

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2017-02566**

BETWEEN

PATRICIA HERRY

Claimant

AND

PORT AUTHORITY OF TRINIDAD & TOBAGO

Defendant

Appearances:

Mr. Gerald Ramdeen, instructed by Ms. Harripaul Attorney-at-law for the Claimant

Mr. Giles and Mr. Joel Roper Attorneys-at-law for the Defendant

BEFORE THE HONOURABLE MADAME JUSTICE DEAN-ARMORER

REASONS

Introduction

1. On September 27, 2018, I granted permission to the Defendant to amend its Defence, which had been filed on October 23, 2018. I also dismissed the Claimant's application to strike the Defence, as disclosing no ground for defending the Claim¹.

2. My reasons for so doing are set out below.

Facts

1. The Claimant, Patricia Herry, had been appointed as Commissioner to the Port Authority of Trinidad and Tobago² on January 19, 2011.

¹ Notice of Application filed on January 04, 2018

² PATT

2. On February 24, 2011, she was appointed a Director of three companies, under whose purview the core operations of the PATT were placed. These companies were: the Port-of-Spain Infrastructure Company (POSINCO), the Port of Port-of-Spain and the Trinidad and Tobago Inter-Island Transportation Company Limited.
3. On July 13, 2017, the Claimant instituted these proceedings claiming Two Hundred and Sixty Two Thousand, Seven Hundred Dollars (\$262,700.00), as remuneration due and owing to her in her capacity as Director of the three companies between January 28, 2011 and November 20, 2015.
4. The Defendant, PATT filed its defence on October 23, 2018, having earlier obtained the consent of the Claimant to file the Defence by October 02, 2018.
5. On November 21, 2017, the Court held the first Case Management Conference (CMC). The Claimant contended that the defence should be struck out for failing to disclose a Defence. The Court, as required by **CPR**, encouraged the parties to consider an amicable settlement and adjourned the first CMC to February 01, 2018.
6. Before the return of the date of first CMC date, the parties filed a number of applications. By her Notice of Application dated January 04, 2018, the Claimant applied to have the Defence struck out and to have judgment entered against the Defendant.
7. The Defendant filed an amended Defence on January 31, 2018 and subsequently on February 01, 2019, applied for the Court's permission to amend. The Notice of Application was supported by the affidavit of Krystal-Lee Kadoo, secretary to Mr. Roper, attorney-at-law for the Defendant. There was no opposing affidavit.
8. Ms. Kadoo attempted to advance the Defendant's reason for seeking an amendment to the Defence. She stated that essential witnesses were out of the jurisdiction, when the original Defence was filed. Among the essential witnesses was Pamela Ford, the former Acting Port

Secretary and Senior Legal Officer of the Defendant. Ms. Forde had been unable to provide instructions since she was undergoing treatment for breast cancer. Ms. Kadoo referred also to Erva Bruno, former Port Secretary.

9. Ms. Kadoo indicated that the amendment, in respect of which permission was being sought, included further documentation and further explanations which were essential to the Defendant's case. She expressed the view that the amendment would not make a material change.
10. When the adjourned first CMC came up for hearing on February 01, 2018, Mr. Ramdeen, learned attorney-at-law for the Claimant vigorously opposed the amendment of the Defence. Accordingly, I gave directions for the filing of Written Submissions as to whether the Court ought to allow the Defendant to amend its Defence.

Submissions

11. The Defendant filed written submissions on March 02, 2018, in support of the application to amend its Defence. The Claimant filed written submissions on May 24, 2018. On September 27, 2018, prior to giving my decision, I heard further oral submissions from Ms. Harripaul, learned instructing attorney-at-law for the Claimant.

Discussion

12. There were two (2) Notices of Application which engaged my attention and upon which I ruled on September 27, 2018:
 - The Notice of Application filed by the Claimant on January 04, 2018 seeking an order striking out the Defence.
 - The Notice of Application filed by the Defendant on January 31, 2018, seeking the Court's permission to amend its Defence.

13. Two issues arose from the above applications:

- (i) Whether the Court should grant permission to the Defendant to amend the Defence
- (ii) Whether the Court should strike out the Defence.

14. The **CPR** identifies three stages at which a party may amend a Statement of Case, which definition includes a statement of Defence. The three stages are determined by reference to the CMC. At the first stage, before the event of the CMC, a party may amend at any time without the Court's permission³. At the first Case Management Conference, a party may seek the Court's permission and the Court may grant permission. Where however, a party wishes to amend after the first Case Management Conference has passed, the Court is enjoined against granting permission unless the party who seeks an amendment also complies with Part 20.1(3) and Part 20.1 (3A). Part 20.1.(3) provides:

"The Court shall not give permission to change a Statement of Case after the first Case Management Conference, unless it is satisfied that

(a) There is good explanation for the change not having been made prior to that case management conference; and

(b) The application to make the change was made promptly"

15. Part 20.1(3A) sets out the criteria which the Court is required to consider when deciding to grant leave, after the first Case Management Conference. It provides as follows:

"20 (3A) In considering whether to give permission, the court shall have regard to—

(a) the interests of the administration of justice;

(b) whether the change has become necessary because of a failure of the party or his attorney;

³ CPR Part 20.1(1) A statement of case may be changed at any time prior to a case management conference without the court's permission.

(c) whether the change is factually inconsistent with what is already certified to be the truth;
(d) whether the change is necessary because of some circumstance which became known after the date of the first case management conference;
(e) whether the trial date or any likely trial date can still be met if permission is given; and
(f) whether any prejudice may be caused to the parties if permission is given or refused.”

16. In deciding whether to grant permission, it is first necessary to determine the stage of litigation at which the application to amend is being made. In these proceedings, the first Case Management Conference was heard on November 23, 2017. After discussing with the parties, the possibility of settlement, I adjourned the first Case Management Conference pending settlement.
17. The correctness of adjourning the first Case Management Conference was endorsed in ***Chantal Riguard v. Anthony Lambert CV 2015-1091***, a judgment of Justice Devindra Rampersad and upheld by the Court of Appeal.
18. In ***Riguard***, Justice Rampersad was seized of a Claim for a breach a contract. At the first hearing Rampersad J adjourned the first CMC to facilitate the attendance of the Defendant and to allow the parties to consider their pleadings⁴.
19. At paragraph 16 of his judgment, Justice Rampersad had this to say:

“This court was of the respectful view that there can be no contention, and there was none, that the first CMC had not yet come to an end. The issue for determination, therefore, was whether or not permission was required for the amendment at the stage of the proceedings which had been reached.”

⁴ See Riguard at paragraph 4

20. I respectfully borrowed the words of Rampersad J and held that in the proceedings before me, the first CMC had not come to an end and was continuing on February 01, 2018.
21. Having so held, it became necessary to identify the criteria which the Defendant would be required to satisfy in order to obtain permission to amend and eventually whether such permission should be granted.
22. Where an amendment is sought during the first CMC, the applicant is required to obtain the Court's permission. At this stage however, the applicant for permission is not required to comply with the factors outlined in Part 20.1(3) and (3A)⁵. In the words of Rampersad, J:
- "...the court has a fairly liberal rein to deal with any application for permission, [and is] constrained only by the exercise of its judicial discretion and the furtherance of the overriding objective..."*⁶

It was my view that the threshold which the Defendant was required to surmount was very low.

23. In exercising my discretion as to whether the amendment should be allowed, I considered at the outset whether any prejudice would accrue to the Claimant or to the administration of justice. The Claim was still at a very preliminary stage. If permission were granted to the Defendant to amend the Defence, the trial date would not be affected, since none had yet been fixed. There was no prejudice to the Claimant, who would be entitled to seek the Court's permission to file a reply.
24. I considered whether the Defendant had advanced a good reason for seeking the amendment. Two reasons had been advanced by the Defendant through the affidavit of Ms. Kadoo: firstly that the amendment was necessary for the purpose of fully setting out

⁵ CPR

⁶ Rigud at paragraph 17.2

the Defence and secondly, that the information, which would have been introduced by the amendment, was not available at the time of the preparation of the Defence, because of the illness of one witness and the unavailability of another. It was therefore my view that the Defendant had advanced good reasons for seeking to amend the Defence.

25. I considered as well the conduct of the parties and their attorneys-at-law. It did not escape my attention that Ms. Kadoo in her supporting affidavit testified that no orders had been made at the first hearing, giving the impression that nothing had been done at the first CMC. This was not strictly correct, since the Court explored the issues and eventually adjourned the first CMC to enable parties to talk settlement.

26. It was my view however, that this was a mild infraction and it would have been disproportionate to refuse the amendment for that reason alone. Accordingly, I held that permission should be granted to the Defendant to file an amended Defence.

27. I proceeded to consider whether the Defence, as amended disclosed no ground for amending the Claim. In so doing, I was guided by the principle that a Defence ought not to be struck out for failing to disclose a reasonable defence except in the clearest of cases. This is a principle that pre-dates the **CPR** and could be found at Order 18/19/6 Supreme Court Practice Vol 1⁷ in these words:

“Exercise of Powers under this Rule:

It is only in plain and obvious cases that recourse should be had to the summary process under this rule”.

⁷ 1999 Supreme Court Practice Vol. 1 para 18/19/6

The rationale for this principle is that striking a pleading amounts to a summary determination of a Claim. The Court ought not finally to determine the rights of parties before hearing them fully except in the clearest of cases.

28. In these proceedings, the Claimant seeks to recover remuneration for work done. The Defendant avers that the Claimant is not entitled to the remuneration as claimed. The Defendant contended that the payment of fees and allowances were subject to the proper appointment of directors and that this required consideration of the State Enterprise Performance Monitoring Manual (paragraph 5 of the Amended Defence). A resolution of this issue would require consideration and interpretation of the Manual.
29. At paragraph 11, the Defendant contended that there had been an emergency appointment of Directors and that there had been no approval from the line Minister for such appointments.
30. At paragraph 12 of the Amended Defence, the Defendant contended that the Defendant's Board had been wound up and that the Claimant had ceased to perform her duties as Director as of January 18, 2013.
31. It was my view that the Defendant has denied the entitlement of the Claimant on the basis of a lack of authority for her appointment. It was my view that both the Claim and the Defence require further investigation and further submissions and that it would be premature to hold that there was no ground for defending the Claim. Accordingly, I dismissed the Claimant's application to strike the Defence.

Dated this 4th day of January, 2019.

M. Dean-Armorer

Judge

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