THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO.CV2016-02903

NOVO TECHNOLOGY INCORPORATION LIMITED

Claimant

v

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before Her Honour Madam Justice Eleanor J. Donaldson-Honeywell

Appearances:

Ms. Jaqueline Chang, Attorney-at-Law for the Claimant
Ms. Keisha Prosper and Ms Lesley Almarales, Attorneys-at-Law for the Defendant

Delivered on January 12, 2018

Ruling

I. Introduction

1. The matter determined in this Ruling concerns the Defendant's Notice of Application dated 12th July 2017 seeking permission to amend their defence pursuant to Part 20.1 of the Civil Proceedings Rules, 1998 [CPR]. The Defence had been filed herein since 9th December 2016. The application is supported by an affidavit of instructing Attorney for the Defendant.

2. In opposition to the Defendant's Notice of Application, the Claimant has filed and served an affidavit of Glen Ramdhani, Chief Executive Officer of the Claimant Company, filed on 21st September 2017.

3. The hearing of the Notice of Application came up before the Honourable Court on 23rd October 2017. The Court directed that the parties file submissions in respect of the said application.

II. **The Rules to be Applied**

CPR PART 20.1(3), (as amended)

4. Part 20.1 deals with amendments to statements of case which states specifically,

> *"(1) A statement of case may be changed at any time prior to a case management conference without the court's permission.*
>
> *(2) The court may give permission to change a statement of case at a case management conference".*

5. However, if permission is sought **after** the first case management conference, **Part 20.1(3)** stipulates,

> *"(3) The court shall not give permission to change a statement of case after the first case management conference [CMC], 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**.*
>
> ***(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."

6. It is not in dispute that Part 20.1(3) applies in the case at bar since the application to amend the defence of the Defendant was made **after** the first case management conference and in fact after the 2nd CMC when pre-trial directions had been given and a trial date set.

III. Issues

7. The issues for determination are :
    a. Whether there is a good explanation for the changes to the defence not having been made prior to the case management conference;
    b. Whether the application to make the change was made promptly;
    c. If both of these are answered in the affirmative, further consideration will be required as to:
        i. Where the interest of the administration of justice lies;
        ii. Whether the change has become necessary because of a failure of the party or his attorney;
        iii. Whether the change is factually inconsistent with what is already certified to be the truth;

iv. Whether the change is necessary because of some circumstance which became known after the date of the first case management conference;
v. Whether the trial date or any likely trial date can still be met if permission is given to amend the Defence; and
vi. Whether any prejudice may be caused to the parties if permission is given or refused

IV. **grounds and Factual Matrix Of The Defendant's Application**

8. The Defendant's grounds of application have been summarised by the Claimant in its submissions as follows:

a. On 12th January, 2017 the matter was reassigned to new Counsel due to the departure of the previous Counsel.
b. On 21st January 2017, a Case Management Conference (CMC) was held wherein the matter was adjourned for the parties to enter discussions.
c. Before settlement discussions could be entered into Counsel required clarification of the instructions and needed approvals.
d. On 29th March 2017, a stakeholders meeting was conducted wherein it became apparent that the authority of the Central Tenders Board (CTB) was required to enter a new contract with the Claimant.
e. There being no such authority given for a new contract with the Claimant, the Attorney General's approval was needed to enter discussions and move forward with the matter.
f. The changes to the defence only became necessary after receiving instructions from the stakeholders on 29th March 2017 and approval from the Attorney General (AG) on 11th April 2017.
g. Upon the instructions of the AG the application was drafted and forwarded to the Deputy Solicitor General for approval. Due to hectic work load the Deputy was unable to vet the application in a timely manner.

h. The Claimant will not be prejudiced by the grant of application and it will not affect trial date as no trial has been set.
i. The non-compliance was due to circumstances mentioned above.
j. The application was made promptly and changes are not factually inconsistent with what was certified as the truth.

9. The Claimant further provided a brief chronology of key and relevant events to assist the Court in considering the issues for determination, as follows:

a. Claimant's Attorney issued a pre action protocol letter dated 7th July 2016. The Defendant neither admits nor denies the said letter and puts the Claimant to strict proof of same.[1]
b. On 23rd August 2016, the Claim Form and Statement of Case were filed and served on the Defendant.
c. On 10th October 2016, the Defendant filed an appearance.
d. On 9th December 2016, the Defendant filed and served their defence.
e. On 31st January 2017, the first (1st) CMC was heard. The CMC was adjourned upon the Defendant's request to have settlement discussions with the Claimant. Claimant agreed to the adjournment[2].
f. On 29th March 2017, a purported stakeholders meeting was held with the Defendant's personnel[3].
g. On 3rd April 2017, the first CMC came back up for hearing. No settlement of the matter. Directions were given by the Court for the filing of lists and bundles of documents. The matter was again adjourned for the parties to have settlement discussions based on the indication of the Defendant that they were still interested and intended to have such discussions.
h. On 11th April 2017, Defendant purportedly got approval from the AG[4].
i. On 26th May 2017, the Defendant filed its list of documents.

[1] As per paragraph 45 of Defence
[2] See paragraph 6 of the affidavit of Glen Ramdhani where he deposes to this.
[3] See paragraph 5 of the affidavit of Lesley Almarales where she deposes to this
[4] See paragraph 10 of the affidavit of Lesley Almarales where she deposes to this

j. On 10th July 2017, the second CMC was heard. Pre- trial directions were given by the Court for the filing of witness statements by 19th January 2018, evidential objections by 23rd February 2018, a PTR was fixed for 12th March 2018, and trial date of 21st May 2018 set.

k. On 12th July 2017, the Defendant filed their Notice of Application.

l. On 21st September 2017, the Claimant filed an affidavit in opposition to the Defendant's application.

m. The hearing of the Defendant's Application was heard on 23rd October 2017.

n. On 15th November 2017, the Court fixed a new trial date of 19th April 2018.

V. **The Claimant's Contentions in Response**

10. In response to the Defendant's application, the affidavit of Glen Ramdhani sets out the factual basis for the Claimant's opposition to the application summarised in the Claimant's submissions as follows:

a. At the hearing of the first CMC on 31st January 2017, the new Counsel for the Defendant had already been appointed since 12th January 2017[5].

b. It is undisputed that it was the Defendant who requested the adjournment of the first CMC in order to have settlement discussions[6].

c. The Defendant was served with the Claim Form and Statement of Case since 23rd August 2016. Their defence was filed on 9th December 2016, some four (4) months after having sight and consideration of the Claimant's claim.

d. At the time of the filing of their defence on 9th December 2016, the Defendant ought reasonably to have had a full understanding of the matter, contrary to what was stated at paragraph 4 of the affidavit of Lesley Almarales[7].

[5] As per paragraph 3 of the affidavit of Lesley Almarales where she deposes to this
[6] See paragraph 6 of the affidavit of Glen Ramdhani where he deposes to this.
[7] As per paragraph 5 of the affidavit of Glen Ramdhani where he deposes to this.

e. The purported stakeholder's meeting took place on 29th March 2017, wherein certain revelations were made regarding the CTB's authority to enter into a new contract with the Claimant. The AG's approval was purportedly given on 11th April 2017, however approval for exactly what purpose was not articulated in the affidavit evidence of Ms Almarales. The Defendant's Notice of Application was not filed until **12th July 2017**, some **four (4) months** after the stakeholders meeting, and well after directions had already been complied with by the parties for the filing of lists and bundles of documents[8].

f. Moreover, the application was filed two (2) days after the 2nd CMC was heard on 10th July 2017, when trial directions were given for the filing of witness statements, evidential objections, and the setting of a PTR and trial dates. No indication was given by the Defendants between the adjourned date of the 1st CMC on 3rd April or at the 2nd CMC on 10th July 2017 or anytime between that timeframe, of its intention to amend their defence[9].

g. Although the grounds of application states that the application was forwarded to the Deputy Solicitor General for approval, the evidence of Ms Almarales is lacking in further and better particulars, in that she fails and/or omits to state when the draft application was forwarded for approval and when, in fact, approval was thereafter given by the Deputy.

h. The Defendant's proposed amended defence contains factual inconsistencies. By way of example, at paragraph 32 of the proposed amended draft, the original defence states that, "***The Defendant admits so much of Paragraph 31 of the Statement of Case that states that the Defendant was liable to pay the Claimants for services rendered in the Interim Agreement" (emphasis mine).*** However, paragraph 32 of the amended defence **denies** 31 of the Statement of Case[10].

[8] See paragraph 8 of the affidavit of Glen Ramdhani where he deposes to this.
[9] See paragraphs 8, 9, 10, 11 12 of the affidavit of Glen Ramdhani where he deposes to this.
[10] See paragraph 14 of the affidavit of Glen Ramdhani where he deposes to this.

i. The Defendant's case was initially pleaded to read as an acknowledgment that it is indebted to the Claimant for services rendered under the interim agreement (new agreement as referred to by the Claimant). The gist of their defence, until now, was that it was just a matter of ascertaining quantum due and owing to the Claimant, not whether the Claimant is at all entitled to payment for services rendered. The proposed amended defence purports to introduce a defence when none was ever pleaded. It changes the absolute gist and complexion of the case when the Claimant was led to believe, from the 1st CMC, that the Defendant was proposing in good faith, genuine settlement discussions[11].

j. Even if the application was granted and the amendments made to the defence, it is undisputed that the Claimant has rendered services beyond the first/original contract (which is admitted by the Defendant). Thus, the Claimant would, in law, be entitled to monies due and owing on a quantum meruit basis[12].

k. The Defendant's evidence at paragraph 17 of the affidavit of Lesley Almarales is wholly inaccurate. A Pre Trial Review [PTR] and trial dates had been fixed at the CMC held on 10th July 2017 (The Defendant was represented by Ms Bello) two (2) days before the filing of its Notice of Application on 12th July 2017. Thus, as at the time of filing their application, they had unfettered details of the said dates and directions.

VI. **Law and Analysis**

11. The Claimant submits that the relevant principles to be considered are outlined in the leading Court of Appeal decision in the case of ***Estate Management and Business Development Ltd v Saiscon Ltd – CA Civ P104 of 2016.*** In that case Jamadar J.A. affirmed that if the application is made "**after**" the first CMC,

[11] See paragraphs 15 and 16 of the affidavit of Glen Ramdhani where he deposes to this.
[12] See paragraph 16 of the affidavit of Glen Ramdhani where he deposes to this.

""a statement of case may be changed, but only with the court's permission AND provided the criteria at Rules 20.1(3) and (3A) are satisfied".

12. Applying the useful guidance in the aforementioned Judgment of Jamadar JA, the Court is bound to consider whether there is a good explanation for the proposed changes to the defence **AND** whether the application was made promptly. Further, if the answer to either of those two (2) criteria is in the negative, the Defendant's application must fail. The dicta of Rahim J in the authority of ***Roberts v Bhagan end Medcorp Ltd*** CV2010-01117 cited by the Defendant herein is clear in this regard,

*"The court must find **both** that there is a good explanation for the change not having been made prior to the first CMC **and** that it was made promptly to grant the applicant permission to amend. The grant of permission is not automatic even after the requirements in Rule 20.1(3) are met. The court **may** grant permission and in considering whether to do so must have regard to the factors set out at Rule 20.1(3A)."*[13] *(emphasis mine).*

13. This is buttressed by the statement of the Court of Appeal in the ***Estate Management Ltd*** case supra, where Jamadar J.A. opined at paragraph 41 of his judgment that:

"I also agree with Jones, J.A. that the threshold requirements of Rule 20.1(3) having not been satisfied there is no need to go further in the analysis to consider the requirements of Rule 20.1(3A)".

Good Explanation

14. The Defendant contends that in considering whether there is a good explanation for the changes to the defence the Court ought to have regard for the following matters:

a. The reassignment of attorneys after the first CMC;

[13] See paragraph 31 of Mr Justice Rahim's judgment

b. The agreed adjournment to deal with the issue of approval for possible settlement;
c. The information received by the newly assigned attorney;
d. The necessary steps required to proceed with the matter; and that
e. The newly assigned attorney had a duty to inform the AG of all the facts and matters before any decision could be made as to the appropriate way forward.

15. The Court considers these explanations to be insufficient to constitute a good explanation. The timelines outlined by the Claimant show that the change of counsel was made weeks before the present application and could have had no bearing on the need for changes to the defence. The first CMC was held on 31 January, 2017 and pursuant to the Defendant's affidavit evidence, the Defendant's new Counsel was appointed on 12 January, 2017. Thus, contrary to their evidence and submission in this regard, the reassignment was made well before the first CMC.

16. Additionally, the evidence of Lesley Almarales is that she was holding for Bryan Basdeo, the then Filing Attorney who, "*has proceeded on vacation leave and I have been temporarily assigned conduct of his stead"*[14]. We observe that nowhere in her evidence does she confirm that she is/would be the new Filing Attorney assuming responsibility of the matter.

17. Even if the newly assigned attorney was assigned after the first CMC, the proposed changes to the defence and submissions of the Defendant appear to reflect a mere oversight or administrative inefficiency on the part of the previous attorneys in the preparation of the original defence that was filed and the management of the case.

18. In the ***Roberts*** case supra, Rahim J, relied upon Mendonca J.A's. comments in ***Roopnarine et al v Kisoo Civ CA No. 52/2012***, at paragraph 32, where he said,

"*in the **AG v Universal Projects Limited [2011] UKPC 37**, the Privy Council*

[14] See paragraph 1 of the affidavit of Lesley Almarales where she deposes to this

rejected a submission that a good explanation is one which properly explained how the breach came about, but which may involve an element of fault, such as inefficiency or error in good faith. The Privy Council in its judgment stated (at para. 23): … "Oversight may be excusable in certain circumstances. ***But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency****"*[15]*. (emphasis mine).*

19. Counsel for the Defendant seems to suggest in submissions that it was only when she took conduct of the matter that the new information came to light at the stakeholders meeting which subsequently required the intervention of the AG in determining the way forward. Applying the principles enunciated in ***Rogers*** and ***Roopnarine***, my understanding from the submission is that there was an oversight and/or administrative inefficiency prior to the assignment of new counsel, which has since been addressed leading to the filing of this application to amend the Pleadings. Such circumstances are insufficient to constitute a good explanation for the belated application for amendments to the defence.

20. In response to the Defendant's contention that the agreed adjournment of the first CMC was to "*deal with the issue of approval for possible settlement*", the Claimant argues that this was never the Defendant's stated position. It was in fact the Defendant who sought the adjournment stating that they wanted to enter settlement discussions, the Court having expressly articulated that this was the type of matter which ought to be settled.

21. In summary, the explanations being proffered by the Defendant for the proposed

[15] See also paragraph 110 of Jones's J.A. judgment in the Estate Management case where she states, "*In this case, with respect to the changes to the statement of case, it is clear that the document had been in the hands of the attorney prior to the commencement of the action the excuse of attorney's inadvertence, like inefficiency or lack of competence or inexcusable oversight, cannot in these circumstances be a good reason for seeking a change after the first case management conference".*

amendment not being made before the first CMC cannot be considered good ones in the consideration of this Court given all the circumstances, namely:

a. The Defendant had knowledge of the claim since August 2016 when the claim was served on them. Since that time they could have conducted their proper investigation in order to seek approval from the AG as to how best to deal with this matter.
b. New counsel had been appointed on 12 January, 2017 BEFORE the 1st CMC on 31 January, 2017.
c. The Defendant was represented at the 1st and 2nd CMCs and gave no indication whatsoever that they required time to seek approval from the AG as to the "way forward" or as to whether they could in fact enter settlement discussions at all.
d. The Defendant, at all material times had maintained that they wished to have settlement discussions without any indication that settlement discussions were hinged on whether the AG gives approval to enter such discussions, or any other precursor to having same.

Promptitude

22. The Defendant relies on the learning in ***Roopnarine v Kissoo*** under this limb, to demonstrate that although the Judge in that case found that the making of the application 3 months after the engagement of sanction cannot be considered prompt, there are other distinguishing facts which the court ought to consider when determining whether there was promptness in this case.

23. More particularly, the Defendant contends as follows:
    a. The application is made 7 months before the PTR carded for 12th March 2018;
    b. The application is made 10 months prior to the trial date of 21st May 2018;
    c. The Claimant has seen the proposed amendments so they can amend their claim; and
    d. The amendment is short and deals with a legal point rather than factual issues.

24. As pointed out by the Claimant, the trial date of the matter has since been rescheduled to 19 April, 2018.

25. It is of note that directions for the filing and exchange of witness statements and evidential objections were ordered at the CMC on 10 July, 2017. It is apparent that these dates which were scheduled for a period commencing on January 19, 2018 and ending February 23, 2018 as well as the subsequent PTR and Trial dates will be affected by a decision to allow the proposed amendment.

26. Under this limb, the Court must determine whether the application for leave to amend was made promptly when the changes to the defence was determined necessary.

27. According to the Defendant, the stakeholders meeting was held on 29 March, 2017 and the approval from the AG came on 11 April, 2017. However, the application for leave to amend was made some three (3) - four (4) months after those events, on 12 July, 2017.

28. By way of their affidavit evidence, the Defendant has not provided any explanation for their inaction between 29 March, 2017 and / or 11 April, 2017 and the date of filing of their notice of application on 12 July, 2017, in order to provide a legitimate basis for the delay in making their said application.

29. In the ***Estate Management*** case supra, Jones J.A. held at paragraph 114, that,

> *"A delay of four months from the date when it was ascertained that it was necessary to make changes to the statement of case cannot in these circumstances be considered prompt".*

30. This Court also considers that the delay of 3-4 months between when the changes became apparent/necessary and when the Defendant's application was filed, in the words of Jones J.A., cannot be "*considered prompt"*.

31. The Defendant has not met the threshold criteria of Rule 20.1(3) and thus there is no need to consider the applicability of CPR Part 20.1(3A) - ***Estate Management***.

32. However, as a matter of completeness and having regard to the efforts of Counsel addressing this aspect of the Application, I indicate that for the reasons briefly stated below, I do not find that in the circumstances of this case the Defendant has succeeded in proving factors of CPR 20.1(3A).

The Rule 20.1(3A) Considerations

The interests of the administration of justice

33. In respect of this factor, the Defendant contends that:
    a. The administration of justice favours the granting of the application to ensure both parties are on equal footing;
    b. Having regard to the amount of damages claimed, justice would be served in granting the application; and
    c. The Court ought to take into consideration whether the CTB procedure applies, in that the Claimant was aware of same and failed to take notice.

34. In this regard I agree with the Claimant's submission that if any party can make a legitimate claim that they were not on equal footing in the course of this matter, it would be the Claimant. This is so because the Defendants, at all material times, had expressed to the Court and the Claimant that they wanted to have settlement discussions. At no time whatsoever was it made clear that they were seeking to clarify certain legal and or factual issues (in this case the CTB defence proposed), **BEFORE** they could enter discussions.

35. The Claimant was eager to proceed with the matter but because of the Defendant's insistence on having settlement discussions, the Court's view was that the Defendant

should be given the opportunity to seek their instructions for the purpose of making a proposal. At no time whatsoever was the Court or the Claimant notified that the Defendant intended to adjust their position, to switch from wanting to enter into negotiations to wishing to introduce a new defence including therein a denial of the claim.

36. It is the Defendant's submission that the substantial sums claimed make it in the interest of proper administration of justice to allow the defence to be amended and the issue of want of authority to be aired. However, as argued by Counsel for the Claimant, since service of this claim on the Defendant, there was ample opportunity to prepare a proper and appropriate defence having regard to the large sums at stake.

37. Further, Claimant has already been disadvantaged by the effluxion of time since the filing of the claim, due to adjournments for settlement discussions at the request of the Defendant. Any further postponement of the hearing of this matter would be contrary to the proper administration of justice. Accordingly, the Defendant's argument on this point is rejected by this Court.

Failure of the party or attorney

38. As considered above, a suggestion of administrative inefficiency and oversight by an attorney such as clearly exists on the part of prior counsel, based on the Defendant's current submissions, cannot be a good explanation for the belated change to the pleadings to be permitted - ***Estate Management***; ***AG v Universal***.

Factually inconsistent with what is already certified

39. The Defence as initially filed included admissions as to liability to pay the Claimant for services rendered in the Interim Agreement. Accordingly, all that remained for determination on the pleadings was the quantum which made the matter suitable for settlement as then proposed by the Defendant.

40. The proposed amendment in the Application recently filed seeks to reverse those admissions. The Defendant cites the case of ***Arda Borough Council v Northern Bank Ltd 1994 NI121*** as authority for the proposition that the Court can permit a withdrawal of admissions. They say further that the Court has the power to give leave to amend a defence where the admission had been made on a mistaken view of the law so long as the plaintiff had not acted to his detriment in consequence of the admission and upon suitable terms as to costs.

41. However, as elucidated by the Claimant, in the case of ***Arda Borough Council*** the Appellant's appeal was dismissed and leave in fact was not granted to the Appellant bank to amend its defence by withdrawing the admission and making other amendments necessary to advance the case which it had sought now to argue, namely that they were not bound to comply with the Arbitrator's award in law.[16]

42. The Court went further to state as per the last paragraph of its ruling,

> *"The amendment* ***would not only change the whole gist of the defence*** *but would* ***inevitably lead to the serious detriment to the opposing party****, the council, which Carswell LJ has particularised*". *(Emphasis mine).*

43. That decision turned upon the degree of detriment which the Claimant would have suffered if the amendment was allowed. This, in the Court's consideration bears considerable likeness to the case at hand as the proposed amendments seek to introduce an entirely new defence, one which was never pleaded, mentioned, stated or otherwise alluded to until now and one which is in direct opposition to the original defence.

44. The Claimant further relied on the learning in notes to Part 17 in the **Civil Court Practice 2017 (The Green Book)** which clearly stipulates under the rubric

[16] Page 123, para (a)

'Amended case inconsistent with original case', that amendments which are inconsistent with the original case should not be permitted. It states specifically that,

> *"Generally, an amendment should not be permitted if the statement of truth in respect of the amended case is inconsistent with the statement of truth in respect of the original case. Alternative claims may be permitted, however, where the statement of truth merely affirms an honest belief that on either set of facts or the other the case is made out: Clarke v Marlborough Fine Art (London) Ltd (No 2) [2002] 1 WLR 1731".*

45. In the instant case, the Defendant's proposed amended defence contains various inconsistencies:
    a. **Paragraph 10** - the original defence **neither admits nor denies** paragraph 9 of the statement of case but the amended defence **denies** it.
    b. **Paragraph 32** - the original defence **admits** paragraph 31 of the statement of case that states the Defendant was liable to pay the Claimant for services rendered in the Interim Agreement yet in the amended defence it **denies** paragraph 31.
    c. **Paragraph 44** – the original defence **neither admits nor denies** paragraph 43, but the amended defence **denies** it.
    d. **Paragraph 46** - the original defence **neither admits nor denies** paragraph 44 and 45, but the amended defence **denies** it.
    e. **Paragraph 48** - the original defence **neither admits nor denies** paragraph 47, but the amended defence **denies** it.

46. Having regard to the inconsistencies outlined hereinabove which change the whole gist of the Defendant's defence, this Court rejects the Defendant's submission that there is factual consistency in the new Defence now proposed, with what was initially certified by the Defendant..

Whether the change is necessary because of some circumstances which became known after the first CMC

47. The Defendant's argument is that the change became necessary after the stakeholders meeting on 29 March, 2017 and the instructions received on the 11 April, 2017. However, as outlined above, the timeline of events reveals the Defendant's prolonged inaction which does not match up to the importance it attributes to this newly received information.

Whether the trial date can still be met if permission is given

48. It is clear that the trial date of 19th April 2018 will very likely need to be vacated if the amendment is granted due to the resulting necessity for the Claimant to apply for permission to file a Reply that will undoubtedly arise. More significantly, witness statements are due on 19th January 2018; evidential objections were to be filed and served on 23rd February 2018 and the PTR is to be held on 12th March 2018. All these deadlines will require extensions of time if the amended Defence is permitted.

49. The Claimant has also submitted that further lists of documents may be required to be filed. Thereafter there will be need to postpone the Trial resulting in substantial delays to the Claimant seeking relief from the Court. This change of trial date will result in prejudice to the Claimant who has already been awaiting payment of the debt claimed, for almost two (2) years. The Defendant's submission on this point therefore also fails.

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

50. The Defendant contends that while an amendment may prejudice the Claimant, a greater prejudice would result against the Defendant if it were denied since they would not be able to advance the law in relation to the illegality of the contract between the parties.

51. Counsel for the Claimant submitted, however, that:
    a. The Defendant does not dispute the legality of the First Contract between the parties.
    b. The Defendant does not dispute that services were rendered by the Claimant beyond the First Contract, in favour of the Defendant's Ministry.
    c. The Defendant does not dispute that the Ministry accepted those subsequent services to a certain date.
    d. The Claimant did not plead a new contract having been created by way of a formal written agreement.
    e. The Claimant's case as it relates to the new contract put simply, is that by the course of dealings, conduct of the parties, the formation of a further contract occurred between the parties.
    f. Therefore, it matters not, as the Defendant purports to argue, that the new contract was created without any authority and/or contrary to the CTB procedure, since it is trite law that contracts can be created by course of dealings and the conduct of parties.
    g. Furthermore, it would make no difference to their defence in that in law, the Defendant will still face the risk of being held accountable to remunerating the claimant for services rendered on a quantum meruit basis.
    h. Finally, we respectfully say, without delving into a profound and deep analysis of the merits of the claim, that the common law on contract formation will be a legal issue for submissions at the end of trial.

52. This Court finds merit in these submissions, particularly on the fact that there is no dispute that services have been performed by the Claimant and therefore is entitled to appropriate compensation on a quantum meruit basis at the very least. Accordingly, it is not accepted that greater prejudice would be suffered by the Defendant if this application is denied.

VII. Conclusion

53. In summary, the Defendant's explanation that the defence had to be changed due to the assignment of a new attorney to the matter and the discovery of new information at the shareholders' meeting are not good explanations. This determination is made due to the facts that the attorney had been assigned prior to the first CMC and that the oversight of the previous attorneys in preparing the defence cannot be considered a reasonable excuse.

54. Further, the Defendant's application was not made promptly after the discovery of this new information and its affidavit does not sufficiently explain the lapse of approximately 3 months between obtaining approval and filing the application.

55. This application therefore fails without necessity to consider the factors outlined in CPR Part 20.1(3A). However, it is to be noted that this Court does not accept the Defendant's submissions on these points for the reasons more fully explained above.

56. For these reasons, Defendant's application is dismissed with costs payable to the Claimant by the Defendant to be assessed if not agreed.

Delivered on January 12, 2018

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC I