

**IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

Claim No. 2017/CLE/gen/FP/00116

B E T W E E N

ELNET MARITIME LTD

Claimant

AND

DESMOND ROLLE

Defendant

Before: The Honourable Madam Justice Constance Delancy

Appearances: Jacy Whittaker for the Claimant

Ryan Brown for the Defendant

Hearing date(s): On the papers

RULING

DELANCY, J

[1.] This is the Court's brief ruling on the issue of the defence of tender which was raised by the Defendant as part of an application for leave to amend 15 August, 2025.

Procedural Background

[2.] On 28 May 2017, the Claimant commenced an action via by Specially Endorsed Writ of Summons.

[3.] On 9 August 2017, the Defendant filed a Defence and Counterclaim seeking liquidated damages in the sum of \$28,006.49, general damages, interest and costs.

[4.] On 14 August 2017, the Claimant filed its Reply and Defence to the Counterclaim.

[5.] On 27 March 2018, a Notice of Referral to Case Management Conference was filed. On 27 June 2018, case management conference was conducted by *Gray-Evans, J.*

[6.] On 11 July, 2018, directions were given to prepare the action for trial and directed that the trial of this matter and trial date was fixed for within 90 days of 21 March 2019 (the pre-trial review); the trial dates were vacated.

[7.] On 10 February, 2022, further case management held and trial dates were set for 29 and 30 November, 2022.

[8.] On 29 November 2022, the Defendant's Counsel granted leave to withdraw as counsel on the record and case management hearing was adjourned to a date to be fixed. Costs awarded to the Claimant.

[9.] On 2 December, 2022, the Claimant filed a Summons for leave to strike out the Defendant's Counterclaim; and supported by an Affidavit of Sheila Taylor filed 14 February 2023.

[10.] On 19 January 2023, the Claimant filed a Summons for leave to serve the Defendant via substituted service.

[11.] On 5 March 2024, the Claimant filed a Notice of Application to have the Defence and Counterclaim struck out and judgment entered for the Claimant. On 14 May 2024 Deputy Registrar Saunders ordered that the Defendant retain Counsel and comply with the directions given under the case management order, failing which judgment to be entered for the Claimant.

[12.] On 28 May 2024, Defendant's present Counsel was appointed and filed a Notice of Application for Case management on 4 June 2024.

[13.] On 5 February 2025, Deputy Registrar Saunders referred to a Judge for Case Management. The Defendant filed a second Notice of Application for case management on 6 February 2025.

[14.] On 15 May 2025 the Claimant filed a Notice of Payment into Court under Part 36 CPR. Thereafter, on 4 July 2025, the Claimant, without leave, filed an Amended Reply and Defence to Counterclaim including a defence of tender.

[15.] On 15 August 2025, the Claimant filed a Notice of Application seeking leave to file (or regularize) the Amended Reply and Defence and the same was supported by an Affidavit of Latiyah Johnson filed on the 15 August, 2025. The Defendant opposed the application.

[16.] On 22 September 2025, parties appeared on a case management conference and directions were given for trial and trial dates set. The Claimant's extant interlocutory application for leave to file an Amended Reply and Defence to Counterclaim was brought to the Court's

attention. Parties were directed to submit skeleton arguments and the Court would decide the same on the papers.

Issue

[17.] The Court must determine whether to allow the Claimant to amend its Reply and Defence to Counterclaim to include the Defence of tender.

Law and Analysis

[18.] The Defendant submits that the Court must be guided by the provisions of Part 20.1 CPR which states that:

- (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 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**.
- (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.

[19.] A “*statement of case*” is defined under Part 2.1(a) as “*a claim form, statement of claim, defence, counterclaim, additional claim or defence and reply*”.

[20.] The rules provide for a defence of tender under Part 10.8 of the Supreme Court Civil Procedure Rules:

- (1) The defence of tender is not available unless the defendant (*or claimant defending a counterclaim*) pays into —
 - (a) an **interest bearing account with the agreement of the claimant (the defendant)** or the permission of the Court, an interest bearing account; or

(b) **Court, the amount alleged to have been tendered within the period for filing a defence** (*defence to counterclaim*).

(2) If the **claimant (defendant) does not give notice accepting the payment into Court within twenty eight days of service of the defence**, the defendant (*claimant*) may apply for payment out of the monies.

[21.] In the instant case it is the Claimant who seeks to rely on the defence of tender and seeks the Court permission to allow it to amend its Reply and Defence to Counterclaim to include the same.

[22.] The Court notes that the Reply and Defence to Counterclaim was filed herein in 14 August 2017 and did not include a defence of tender. Under the previous Rules of Supreme Court, 1978 (RSC) which governed these proceedings at the time of the filing of the Reply and Defence to Counterclaim the defence of tender was available under Order 18 rule 16:

Where in **any action a defence of tender before action is pleaded**, the defendant must pay into court in accordance with Order 22 the amount alleged to have been tendered, **and the tender shall not be available as a defence unless and until payment into court has been made.**

[23.] Though Order 18 r.16 RSC did not provide an explicit time limit for tendering of the amount within the period of the defence as is required by 10.8(1)(b) CPR. The defence of tender was available to the Claimant in 2017 when it filed its Reply and Defence to Counterclaim. However, it could not be relied upon “*unless and until payment into court was made*”. Further, it is implied that the defence could only be relied upon where an amount was tendered “*before action is pleaded*”.

[24.] Similarly, Part 10.8(1)(b) CPR provides that the tendering of the sum must be made within the period for the filing of the defence. Under the provisions of Part 10.8(1)(b) CPR in order for the Claimant to rely on the defence of tender the sum has to be paid into an interest bearing account by agreement with the Defendant or into Court “*within the time period for the filing of the defence*”, that is, within 28 days (*Part 10.3 CPR*)

[25.] Part 36.2 CPR permits payments into Court to support offers to settle:

(1) A defendant who **offers to settle the whole or part of a claim may pay money into Court in support of the offer.**

(2) A **defendant may not pay money into court unless** the —

(a) defendant certifies that such payment is in support of an offer to settle;

(b) **payment is made to support a defence of tender;** or

(c) payment is made under a court order.

(3) A payment into court may not be made until a claim is filed.

(4) A payment into court to support an offer may be made —

(a) when the offer is made; or

(b) at any time while the offer is outstanding.

- (5) A **defendant who pays money into court must** —
- (a) **serve notice of payment on the claimant; and**
 - (b) **file a copy of the notice with a statement of the date**, if any, by which the offer is open for acceptance under rule 35.9(1).

[26.] The Claimant contends that the sum sought in the Counterclaim has been tendered in full, which if accepted would dispose of the Counterclaim entirely. Further that Part 35.5(4) CPR allows for the Court to be informed of the payment in circumstances “*where a defence of tender before claim has been pleaded*”. The Court notes that in this case the defence of tender was not raised “*before claim has been pleaded*” as provided for in Part 35.5(4) CPR and therefore it is not covered by the exception of the non-disclosure of payments to the Court rule.

[27.] The Claimant argues that the rules under Part 20.4(2) CPR provides that the Court may grant leave for it to amend its Reply and Defence to Counterclaim. Further that the amendment is necessary for the just resolution of the dispute between the parties in accordance with the overriding objectives, saving the court’s time, costs and dealing with the matter expeditiously.

[28.] The Claimant relies on the observations of *Peter Gibson, LJ* in **Julie Ann Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074, to support its submission that applications to amend should be approached through the lens of the overriding objective to deal with cases justly.

It is, of course, important that trial dates, when they are fixed, should be adhered to, but I fear that he may have let that factor dictate his approach to the question of the amendment. 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.

[29.] The Claimant invites the Court the case of **Ayton v RSM Bentley Jennison** [2016] 1 WLR 1281 (CA). The Claimant contending that the case supports its view that the tender defence remains available under CPR provided the amount tendered covers the full sum due. The Claimant submits that the sum paid covers the Counterclaim entirely.

[30.] The Defendant submits that the sum paid into Court in furtherance of the Claimant reliance on a Defence of tender is not for the full amount claimed in the Counterclaim. The Defendant claimed for a liquidated sum, general damages, interest and costs in his Counterclaim. The Defendant relies on **Ayton** (supra) as per *Underhill, LJ* that for a defence of tender to be permitted, the tender must be equal to the amount claimed and no further assessment is needed by the Court to determine the amount of the claim:

...The **essence of a defence of tender must be that claim and demand can be seen to correspond, so that the resort to proceedings is demonstrably unnecessary**: that situation ceases to obtain if the court has to carry out an assessment of the damages in order to decide whether a sufficient tender has indeed been made.

[31.] The Defendant contends that the Court ought to consider that the sum paid falls short the sum claimed and the delay in the Claimant's application for leave to amend is over eight years. The sum paid does not factor in that the Defendant also claim general damages to be assessed and interest on the claim. Further that Defendant would be prejudiced by the late request for amendment and sum paid into Court would not settle the Defendant's Counterclaim entirely.

Preservation of trial dates and Administration of Justice

[32.] The Court adopts the observation made by *Fraser, Snr. J* (as she then was) in the case of **MS Amlin Corporate Member Limited v Buckeye Bahamas Hub Limited** 2020/COM/adm/00016 at para.73 thereof:

The administration of justice requires that fairness to all parties be done. I remind myself of the overriding objective as provided under Rule 1.1 of the CPR. That rule reads as follows:

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 an 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 case**;
 - (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 rules, practice directions and orders.

[33.] The Court notes that although the rules are to be "*liberally construed to give effect to the overriding objective*" it does not mean that the rules are be used to circumvent or misapply specific and existing rules in the CPR. In **Treasure Island Co. v Audubon Holdings Ltd.** [2004] Court of Appeal, ECS (British Virgin Islands), Civ App No.22 of 2003, *Saunders, JA* at para. 24 states that:

..... it must not be assumed that a litigant can intentionally flout the rules and then ask the Court's mercy by invoking the overriding objective.... **the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any**

discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself...

[34.] The Court notes that case management in this matter commenced in 2018 as evidenced by the Order of *Gray-Evans, J* filed herein. A review of the file reflects that the first attempt to identify and fix trial dates were abandoned as the Defendant was not compliant with the case management directions. The trial dates set by this Court are the 4th and 5th May, 2026 and parties have a reasonable window of time to comply with the additional directions given by the Court in this matter.

[35.] The procedure set out in Part 10.8 CPR which governs defence of tender is clear, specific and unambiguous. It provides that the Claimant must pay the sum being tendered into (a) an interest bearing account with the agreement of the Defendant or the permission of the Court, an interest bearing account or (b) into Court; and (c) the sum must be tendered within the period set by the rules for the filing of the Reply and Defence to Counterclaim. The Claimant has not satisfied the criteria that the sum tendered would cover entirely the liquidated sum claimed by the Defendant in alignment of **Ayton** (*supra*).

[36.] The Claimant tendered a sum which it claims is the amount claimed in the Counterclaim and the Defendant refutes that assertion. Further the sum was not tendered within the time period allocated by the rules. The Claimant's payment into Court to rely on defence of tender was paid some eight years after the period to file its Reply and Defence to Counterclaim and some three years' months after the coming into force of these rules.

Disposition

[37.] In all the circumstances the Court having reviewed the pleadings and the submissions of the parties hereby dismisses the Claimant's application to amend its Reply and Counterclaim. Further, the Court strikes the erroneously filed "Amended Reply and Defence to Counterclaim." Costs of the application to the Defendant to be assessed if not agreed.

Dated the 21 day of November, 2025

[Original signed and sealed]

Constance Delancy
Justice