

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/01348

IN THE MATTER of a Share Purchase Agreement dated 30th of June 2007 and made between Eleuthera Properties Ltd and Robert B. Millard

AND

IN THE MATTER of the exercise of a put option set out at Article 12 of the aforementioned Share Purchase Agreement

BETWEEN

ROBERT B. MILLARD

Claimant

AND

ELEUTHERA PROPERTIES LIMITED

Defendant

Before: Her Ladyship The Honourable Madam Senior Justice Deborah Fraser

Appearances: Mr. Wilfred Ferguson Jr. for the Robert B. Millard
Mr. Robert Adams KC and Mr. Edward Marshall II for the Eleuthera Properties Limited

Hearing Date: 25 September 2024

Civil Procedure –Application for Permission to amend Defence and Counterclaim – Part 20. 1 of the Supreme Court Civil Procedure Rules, 2022 (“CPR”)

RULING

FRASER, SNR. J:

On 10 December 2024 this Court had given its oral decision granting the Application for Leave to Amend Defence and Counterclaim, I now set out my written reasons for the decision.

Background

[1.] This is an application arises out of a breach of contract dispute between the parties. This application was brought by the Defendant/Applicant, Eleuthera Properties Limited (“the Defendant”), requesting permission to Amend its Defence and Counterclaim.

[2.] The Claimant, Robert B. Millard is a shareholder in the Defendant Company.

[3.] The Defendant/Applicant is a registered company incorporated under the laws of the Commonwealth of the Bahamas and the owner of approximately Four Thousand Six Hundred (4,600) acres of land in South Eleuthera, The Bahamas.

[4.] The background of facts are comprehensively detailed in my Ruling dated 26 May 2023 on the Application for further and better discovery. For the purposes of this judgment, I will focus only on the specific filings that are relevant to this application.

[5.] By way of additional background the following procedural chronology is provided, so far as is relevant:

- i. On 9 March 2021 the Defendant/Applicant filed its Defence and Counterclaim;
- ii. On 30 June 2022, the Defendant/Applicant filed the Witness Statement of Sir Franklyn Wilson;
- iii. On 06 September 2022, the Defendant/Applicant filed Statement of Facts;
- iv. On 21 September 2022, the Claimant filed his Statement of Facts.

[6.] On 5 September 2024, the Defendant/Applicant filed an Application for Leave to Amend the Defence and Counterclaim pursuant to **Part 20.1 of the Supreme Court Civil Procedure Rules, 2022 (“CPR”)**. The grounds for the application, summarized are:

(i) 9 March 2021, the Defence filed a Defence and Counterclaim;

(ii) The Defence and Counterclaim inadvertently stated that representations regarding the sale of lots at Jack’s Bay, Eleuthera, were made by the “Defendant representative” which is inaccurate. The correct position is outlined in the Affidavit of Sir Franklyn Wilson, filed on 29 September 2022 (paragraphs 12 to 18), and the documents exhibited therein.

(iii) The Defendant seeks permission to amend the Defence and Counterclaim to correct the inaccuracy and align the pleadings with the accurate evidence.

Issue:

[7.] The issue is whether the Defendant/Applicant ought to be granted leave to Amend its Defence and Counterclaim?

Evidence

Defendant Evidence

[8.] On 05 September 2024, the Defendant/Applicant filed the Affidavit of Samuel Brown (“**Brown Affidavit**”) made in support of its application seeking leave to amend the Defence and Counterclaim. The Brown Affidavit exhibited a draft copy of the Amended Defence and Counterclaim. The Brown Affidavit provides that: (i) the Defence and Counterclaim filed on 9 March 2021 was inadvertently pleaded on behalf of the Defendant, that representation concerning the sale of lots at Jack’s Bay, Eleuthera, made by “Defendant’s representative” which was inaccurate, (ii) the accurate position is set out in the Affidavit of Sir Franklyn Wilson filed on 29 September 2022 at paragraphs [12] and [18]; (iii) the amendments are solely to correct the inaccuracies, and (iv) to bring the Defence and Counterclaim in conformance with the Defendant’s accurate evidence.

[9.] The Draft Defence and Counterclaim seek to amend the following paragraphs:

“17. Paragraph 27 of the Statement of Claim is denied. No sales information was provided by Sir Franklyn Wilson to the appraiser. Information regarding the sale of lots at Jack Bay was provided by Mr. Ray Jackson, ~~the Defendant’s Representative~~ **Executive Director of Sales at Jack’s Bay**, to the appraiser. Further, it is contended that the information provided, and representations made, to the appraiser were accurate.

28. Paragraph 40 of the Statement of Claim is denied. ~~The Defendant~~ **Mr. Ray Jackson** represented to Bahamas Realty Limited that certain lots were either under a reservation agreement or purchase and sales agreements. ~~The Defendant~~ **Mr. Ray Jackson** did not represent to Bahamas Realty sales of lots at Jack’s Bay were ‘completed. The Plaintiff will be put to strict proof thereof.

30. Paragraph 42 of the Statement of Claim is denied. The Plaintiff is put to strict proof thereof. The ‘sales information’ provided by ~~The Defendant~~ **Mr. Ray Jackson** to Bahamas Realty was accurate.

36. Paragraph 48 of the Statement of Claim is denied. The representations made by ~~The Defendant’s representative~~ **Mr. Ray Jackson** to the appraiser regarding sale of the lots in Jack’s Bay were accurate and truthful.

43. By an email message dated 2 November, 2017 ~~By letter dated 18 October 2018,~~ ~~the Defendant, by their attorneys,~~ the Defendant notified the Plaintiff of the Defendant’s intention to purchase the Plaintiff’s 15,000 ordinary shares in the Defendant by the conveyance of land to the Plaintiff and also made a request that the Plaintiff inform the Defendant of the land or lots selected by him.”

Claimant's Evidence

[10.] On 19 September 2024, the Claimant filed the Fourth Affidavit of Valdere J. Murphy (“Murphy Affidavit”) in response to the Affidavit of Samuel Brown and in opposition to the Defendant’s application. The Murphy Affidavit provides that the proposed amendments in the draft Defence and Counterclaim are unsupported by evidence and conflicts with prior admission made by the Defendant. The Affidavit references: (i) admissions in paragraphs 17, 28, 30, and 36 of the Defence regarding the Defendant and its representatives; (ii) a letter dated 31 May 2022 from the Defendant’s counsel acknowledging information provided by EPL or its agents; (iii) paragraph [16] of the Defendant’s Statement of Facts filed on 6 September 2022 admitting the provisions of a chart to the joint appraiser, and (iv) admissions in the Defendant’s Skeleton Argument filed on 20 February 2023 at paragraphs [30] – [32] and oral submissions on 24 February 2023 where it was stated that Jack’s Development and Beacon were agents of the Defendant.

[11.] The Murphy Affidavit further provides that for a period of three years, the Defendants consistently admitted that representations were made to the Appraiser on behalf of the Defendant’s.

Defendant/Applicant Submission

[12.] Counsel for the Defendant/Applicant relied on **Part 20.1 (2) of the CPR** and highlighted Part 2.1, which defines a “statement of case” as including “*a claim form, statement of claim, defence, counterclaim, additional claim form or defence and a reply.*”

[13.] Counsel for the Defendant/Applicant argues that the proposed amendments are necessary to clarify the Defendant’s pleadings, particularly regarding the relationship between the Defendant and Jack’s Bay Development Ltd, as well as to specify the role of Ray Jackson in the matter. Counsel contends that the amendments align the pleadings with the evidence presented in the Affidavit of Sir Franklyn Wilson, filed on 29 September 2022.

[14.] During his oral submissions, the Defendant/Applicant Counsel emphasized that the amendments are essential to ensure the Defendant’s case accurately reflects the evidence disclosed during discovery and provides clarity on the issues in dispute.

[15.] Counsel for the Defendant/Applicant directed the Court attention to **Scipion v Vallis [2020] EWHC 795 (Comm)**, where Henshaw J outlined the principles governing the Court’s discretion to grant permission to amend pleadings. At paragraph [61] and [62] he states:

“61. ...it has always been a question of striking a balance...The court should be less ready to allow a very late amendment that it used to be in former times and that a heavy onus lies on a party seeking to make a very late amendments to justify it as regard to his own position, that of the other parties to the litigation, and that of other litigants in other cases before the Court.

62. In Hague Plant Ltd v Hague [2014] EWCA Civil 1609, the Court of Appeal upheld a challenge to a refusal to permit re-amendments to particulars of claim on grounds, inter alia, that they were too late, notwithstanding that no trial date had yet been fixed.

“33. ...It all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done....When dealing with specific matters sought to be introduced he never said merely that it was ‘too late’ but rather that the manner of pleading it, or the lack of satisfactory explanation for it not having been pleaded earlier meant that it was being introduced at too late a stage”

[16.] Counsel for the Defendant/Applicant submits that the principles guiding the Court’s decision to grant permission for an amendment are outlined in paragraph 66 of **Scipion** case, where Henshaw J stated:

“66....In essence, the court must, taking account of the overriding objective, balance the injustice the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendments is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.”

Claimant’s Submission

[17.] The Claimant’s Counsel argues that the Defendant’s application should be dismissed, asserting that the proposed amendments would introduce a fundamentally different defence, from that pleaded in March 2021 and pursued until August 2024. Counsel contends that the application was made in bad faith and is an attempt to mislead to address evidential challenges. Additionally, Counsel asserts that the Defendant breached its contract with the Claimant by making inaccurate, fraudulent, and/or negligent representations to the Appraiser, claiming five lots, in Jack’s Bay had been sold within six months, which significantly influenced the findings in the Report. Counsel cited **Rondel v Worsley [1967] 3 All ER 993**, where Lord Pearce observed that while amendments are permitted, even late in proceedings, to ensure the substance of a case is fairly tried, they should not be allowed if they conflict with or contradict previous admissions of fact. Counsel further relies on **Part 20.1 of the CPR** regarding amendments, and cites **Ms Amlin Corporate Member Limited v Buckekye Bahamas Hub Limited 2020/COM/adm/0016 (4 December 2023)** for the factors the Court must consider in amendment applications.

[18.] Counsel submits that the Court should exercise caution and carefully evaluate its discretion when considering whether to allow amendments that introduce a new defence. Counsel cited the Jamaican case of **Moo Young and another v Chong and others [2000] 3 JJC 2301** which referred to the dicta of Lord Pearce in **Rondel** and stated:

“An amendment should not be made if it is in conflict with and contrary to a specific allegation of fact previously made...In the Ketteman case (supra), an application for an amendment to pleading to include a new defence, after evidence was heard, was refused, in the circumstances of the case. Lord Griffiths said, at page 62,

There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time. Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies.”

[19.] Counsel for the Claimant also relied on the decision of Justice Mangatal in **Index Communications v Capital Solutions and others [2012] JMSC Civ. No. 50**, where at paragraph 49, it was emphasized that the primary consideration for allowing amendments is whether they are made in good faith. The Court will not permit amendments that lack supporting evidence, are illegitimate, or raise fabricated allegations.

[20.] Counsel for the Claimant further directed the Court to **Maxine Watts and Omar Clarke and others [2024] JMSC Civ. 58**, where Master Jackson, at paragraph 42, addressed the issue of prejudice, stating that it would be unfair to the Claimant to grant an amendment with inconsistent aspects, as it creates difficulty in determining the Defendant’s position and what the Claimant must respond to. Such prejudice cannot be remedied by a costs order.

[21.] Counsel for the Claimant avers that allowing the Defendant/Applicant to amend its Defence and Counterclaim would enable the Defendant to deny liability and introduce a new defence that conflicts with specific admissions of facts previously made. This, Counsel argues, would be highly prejudicial to the Claimant and cannot be adequately remedied by the payment of costs and/or interest.

[22.] In conclusion, the Claimant Counsel further contends that the Defendant’s application is an attempt to mislead the Court. Granting the amendments, Counsel argues, would be highly prejudicial to the Claimant and, therefore should be dismissed with costs awarded to the Claimant.

LAW

[23.] An amendment application is governed by **Rule 20.1 of the CPR**, which states:

“20.1 Changes to statement of case.

- (1) A statement of case may be amended once, without the Court’s permission, at any time prior to the date fixed by the Court for the first case management conference.**
- (2) The Court may give permission to amend a statement of case at 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.**
- (4) **A statement of case may not be amended without permission under this rule if the change is one to which any of the following applies –**
- a. **Rule 19.4; or**
 - b. **Rule 20.2.**
- (5) **An amended statement of case must include a certificate of truth under rule 3.8.”**

[24.] In my earlier decision **Ms Amlin Corporate Member Limited v Buckeye Bahama [2023] BHS J. No. 193**, this Court highlighted the factors that must be considered in an amendment of case application. I made the following pronouncements at paragraph 58:

“58. Accordingly, in an amendment of statement of case application, the Court must bear in mind the following factors: (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.”

[24.] In the **Ms Amlin's** case, I made the following observation at paragraph 42 where I referred to the Eastern Caribbean Supreme Court decision of **Mark Brantley v Dwight C. Crozier [2015] ECSC J0827 – 1** where the Court stated:

“In exercising its discretion with regard to the appellant’s application to amend his defence, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be without causing injustice to the other party and can be compensated in costs.

Discussion and Analysis

[26.] It is not in dispute that the application to amend was made three years after the Defence and Counterclaim were filed. The Claimant argues that allowing the amendment would prejudice them by enabling the Defendant to advance an entirely new case. However, the Defendant/Applicant contends that the delay in seeking the amendment was partly attributed to nine months of settlement negotiations and that the discovery of the mistake in the Defendant pleading was reveal post-discovery and that there would be no prejudice to the Claimant, as the trial date was not fixed when the application was filed, and any inconvenience can be remedied by

costs. The Defendant further asserts that refusing the amendment would cause significant prejudice by forcing them to advance a defence inconsistent with their evidence.

[27.] The Court has carefully considered the submissions of both Counsel's. The application to amend was made three years after the Defence and Counterclaim were filed. I find that there would be no prejudice to the Claimant, as the trial date was vacated when the application was filed, and the date was fixed only a day before the hearing of this application. Any inconvenience can be remedied by costs.

Delay/Promptness

[28.] Based on the authorities, including **Scipion v Vallis** which emphasized balancing the injustice to the applicant against the prejudice to the opposing party and the importance of finality in litigation; **Moo Young v Chong** which addressed the timing of amendments and their consistency with the evidence; and **Index Communications v Capital Solutions** which highlight, at paragraph 49 “...a court will not countenance an application for an amendment not made in good faith, hence the need for evidence and legitimate amendment and for the allegation raised by the proposed amendment not to be an invention.” The Defendant/Applicant acknowledges the delay in seeking the amendment but partly attributes it to nine months of settlement negotiations period and that the discovery of the mistake in the Defendant pleading was reveal post-discovery. I note that this application was on 5 September 2024. While the three-year delay is substantial, the Court accepts the Defendant's explanation as reasonable as the settlement negotiation accords with the Court's overriding objective.

[29.] The wide discretion provided under the CPR allows amendments at any stage if they can be made without injustice to the opposing party. The principles in **Ms Amlin** emphasize balancing fairness by ensuring that amendments do not cause prejudice that cannot be remedied by costs. In this case, the proposed amendments are minor and seek to clarify the pleadings rather than introduce a new cause of action. I do find that the delay was inordinate but this was offset by the settlement negotiation coupled with the Defendant/Applicant justification and minor amendment.

Prejudice

[30.] The Claimant asserts that allowing the amendments would cause prejudice. However, the Court finds no significant prejudice, as the trial date is set for 24 April 2025, providing the Claimants ample time to file a Reply considering the nature of the proposed amendments. Conversely, refusing the amendments would prejudice the Defendant by preventing them from presenting a coherent defence consistent with their evidence. Any inconvenience to the Claimant as stated previously can be addressed through an award of costs for preparing a reply to the amended pleadings.

[31.] The proposed amendments aim to correct inaccuracies in the original Defence and Counterclaim and to align the pleadings with the evidence provided in the Affidavit of Sir Franklyn Wilson. They do not introduce a new cause of action but instead clarify the relationship between

the Defendant and Jack's Bay Development Ltd and the role of its representatives. The inconsistencies highlighted by the Claimant are substantive issues that can and should be addressed at trial.

Admission of justice

[32.] Having regard to the administration of justice which requires fairness to all parties. This Court is reminded of the overriding objectives under Rule 1.1 of the CPR. It provides:

"1.1 The Overriding Objective.

- (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.**
- (2) Dealing justly with a case includes,, so far as is practicable:**
 - (a) ensuring that the parties are on equal footing;**
 - (b) saving expense;**
 - (c) dealing with the case in ways which are proportionate to –**
 - (i) the amount of money involved;**
 - (ii) the importance of the issues; and**
 - (iii) the complexity of the issues; and;**
 - (iv) the financial position of each party;**
 - (d) ensuring that it is dealt with expeditiously and fairly;**
 - (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and**
 - (f) enforcing compliance with the rules, practice directions and orders**

(Emphasis added)

[33.] The substantive claim concerns a breach of contract. In applying the overriding objective of the CPR, the Court must ensure fairness while balancing the need for finality in litigation. The principles from authorities underscore that amendments should be permitted if they do not cause irreparable prejudice. In this case, the amendments would ensure consistency and accuracy in the Defendant's pleadings, supporting the fair resolution of the matter on its merits. The Claimant would be afforded the opportunity to file a Reply to which an order in favour of the Claimant, which would ensure that the parties are on equal footing.

Conclusion

[34.] Based on the submissions of both Counsel and the principles outlined in authorities provided by both Counsel, the Court grants the Defendant's Application for permission to Amend the Defence and Counterclaim. The amendments are minor, justified, and consistent with the evidence and will ensure that the matter proceeds fairly and efficiently.

[35.] My Order is as follows:

- (i) The Defendant is granted leave to amend its Defence and Counterclaim as outlined in the Draft Defence and Counterclaim in red and exhibited in the Affidavit of Samuel R. Brown.
- (ii) The Defendant is granted leave to file and serve the Amended Defence and Counterclaim within fourteen (14) days from the date of this judgment.
- (iii) The Claimant is granted leave to file and serve a Reply to the amended Defence and Counterclaim within fourteen (14) days from the date of service of the Defendant's Amended Defence.
- (iv) The Defendant shall pay the Claimant's cost for the Reply to the Amended Defence, to be assessed by the Registrar if not agreed.

Senior Justice Deborah Fraser

Dated this 17 day of January 2025