy trailer be assessed; and that awards be made for aggravated and exemplary damages. He also made submissions on the various factors listed in Rule 20.1(3).

(i) How promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make

29. The Defence and Counterclaim was filed on 4 May 2023. According to the affidavit of the Defendant, the surveyor's report which (among other things) placed an estimated market value and replacement value on the vessel was only provided to him on 21 July 2024. Access to the vessel was purportedly denied previously. The application to amend was subsequently filed on 8 August 2024. The proposed amendment speaking to the alleged replacement value of the vessel also appears to be the main source of contention between the parties.

30. In all the circumstances, there was no appreciable delay on the part of the Defendant in seeking permission to amend. The Claimant appears to accept this (see Claimant's Skeleton Argument, para.20).

(ii) The prejudice to the applicant if the application was refused

31. For the most part, the Defendant's proposed amendments consist of changes or additions to various heads of loss or damage.

32. In reference to the issue of prejudice to the applicant if permission is refused, Mr. Smith submitted: *"If the application is refused the Defendant would not be prejudiced, considering that he is attempting to increase the value/replacement cost by more than \$750,000.00."* (Claimant's Skeleton Argument, para.21). He further submitted that an independent assessment can be done to determine the true value or replacement cost of the vessel.
33. Whilst I can sympathise with Mr. Smith's stated concern, I do not regard this as a basis for refusing permission to amend. Firstly, as indicated earlier, a new head of loss may readily be added by amendment where the loss is a consequence of facts already pleaded. Secondly, the very concern expressed by the Claimant may be relied on by the Defendant to justify the proposed amendment, and to show prejudice to him if permission to amend is refused. Thirdly, the majority of the Defendant's proposed amendments appear intended to enable him to make full recovery of general and special damages under his counterclaim. The estimated replacement cost of the vessel is also based on the opinion of his marine surveyor.
34. For the reasons stated, I conclude that the Defendant would suffer prejudice if his application is refused.
- (iii) The prejudice to the other parties if the change were permitted*
(iv) Whether any prejudice to any other party can be compensated by the payment of costs and or interest
35. In reference to factor (iii) above, Mr. Smith contended that if the proposed amendments are allowed the quantum of the counterclaim would increase exponentially, which would be *"unreasonable"*. Mr. Smith further argued that costs would not provide adequate compensation, stating: *"Presumably the Claimant would have to spend thousands if not tens of thousands to have an expert make an assessment and act as a witness."*
36. A number of the comments made in relation to the previous factor are also relevant here, particularly as it concerns amendments addressing additional heads of loss or damage. The Claimant's concern about having to engage an expert of its own to assess the vessel also appears to be moot. The second affidavit of Ms. Morley (which was seemingly filed after the Claimant's written submissions) suggests that this has already been done and exhibits a report prepared by the Claimant's marine surveyor, placing a substantially lower market value and replacement cost on the vessel than that alleged by the Defendant. The Claimant's stated concern that costs would not provide an adequate remedy because costs would be incurred in engaging an expert, with all due respect, appears to be a non sequitur.
37. A similar scenario to the present case arose in *Chilton v. Surrey County Council and Anor.*, 24 June 1999 (CA), unreported, where the claimant in a personal injuries action sought to move an amendment on the eve of trial which, if granted, would have resulted in his claim for damages effectively being increased from £5,000 to £400,000. The need for the amendment arose as a result of a mistake on the part of his attorneys, who neglected to file a schedule of special damages in time and only realised their error two weeks before trial. At first instance, permission to amend was refused. This was predicated in part on the judge's conclusion that the defendant would likely have investigated liability and quantum more thoroughly if facing a substantial claim, and thereby stood to suffer undue prejudice by allowing the amendment at such a late stage.

38. On appeal, the court concluded that the loss of earnings claim which served to increase the damages sought substantially had been foreshadowed in documents disclosed earlier. On the issue of prejudice to the defendant, Henry LJ relevantly stated:
"In relation to the prejudice suffered by the defendants, on the affidavit before the judge it was simply generally asserted that matters were dealt with on the basis of a modest claim when they would have been dealt with differently if there had been a more substantial claim. In relation to the question of quantum that is probably right but it can be remedied by giving the defendants the opportunity to do that work. That can simply be done."
39. Mr. Smith also took issue with the proposed amendment speaking to the vessel not being properly maintained prior to the time of its collection, which the Defendant asserts resulted in a diminution of its value. This is still raised in the context of the original cause of action for conversion and/or unlawful detention of the vessel. There are no limitation issues engaged. It simply appears to represent an additional head of damage or layering of the existing claim.
40. In the final analysis, any prejudice the Claimant would suffer if the Defendant is granted permission to amend would in my view be compensable by the payment of costs and/or interest. I would also emphasise that this is by no means to say that the Defendant, if successful in establishing liability under its counterclaim, would be entitled to the additional or enhanced damages sought by the proposed amendments. Equally, the Claimant ought to be afforded every opportunity to dispute the Defendant's counterclaim and all heads of loss and damage.
41. *(v) Whether the trial date or any likely trial date can still be met if the application is granted*
As indicated, both counsel expressed confidence that the two amendment applications will not jeopardise the new trial date and they have been working towards meeting the same. This factor would not therefore justify refusal of permission.
42. *(vi) The administration of justice*
For the same basic reasons the administration of justice supports the grant of permission to amend being given to the Claimant, it also supports the grant of permission being given to the Defendant.
43. In conclusion, I therefore order that the Claimant be granted permission to amend its Statement of Claim in the manner shown in its draft of the proposed amendments. Likewise, I order that the Defendant be granted permission to amend his Defence and Counterclaim in the manner shown in his draft of the proposed amendments. Both parties are to file and serve their respective amended pleadings within seven (7) days from the date hereof. I will hear the parties further on any other consequential directions deemed necessary and on the issue of costs.

L. Farquharson

FARQUHARSON, J.

11 July 2025