THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012 – 03949

BETWEEN

THE NATIONAL INSURANCE BOARD OF TRINIDAD AND TOBAGO

CLAIMANT

AND

THE TRINIDAD AND TOBAGO NATIONAL PETROLEUM COMPANY LTD

DEFENDANT

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr D. Mendes SC leading Mr V. Deonarine instructed by Ms S. Narine for the Claimant

Mr S. Roberts instructed by Mr G. Armorer for the Defendant

Date: 20 April 2016

RULING

1. On 27 September 2012 the claimant began this claim against the defendant. The defendant filed its defence on 22 February 2013. An amended statement of case was filed on 2 May 2013. Among other days, the matter came up for hearing before Gobin J. on 17 October 2013 when directions were given for the parties to formulate preliminary legal issues to be determined. A notice setting out the issues was filed on 25 October 2013. On 31 October 2013 directions were given for written submissions on these issues to be filed. Extensions were granted. The court heard the submissions. On 27 June 2014, the court ruled on the issues. Permission was given to file an amended defence on or before 9 August 2014.

2. The defendant's application of 3 July 2015 is for an extension of time to file an amended defence or alternatively for permission to file an amended defence. The first application is premised on the need for an extension of time. The second application is on the basis that the extension would be granted. The proposed amended defence has been annexed to the application.

3. Both of these issues are intertwined. If I grant the extension of time to file an amended defence then necessarily I would be giving permission to file an amended defence. If I refuse the application to extend time, then it follows that the defendant will not have permission to file an amended defence.

4. The first issue impacting on the determination of this application is if the first case management conference has been concluded, and if so, when was it concluded.

5. The first case management conference marks the beginning of the process of the judge becoming involved in managing the case. The judge's powers of case management are wide: See **Parts 25 to 27 of CPR**. The judge is not required to give every direction for the determination of the case. He or she does not exercise all of the case management powers at the first case management conference. There is a distinction between the concept of the first case management conference and the powers that are exercisable under case management. There may be several case management conferences as appropriate. What is essential to constitute a case management conference is that some step or approach or direction of significance must have taken place.

6. Implicit in there being a first case management hearing is the likelihood of a second case management conference and perhaps a third or more. Also implicit is that the first case management conference must end. That point must be definitive so it is clear that this has occurred. In some cases the end will be obvious. In others, less so. If, for example, the court gives directions for lists of documents to be exchanged and for the inspection process to proceed, it would follow that the first case management conference has ended. The court would have taken definitive steps to advance the claim beyond the pleading stage.

7. From the brief history above, it is clear that the court commenced the first case management conference. The court considered that the determination of the claim should be based on hearing the preliminary issues raised. Directions were accordingly given to facilitate the court's determination of the preliminary issue by directions for the formulation of the issues and submissions. The very fact that the 27 June 2014 order of Gobin J. stated that "permission is granted" to the defendant to file an amended defence is indicative that the first case management conference was begun since no permission was necessary if it had not been.

8. The issue is whether it was concluded. Each case has to be considered in its context. The court embarked on giving directions for the preliminary issues, hearing of the preliminary issues and the court gave its decision. The court then gave consequential directions. One of these was for the filing of "an amended Defence if necessary".

9. It seems to me that the court must have concluded the first case management conference at that stage, at the latest. Indeed, an examination of the notes of the proceedings indicates that the court on 17 October 2013 asked the parties to formulate the preliminary issues for determination and return on 31 October 2013. To my mind this is when the first case management actually concluded since the court had made a determination of how it would go forward with the case which was to consider and determine the preliminary issues being agreed. From that time, therefore, permission was necessary to file any amended defence.

10. I will therefore go on to consider the defendant's application for an extension of time to file its amended defence in accordance with the principles set out in **Roland James v The Attorney General of Trinidad and Tobago, Civil Appeal No. 44 of 2014** and **Dr Keith Rowley v Anand Ramlogan, Civil Appeal No. P215 of 2014**.

11. Gobin J. had given until 9 August 2014 to file the amended defence. However, a procedural appeal was filed on 7 July 2014. The appeal was determined on 1 December 2014. The application to extend time was filed on 3 July 2015.

12. I note that the matter of an amendment was raised before me on 27 January 2015. The approach adopted was to have the draft sent for consideration by the claimant's attorneys. This was not done by the defendant until April 2015 however, just before the case management conference. The claimant indicated it was objecting by letter of 20 May

2015. Then the application for the extension of time was filed over 6 weeks after. Given all the time that had passed from the time given by Gobin J. the defendant cannot be said to have acted promptly, even considering only the period after the determination of the appeal on 1 December 2014.

13. One explanation given for filing the application was the fact that the court had suggested settlement discussions. While settlement discussions are always appropriate and to be encouraged, they do not excuse a party from doing what is needed to preserve its position in the interim by either specifically asking that further directions be suspended, which the court would be likely to permit once there is a consensual position and where genuine efforts are being made to settle the claim, or by filing the necessary application for the extension.

14. In determining this aspect of the application, I do not take account of the time period of pursuing the appeal since the appeal was filed before the date for the filing of the amended defence. A litigant is entitled to pursue a procedural appeal. The court would not lightly make adverse findings against a litigant who embarks on such a course. I consider the time for the extension should properly run from the disposition of the appeal on 1 December 2014. I note that the defendant indicated at the 27 January 2015 case management conference that it would submit its proposed amendment to the claimant for consideration. While no time limit was placed on doing this, the defendant took a considerable amount of time to do so. No explanation has been given for the time it took.

15. It seems, at least after January 2015, that the defendant tended to become spurred into action as the next hearing of the claim drew closer.

16. There has not been advanced any other reasons for having to file this application at the time they did. I do not think the reasons given are a good explanation in the context of this matter given the overall course of the progress of the matter.

17. The defendant chose to file the procedural appeal and chose not to file the amended defence. Having filed the appeal, the defendant cannot be said to have failed to intentionally comply with the direction for filing the amended defence. While there was no stay, they pursued an appeal, which was a legitimate avenue open to them. It is understandable in that context, given the nature of the appeal, that they would not have filed their amended defence then. But different considerations apply after the disposition of the appeal.

18. It cannot be said that the defendant complied with all of the directions and court orders in this matter. Extensions were sought for filing the defence. The defendant filed submissions late.

19. The interests of the administration of justice lean in favour of moving forward with this claim. There has been delay on account of the attempts to settle the claim, the hearing of the preliminary issues, the pursuance of a procedural appeal, the further settlement discussions and the time during which the amendment application has been considered.

20. Further, many of the facts set out in the proposed amended defence seem unnecessary to determine the main matters in dispute. In some instances the proposed facts are matters which can be dealt with as evidence under the already pleaded facts. The central issues relate to whether the defendant owes contributions; for whom; and over what period, taking account of any limitation period under section 3 of the **Limitation of Certain Actions Act**.

21. There is also a strong public interest element in relation to contributions to the National Insurance Scheme being paid as soon as possible if they are in fact determined to be due. This also affects the entitlements of various persons for whom contributions may or may not have been due. As those persons draw closer to the age at which benefits are payable, it is in their interest that this matter is determined in the shortest possible time. Much time has already passed.

22. The failure to file the amended defence seems to be attributable to the attorneys. The matters now pleaded in the proposed amended defence appear to be facts which the attorneys would have known of at the time of the filing of the defence. I note also that the defendant's attorneys have not said they were awaiting instructions nor have they said they had any difficulty to obtain necessary instructions in relation to the amended defence. In this regard the Hobson's letter dated 31 March 2010 attached as DDR 3 to the affidavit of Ms Ramnanan-Maharaj is instructive.

23. As things stand, the failure to comply can be remedied immediately since a draft amended defence has been attached to the application.

24. No trial date has been set, but the fact that the amended defence was not filed has necessarily pushed back any trial date which could have been fixed.

25. I now consider the overriding objective. The parties here can be seen to be on an equal footing. They are both State entities with resources available to them to further this litigation. These applications have not saved expense.

26. This is an important case for both sides. It also concerns the rights and liabilities of third parties. The amount of money involved can be considered to be significant. The issues for determination are also novel and significant. Ensuring this matter is dealt with expeditiously requires the court to advance the case management process. Allowing the additional pleas of laches, acquiescence and delay will add to the length and complexity of the proceedings and to the resources required to dispose of these additional issues. Whether contributions are owed, how much, for whom, and over what period, are more important to be decided in an expeditious way than seeking to adjudicate on the new pleas raised by the defendant in its proposed amended defence.

27. The prejudice to the defendant would be that certain facts would not have been pleaded. In some instances, the matters pleaded amount to evidence. Thus they can be advanced as evidence once they can be shown to be grounded in a factual assertion contained in the defence.

28. Further, the prejudice would include that the pleas of laches, acquiescence and delay would not be matters which they will be permitted to raise. It is undoubtedly the right of litigants to be able to advance whatever legitimate legal defences are available to them before the court. However, this must be done in accordance with the rules laid down for doing so. While I consider this right to be a weighty factor in this case, I have to counter balance that right against the right of the claimant to have a determination of the issues it has advanced in an expeditious and efficient manner. This claim has been in the sight of the defendant for some years now. The defences of laches, delay, and acquiescence are not matters that depended on anything the claimant advanced after the filing of the claim. They were available to the defendant to plead them from the very start. The defendant has itself been guilty of delay in advancing their plea of delay.

29. To the claimant, the prejudice would likely be to have to deal with several new facts and pleas not previously raised a considerable time after this claim was filed and even much longer since the applicable issues were raised. They would have to deal with an expanded claim at this stage. More resources would have to be applied to meet the case of the defendant. The trial would more likely than not be more complicated, longer and expansive. Therefore, notwithstanding the weight to be attached to the right of the defendant to advance legitimate defences, the prejudice to the claimant overrides that right in this case.

30. The delay, reasons advanced, the interests of justice and the relative prejudice weigh in the claimant's favour. For the reasons set out above, on balance, the weighing of these factors are not in favour of granting the extension of time for the filing of the amended defence.

31. In the event I am wrong on refusing the extension of time for filing the amended defence, I go on to consider whether permission should be granted to amend the defence in the terms set out by the defendant.

32. In his affidavit in support of the application to amend, Mr Armorer has premised his application on the basis that the first case management conference has not ended. As noted above, I respectfully disagree with this contention. No other reason has really been advanced.

33. Before Gobin J. and before me, the parties have indicated there have been attempts to settle the claim. This was also indicated to the Court of Appeal and they were indeed urged to do so. But attempting to settle the matter did not obviate the need for the defendant to do what was required to preserve its position earlier.

34. Even before me, the delay has not been explained. At the case management hearing in January 2015, I had noted that the matter had recently been reassigned to me. I had not been able to consider the file. After some discussion of the issues, I had suggested that given who the parties were, and the ultimate issue involved, the parties should try to resolve the matter in light of the obvious public interest principle that such contributions as were due should in fact be paid since this would impact on the rights of third parties. One would also expect a State entity to comply with its statutory obligations, breach of which extended to an infraction of the criminal law. The defendant's attorney had indicated it would seek to amend its defence. There was a dispute as to how far the amendment could go and it was agreed that the terms of the proposed amendment would be sent to the claimant's attorneys and they would indicate if they would consent to it.

35. It was only shortly before the next hearing on 20 April 2015 that the proposed amendment was supplied to the claimant's attorney and "one last edit" was being considered. The claimant's attorneys on 20 May 2015 wrote to the defendant's attorneys indicating they were objecting to the proposed amendment. It was following this, only on 3 July 2015, that the application to amend was filed.

36. Given that the application of the defendant is premised on the first case management conference being still in operation, it has not advanced any other reason for the failure to file the amended defence before. In fact, the rationale is that they are not obliged to advance a reason since they submit that general common law principles and the overriding objective would guide the judicial discretion in this area.

37. Part 20.1 of the CPR as amended states:

> "A statement of case may be changed at any time prior to a case management conference without the court's permission."

38. Part 20.2 states:

> "The court may give permission to change a statement of case at a case management conference.'

39. Part 20.3 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 a 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."

40. Part 20 (3A) provides:

> (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;
> (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.".

41. The rules of the CPR make a stricter distinction between what can happen before the first case management conference on the one hand and what can happen after the first case management conference on the other. Before the first case management conference a party may change its statement of case/defence without permission: 20.1. After the first case management conference, the party must satisfy the criteria set out in 20.3 and 20.3A. At the first case management conference, permission is needed to change the statement of case, but the 20.3 factors do not come into play. At this stage general common law principles and the overriding objective apply to the court making its decision on whether permission should be granted.

42. In my view, except for what is stated in paragraphs 50 and 51 below, there is no good explanation for why the change was not made before the applicable case management conference. The application was also not prompt. In this regard I adopt the reasons set out above in relation to the time when the application was filed and the delay in doing so and I add the following observations regarding the 20.3A factors.

43. The application was filed on 3 July 2015. The appeal had been determined on 1 December 2014. The time set by the judge for the filing of the amended defence had been 9 August 2014.

44. The order of the appeal was to dismiss the appeal and at (4) of the order: "Section 3 of the Limitation of Certain Actions Act Chapter 7:09 is to be applied in determining issues of limitation in this case".

45. Gobin J's permission, to put in an amended Defence was premised on the amended statement of case which was allowed to stand.

46. The essential change made in the amended statement of case filed 2 May 2013 was to annex the list of managers referred to at paragraph 13 of its statement of case in respect of whom the claim was brought. It did not fundamentally alter the nature of the claim. Consequently, the defendant knew of this change since May 2013.

47. I have carefully examined the terms of the proposed amendment to the defence. Nothing, except for paragraph 6, which will be dealt with below, detail any facts which the defendant would not have known at the time the defence was filed or before the first case management conference (See Hobsons' letter). None of the facts arose out of the amended statement of case. The defendant ought to have known of them. Thus the question arises, why wasn't it included in the defence? Or put another way, there is no explanation for why it was not advanced before the first case management conference.

48. I now consider the 20.3A factors. As noted before, there is some overlap from the application to extend time and I rely on my reasons above.

(i) The interests of the administration of justice

This overlaps from the application to extend time and I rely on my reasons above.

(ii) Whether the change has become necessary because of a failure of the party or his attorney

It would be difficult to ascribe to the defendant party a failure to provide relevant instructions. The matters set out appear to have been information that must have been available to the attorneys for the defendant when the defence was filed.

(iii) Whether the change is factually inconsistent with what is already certified to be the truth

The change adds matters which were not dealt with before. It also adds as pleas laches, acquiescence and delay. It cannot be said that the pleadings are factually inconsistent however.

(iv) Whether the change is necessary because of some circumstance which became known after the date of the first case management conference

Apart from the applicability of the **Limitation of Certain Actions Act**, which was decided by the Court of Appeal, the changes cannot be said to be due to circumstances which became known after the first case management conference. This weighs against the defendant.

(v) Whether the trial date or any likely trial date can still be met if permission is given

No trial date has been set. Because of having to deal with this application, however, any trial date to be given is likely to be later than if the application had not been made.

(vi) Whether any prejudice may be caused to the parties if permission is given or refused

This has been dealt with above.

49. Based on these factors the court's discretion weighs against granting permission to file an amended Defence at this time. In this regard the most significant factors are at 48 (i), (iv) and (vi) above.

50. There is one matter, however, which the defendant ought to be allowed to raise even at this stage. On 3 November 2014, Mr Mendes SC is noted as having told the Court of Appeal: "We will not resist an application to amend the defence to plead the 1997 Act". This undertaking was given on the basis that the court would decide the issue of which limitation period applied. On 1 December 2014 the Court of Appeal decided that the

1997 Limitation of Certain Actions Act applied. This was also reflected in the order of the Court of Appeal.

51. The Court of Appeal has therefore pronounced on this matter and I am bound to follow the order. In those circumstances, it would be appropriate to allow the amendment at paragraph 6 of the draft Amended Defence to stand.

52. There is one final matter that I will make a comment on. It is on the issue of the first case management conference. Under the CPR the court office is obliged to fix a case management conference within a certain period after the defence is filed, or if there is more than one defendant, after the last of the defences is filed or should have been filed. That hearing will ordinarily be considered to be the first case management conference.

53. Given that under the overriding objective the parties to litigation have a duty to cooperate to further the just resolution of the claim (**Roland James above**) the parties may often be engaged in holding discussions before and up to that hearing. Those discussions may require further time to take place or to realise progress. Some claims are far more complex than others. Notwithstanding that, the time period for the fixing of the first case management conference by the court is confined to specific periods, which in some complicated or contentious cases may be considered to be short, if realistic efforts at settlement are to be made. In this context, from a practical perspective, the parties can jointly request the court to reschedule the first case management conference. That way it is open for any amendments considered necessary to be made to the statement of case and for any amendment or consequential amendment to be made to the defence. This approach finds some support in **Part 27.8 (2)** of the CPR.

54. The interests of justice may even demand that the first case management conference be rescheduled more than once in an appropriate case. This is especially the case where genuine efforts are being made to resolve the claim or aspects of it and the parties are making progress towards this. Sometimes there may be delays in awaiting relevant information. For example, the parties in a boundary dispute claim may consider that a survey report by a joint surveyor will help to dispose of the claim or narrow the issues. Instructions may have been given to the surveyor and the parties may require more time for the report to be prepared or considered. In a running down claim, negotiations may be taking place to try to determine either liability or quantum, or both. The parties may have sought a joint medical expert report or may be awaiting a report from a public health institution or they may be exchanging documents. In a money claim a report from an accountant may be thought to be helpful. Commercial litigants may be seeking to find a business solution to avoid the litigation process. The parties may be trying an alternative dispute resolution process. In all of these instances, the pushing back of the first case management conference may be helpful to narrow or resolve the claim. In this respect the overriding objective will be met. This will also lead to saving costs and lead to freeing up the court to deal with other claims. It may avoid haggling over amendments. This approach can also conduce to the more efficient operation of the civil justice system. It would be quite appropriate for the court to encourage such initiatives by facilitating the rescheduling or adjournment of the first case management conference when justified.

55. Thus, when the parties attend the first case management conference, the court and the parties may be in a better position to actually and actively case-manage the claim in accordance with its case management powers. The parties will also not be uncertain about whether the first case management conference is upon them or on-going. Certain matters may have been cleared up, at the very least. The litigation can then be continued with a tidier and narrower focus.

56. I say this respectfully so that we may be able to sometimes avoid the necessity of seeking to adjourn the matter to "continue the first case management conference". It will also avoid the confusion and uncertainty that can occur when it is not clear if the first case management conference has ended. As Mr Mendes has said, first means first.

57. Except for the proposed amendment to paragraph 6, the applications for an extension of time/permission to amend contained in its notice of application filed 3 July 2015 are therefore dismissed. The defendant must pay the claimant its costs of the applications to be assessed in default of agreement.

Ronnie Boodoosingh
Judge