REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2008-03628

BETWEEN

RAJESH CHITTA

CLAIMANT

AND

POINT LISAS INDUSTRIAL PORT DEVELOPMENT CORP. LTD.

DEFENDANT

DECISION

Before The Honourable Madam Justice Charmaine Pemberton

Appearances:

For the Claimant: Mr. Ronnie Bissessar instructed by Ms. Jessica Maicoo

For the Defendant: Mr. Gerald Raphael

[1] **FACTUAL BACKGROUND**

On September 19, 2008 Rajesh Chitta, ("Chitta"), filed an action against the Point Lisas Industrial Port Development Corporation ("PLIPDECO") for loss of goods claiming:

> *"(1) The sum of $148,212.16.*
>
> *(2) Damages for breach of contract including loss of profit and wasted expenses*
>
> *(3) Interest*
>
> *(4) Costs*

(5) Such further or other relief as the nature of the case may require"[1]

[2] PLIPDECO filed its Defence on December 12, 2008[2]. On November 30, 2009 it caused to be filed, a Notice of Application requesting that:

"1. Permission…to file and serve its list of documents, bundle of documents and witness statement outside of the time directed by the Honourable Madame Justice Pemberton on the 24th July, 2009 for the filing and service of the said documents.

2. The court do grant relief from any sanction imposed for failure to comply with the said order of the Honourable Madame Justice.

3. Permission to change the Defendant's defence filed herein on the 12th December, 2008 pursuant to Part 20.2 and 3."[3]

[3] I heard PLIPDECO's Application on December 15, 2009. I extended the time for the filing and exchanging of the list of documents and witness statements to February 26, 2010 and instructed that written submissions be filed and exchanged on paragraph 3 of the Application. In compliance, on December 17, 2009 PLIPDECO filed the documents *inter alia* the witness statement of Richard Brown. This witness statement contained paragraphs referring to PLIPDECO's Proposed Amended Defence. I now turn to examine the issue at hand.

[4] **AMENDMENT OF DEFENCE**

DECISION

I have decided against permitting PLIPDECO to amend its Defence for the following reasons.

[1] Statement of Case. Sept 19, 2008. Pgs. 1-4.
[2] See Appendix 1
[3] Notice of Application. Nov 30, 2009.

[5] **REASONS**

From a perusal of the files, I have observed the following:

1. The July 17, 2008 Pre-action Protocol Letter, which contained the substance of the eventual action.
2. The July 28, 2008 response from PLIPDECO asking for an extension of time for it's Attorneys to respond.
3. A further letter of enquiry from the Chitta's Attorney dated August 14, 2008.
4. No follow up.

Therefore, since July 17, 2008 PLIPDECO had been aware of Chitta's claim, and ought to have started the process to answer the claim as stated, that is: whether PLIPDECO was responsible for compensating Chitta for the missing goods. There was nothing forthcoming from PLIPDECO to Chitta.

5. The claim was filed on September 19, 2008.
6. The Appearance was entered on October 23, 2008.

This provided evidence of PLIPDECO's intention to defend the entire claim.

7. An *inter-partes* application for an extension of time for the filing of the defence was sought and granted.
8. The Defence was eventually filed on December 12, 2008.

This was a "bare bones" defence with the linch pins of: the statement of case not disclosing any reasonable cause of action, and the limitation issue, the claim was filed out of the period limited by statute. There was no factual basis expounded in the defence regarding the reasonable cause of action issue[4].

[6] The first Case Management Conference (CMC) on December 12, 2009 was adjourned since at that meeting Counsel for PLIPDECO informed that the parties were in the process of "talking" with a view to settlement of the matter.

[7] At the adjourned CMC date, July 24, 2009 I *inter alia* identified a preliminary issue of whether provisions in the Bill of Lading MIA/POS07-2804 were sufficient to debar this

[4] See f.n.2

claim as was pleaded in paragraph 2 of the Defence. I gave directions for written submissions regarding that issue and ordered that a further CMC ("FCMC") take place on December 15, 2009.

[8] At the FCMC, I allowed an extension of the time for PLIPDECO to file its list of documents and witness statements. However, whether it could have amended its Defence remained up for review. I gave directions for written submissions on that issue.

[9] On December 7, 2010 the previous Order was varied to allow for PLIPDECO to file and serve its written submissions since the time for doing so had elapsed. That is the subject of this decision.

Should PLIPDECO be permitted to amend its defence by inserting two new paragraphs speaking to Chitta's making a false declaration and deeming the entire transaction illegal and void.

[10] **THE CPR**

Part 10.5 mandates a defendant to set out his case in his defence. The relevant parts of the paragraph read:

> *(1) The defendant must include in his defence a statement of all the facts on which he relies to dispute the claim against him.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) Where the defendant denies any of the allegations in the claim form or statement of case –*
>
> *a. he must state his reasons for doing so; and*
>
> *b. if he intends to prove a different version of events from that given by the claimant, he must state his own version.*
>
> *(5) If, in relation to any allegation in the claim form or statement of case, the defendant does not –*
>
> *a. admit or deny it; or*

b. put forward a different version of events,

he must state each of his reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which he considers necessary to his defence.

[11] In Part 10.6 the provisions relate to the consequences of not setting out a defence. The paragraph reads as follows:

(1) The defendant may not rely on any allegation which he did not mention in his defence, but which he should have mentioned there, unless the court gives him permission to do so.

(2) The court may give the defendant such permission at a case management conference.

(3) The court may not give the defendant such permission after a case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known after the date of the case management conference.

[12] This has to be read in conjunction with Part 20.1(3) which provides that the Court may grant permission to a party to change a statement of case *"after the first CMC",* if he can satisfy the Court that the change is *"necessary because of some change in circumstances which became known after* ***that*** *case management conference"*[5]

[13] **THE PROPOSED AMENDMENT**

The terms of the proposed amendment read as follows:

"7. The Defendant says that contrary to S.212 of the Customs Act Chapter 78:01the Claimant made and subscribed a false declaration namely a Non-Trade-Package Duty Entry No. A244342 dated 3rd August, 2007 in which he falsely declared the value of the good to be $2,108.26. The said document was required to be verified by the Claimant's signature in that the goods were Trade Goods and the value was in excess of $143,000.00

[5] CPR 1998. Part 20.1(3)

8. In the Premises the entire transaction was illegal and void as containing provisions designed to deceive the Ministry of Finance and the Revenue."[6]

[14] Does the proposed amendment further PLIPDECO's duty as per Part 10.5 (1), (4), (5) and (6) and can it find favour under Part 10.6?

PART 10.5 (1), (4), (5) AND (6).

The quoted part speaks to the full nature and extent of the amendment requested. What the amendment seeks to do is to introduce a new factual situation, speaking to the alleged illegality on the part of Chitta which by inference debars the action. In my view this proposed amendment **does not answer** Chitta's claim that the goods had arrived at the Port facility and **were not delivered** to him on the presentation of his documents and the further allegation that they were **lost** whilst in the Port's custody and control.

[15] To my mind, were I to allow the amendment it would introduce an entirely new case which **may** have been better dealt with by another action, the parties to which would be, respectfully, the Customs and Excise Division, the Minister of Finance and/or the Attorney General, who would be directly affected by the pleaded illegality[7]. I do not think that PLIPDECO can stand in their shoes for the purpose of vindicating the Revenue authorities.

[16] If the alleged illegality changes character and becomes a proven fact then I **may** be able to determine the impact on Chitta's claim. In any event, the allegation and if proven, "illegality" does not answer Chitta's claim and the question troubling this court: **were the goods lost or are they in PLIPDECO's possession?** I say again this pleading really does not add to PLIPDECO's defence. The most that I can do at this stage is to refer the matters raised to the relevant authorities for their attention.

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[6] Proposed Amended Defence. Filed Nov. 30, 2009. Para 7-8.

[7] See **MORTGAGE CORPN v ALEXANDER JOHNSON (A FIRM) (1999) Times, 22 September**, quoted in "***The Caribbean Civil Court Practice***" Note 19.11; p. 205

[17] **PARTS 10.6 AND 20.1(3) CPR**

Since I have decided that the amended paragraphs do not in any way take PLIPDECO's Defence further, as a matter of substance, I can end here. However, in examining the issue in light of the Parts 10.6 and 20.1(3) of the CPR two questions emerge:

1. **What then is the significant change in circumstances that PLIPDECO relies on to make it necessary to permit the change?**
2. **Even if PLIPDECO succeeds on the first limb, did these changes come about after "that CMC"?**

[18] **SIGNIFICANT CHANGE IN CIRCUMSTANCES**

I note that Part 10.6 refers to a significant change in circumstances, whereas Part 20.1(3) merely refers to a change in circumstances. On a literal reading, it would seem that the defendant therefore has a higher threshold to meet to be granted permission by the court to change his defence. This is readily appreciated given the telos of the CPR and the fact that the defendant would have been in receipt of pre-action correspondence which should have alerted him that litigation was pending. In any event the approach of the court is the same under both parts, litigants wishing to avail themselves of these provisions must satisfy them in both in spirit and intendment.

[19] I must, like Mr. Bissessar, re-call to mind what I stated before. In this case, PLIPDECO was aware of the Chitta's potential claim since the receipt of the Pre-action Protocol Letter, at least by the date of its response, July 28, 2008. Proper preparation would have demanded that **all relevant** documents and papers would have been unearthed, examined and transmitted to Attorneys. To blithely say that it was on the 16th October 2009 that a Legal Officer alerted the department of the misreading of a material figure on the Bill of Lading and then caused a search to unearth the state of affairs,[8] I am afraid, does not

[8] See Affidavit of Merle Jennifer Dennis. Filed Nov. 30, 2009. Para. 13.
This states: *"It was on the 16th October, 2009 that…Legal Officer attached to the Legal Department, drew to my attention that it appeared that the handwritten NTDE endorsement appeared to be read A244342 and not A246342. I then sent an email to Mr. Chandler, Deputy Comptroller, Customs and Excise Division asking him to locate the true document namely Non-Trade Duty-Entry A244342. In the circumstances, this document was received by the Legal Department for the first time on the 20th October, 2009. .."*

constitute or satisfy the requirements either of a "*significant change in circumstances which became known after the date of the case management conference*".

[20] Even though the Rules do not express it, once it is elicited that there is a likelihood of reliance on either Part 10.6 or Part 20.1(3) those applications must, or at the very least ought to be made with promptitude. If the document was received on October 20, 2009, why wait for an entire month[9] to elapse before filing the application for the amendment, which incidentally was bound up with the application to extend time for compliance with a Court Order and file documents? I can only take to heart Jamadar J.A. in **TRINCAN V. SCHNAKE**[10] where the learned Justice of Appeals comments on the necessity for change in the litigation culture are carefully noted.

[21] **THE CASE MANAGEMENT CONFERENCE ("CMC").**

At what stage is the court likely to give permission to change the defence? Part 10.6(2) states that a Court may give such permission at "a case management conference". That power is circumscribed in sub paragraph (3) by the requirement that the defendant must satisfy the court, that there was a significant change in circumstances requiring the change to be made. Part 20.1(3) provides that: *"The Court may not give permission…after **the** first case management conference"* and towards the end, the words *"which became known after **that** case management conference".* [11]

[22] There is a lot of confusion which abounds as to what is the practical effect of those words in both of these Parts. I shall consider Part 20.1(3) first and use this case to illustrate. A grammatical reading of the Part would suggest that the latter **"that"** be circumscribed by the former **"the"**. In other words, there is **one** event, the first CMC. What was the date of the first CMC in this case?

[23] I shall again set out the chronology of events in this case as I see it is:

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[9] See Notice of Application. Filed Nov.30, 2009.

[10] **IN THE MATTER OF TRINCAN OIL LIMITED V. KEITH SCHNAKE. CIV. APP. NO. 91 0F 2009. JAMADAR J. PARA. 22.**

[11] See Part 20.1(3) Idib.

1.	Pre-action Protocol Letters sent	17/07/08
2.	Response Letter sent	28/07/08
3.	Further Letter sent	14/08/08
4.	Claim Form filed	19/09/08
5.	Appearance entered	23/10/08
6.	Defence filed	12/12/08
7.	**CMC** Parties talking - matter adjourned To give parties time to talk and settle.	12/02/09
8.	**CMC** Matter scheduled and heard on 24/7/09	29/05/09
9.	**CMC** Matter discussed with parties and directions given for filing of list of documents, inspection and witness statements. Preliminary issues to be tried at further CMC on 15/12/09.	24/07/09
10.	**FCMC** Application to amend Defence of 12/12/08 to the Proposed Amended Defence of 30/11/09.	15/12/09

To my mind, the first event started on December 2, 2009. A further 5 months elapsed until the adjourned CMC on July 24, 2009 where I discussed the pleadings as filed and gave directions for further steps to be taken – the **process**. That to my mind was when the first CMC was concluded.

[24] In the CPR, "case management" refers to an event and to a process. The two are merged at some point, in the first hearing in the process known as the case management conference. Part 20.1(3) refers to, that event. It does not refer to the **process** which may continue well beyond that first event. That event must end and other events, that is, the management process will continue. In addition, after an extensive discussion of the pleadings at the first CMC, it would not be fair to allow any party to adjust its case in any material way. To interpret otherwise would not be in keeping with the intention of the framers of the CPR. In any event it is well understood that the court will not allow amendments except in accordance with the Rules.[12]

[25] This issue can admit of two views. One is that Part 10.6 must be read subject to Part 20.1(3). The other view is that Part 10.6 can stand alone. I prefer the latter view to the extent that a court may even at a further case management conference refuse to grant permission to the defendant to change the defence if the defendant does not satisfy the limb that there has been a "significant change" in circumstances which became known after the case management conference.

[26] In the premises, PLIPDECO has not satisfied the requirements of **Part 10.6** or **Part 20.1(3)** of the **CPR** so as to allow me to grant permission to change its defence. The application as to paragraph 3 is therefore dismissed with the consequential Order that PLIPDECO pay Mr Chitta's costs of this application.

IT IS HEREBY ORDERED AS FOLLOWS:

1. That on the Notice of Application filed on November 30, 2009 permission is refused to the Defendant to amend his Defence.

2. The Defence filed on December 12, 2008 do stand.

[12] **RAMDATH v. TELECOMMUNICATIONS SERVICES OF TRINIDAD & TOBAGO ET AL** per Rajnauth-Lee J. "The Civil Proceedings Rules, 1998, as amended, contemplate that attorneys will take full and comprehensive instructions prior to pleadings since the Rules do not allow for amendments after the first case management conference except in the circumstances lay out by **CPR Part 20.1**(3).".

3. Those parts of the witness statement of Richard Brown making reference to the Amended Defence be struck out, that is paragraphs 2, 5 and 6.

4. That the Defendant do pay the Claimant's costs of this application, to be assessed if not agreed.

5. That the parties return to Court for PTR on March 2, 2011 at 11:15am in SF 02.

I strongly advise both parties that they should meet to effect a resolution of this matter.

Dated this 13th day of January 2011.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE