REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2010 -03594

EXPORT-IMPORT BANK OF TRINIDAD AND TOBAGO

Claimant

AND

WATERWORKS LIMITED

Defendant

AND

WATERWORKS LIMITED

Ancillary Claimant

AND

WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO

Ancillary Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Marcus S.C., and Mr. J. Herrera instructed by Ms. D. James for the Ancillary Claimant.

Mr. F. Hosein S.C., and Ms. S. Bridgemohansingh instructed by Ms. N. Alfonso for the Ancillary Defendant.

RULING

1. Before me are three applications. The first two, brought by the Water and Sewerage Authority of Trinidad and Tobago, seek to strike out particulars filed by Waterworks

Limited on the 31st of May 2012 pursuant to an order of this Court. The third is an application, brought by Waterworks Limited to re-amend its statement of case filed in an ancillary claim brought against the Water and Sewerage Authority of Trinidad and Tobago. Given the nature of the applications now before me it is appropriate to refer to the history of these proceedings before examining the applications now before me.

2. This action was commenced by a claim filed by the Export-Import Bank of Trinidad and Tobago (the Bank") against Waterworks Limited on the 30th August 2010. On 21st March 2011 Waterworks Limited obtained permission to file an ancillary claim against the Water and Sewerage Authority. With respect to this ancillary claim there was filed: a statement of case on the 20th May 2011; an amended statement of case on the 13th July 2011; a defence and counterclaim on the 17th October 2011 and a reply and defence to counterclaim on the 16th December 2011. The first case management conference with respect to the ancillary claim was fixed for and determined on 16th January 2012.

3. Meanwhile on the 13th July 2011 the Bank filed an application for summary judgement against Waterworks Limited on the original claim and on the 14th December 2011 judgement was obtained by it against Waterworks Limited. Thereafter the only claim before the court in these proceedings was the ancillary claim and its attendant counterclaim.

4. Insofar as the ancillary claim was concerned by its amended statement of case Waterworks Limited ("the Claimant") amended its original statement of case to include, among other things: (a) a claim for monies for work done pursuant to an oral contract made around November-December 2007 for work at Production Well #1, Factory Road, Diego Martin ("the

oral contract"); and (b) some additional details with respect to a contract for the drilling and equipping of certain wells located in Cumuto ("the Cumuto contract"). The three applications now before me deal with these two contracts.

5. Insofar as it is relevant, by its amended statement of case, the Claimant sought payment on both the Cumuto contract and the oral contract. With respect to the Cumuto contract the Claimant sought the payment of the sum of $73,168.75. With respect to the oral contract the Claimant sought payment in the sum of $1,286,144.19. By way of counterclaim the Water and Sewerage Authority ("the Defendant") claimed the sum of $642,686.25 under the Cumuto contract.

6. On 30th January 2012 the Defendant filed an application seeking orders striking out certain paragraphs of the Claimant's amended statement of case and its reply and defence to counterclaim. The application sought, among other things, to strike out those parts of those pleadings which dealt with the Cumuto contract and the oral contract.

7. By an order made by me on 1st May 2012 I struck out certain paragraphs of the statement of case and reply and defence to counterclaim filed by the Claimant. As well with respect to the Cumuto contract I entered judgement for the Defendant on its counterclaim in the sum of $642,686.25 but stayed the execution of that judgement to facilitate a determination of whether the Claimant was entitled to the sum of $73,168.75 claimed under that contract by way of a set-off. I also ordered that the Claimant provide the Defendant with particulars of the money it says was due and owing under both the contracts.

8. On the 31st of May 2012 in purported compliance with my order of 1st May the Claimant filed and served a document described as "particulars of the Ancillary Claimant's statement of case". With respect to this document the Defendant, by way of its two applications before me, seeks to strike out:

(i) paragraphs (a) to (v) under the heading "as regards the Cumuto contract" on the grounds that these paragraphs do not in fact amount to particulars of the monies pleaded to be due and owing under the contract, but in fact amount to a new claim and in the circumstances are an abuse of the process of court and oppressive and vexatious.

(ii) Paragraphs (a) to (j) under the heading "As regards paragraph 7A ("the oral contract")" on the grounds that the paragraphs do not in fact amount to particulars of the Claimant's pleaded case, are in fact a substitution of an entirely different contract and in the circumstances also amount to an abuse of the process in that it seeks to effect an unauthorised amendment to the statement of case.

9. The effect of the applications if successful is to strike out all the particulars filed with respect to both contracts save one paragraph which annexes a copy of the Cumuto contract. The Claimant opposes these applications and on 27th July 2012 filed its application seeking leave to re-amend its statement of case in terms of a draft subsequently filed on 3rd August 2012.

The Defendant's applications

10. With respect to the Cumuto contract, by its amended statement of case the

Claimant pleads:

> "7. After completion of some of the work the Ancillary Defendant terminated this project under the aforesaid Cumuto and the Wallerfield contracts there was and still is owing and payable to the Ancillary Claimant an outstanding balance of $73,168. 75."

By my ruling of 1st May 2012 I struck out those parts of the amended statement of case that referred to the Wallerfield contract, leaving the Claimant with a claim for $73,168.75 due under the Cumuto contract.

11. By the particulars of the Cumuto contract filed on the 31st May 2012 the Claimant gives particulars of the date of the contract; the terms of the contract and its performance by the Claimant and claims the sum of $8,554,030.75. The Defendant submits that the particulars filed under this contract are not particulars of the claim because the particulars now seek sums in excess of the sum of $73,168.75 claimed under the amended statement of case.

12. With respect to the oral contract by the amended statement of case the Claimant pleads:

> "Pursuant to an oral contract made around November–December 2007 by and between the Ancillary Defendant acting by and through its representative Curtis Critchlow and Emmanuel Romain representative of the Ancillary Claimant, the Ancillary Claimant completed the contracted work at Production Well #1, Factory Road, Diego Martin at a total cost of $1,286,144.19 ($63,762.04 plus $245,822.15 plus $976,580.00)."

13. By the particulars filed on the 31st May the Claimant gives details of the scope of works, the commencement and performance of the contract and thereafter claims the sum of $1,450,753.75 plus interest. Insofar as the particulars filed describe the scope of works of the oral contract it is in reference to a variation of contract WTC 108/2003 with respect to Diamond Vale Well #16.

14. The Defendant submits that the particulars provided are not in fact particulars of this claim because (i) the sum claimed with respect to this contract is in excess of the sum claimed in the statement of case and (ii) the particulars bear no relation to the pleaded claim since by paragraph (c) of the particulars it is clear that the particulars relate to a variation of contract WTC 108/2003 with respect to Diamond Vale Well #16 and not to work at Production Well #1, Factory Road, Diego Martin as is pleaded in the amended statement of case.

15. In its submissions filed in opposition to the Defendant's applications the Claimant says that:

(i) neither the judgement nor the order of the court requires that particulars of $73,168.75 be given;

(ii) "the Ancillary Claimant recognises that in the circumstances where the particulars supplied pursuant to the Judge's Order exceed in quantum the original sum of $73,168.75 claimed an amendment is appropriate." and

(iii) the submissions above apply mutatis mutandis to the Defendant's submissions on the oral contract.

16. With respect to the submission contained in (i) above let me say here that I find this to be a very disingenuous argument. Indeed, from the Claimant's second submission it is clear that the Claimant was satisfied that what was required were particulars of the claims made in the statement of case. Insofar as the Cumuto contract was concerned this claim was for the sum of $73,168.75. To suggest or imply that because the order did not identify the actual amount claimed by the Claimant that somehow it widens the scope of the particulars ordered is simply not the case. What the Claimant was required to provide were particulars of the claim in the amended statement of case with respect to the Cumuto contract. The claim in the amended statement of case with respect to the Cumuto contract was $73,168.75 and no more.

17. Insofar as the submissions suggests that this argument is also applicable to the particulars ordered with respect to the oral contract the position is the same. My order of 1st May 2012 can only be interpreted as allowing the Claimant to provide particulars of its claim made in the amended statement of case. The claim in the amended statement of case with respect to this contract was for the sum of $1,286,144.19 for work done at Production Well #1, Factory Road, Diego Martin. The claim in the particulars is for the sum of $1,450,753.75 plus interest with respect to work done on Diamond Vale Well #16 under a variation of contract WTC 108/2003.

18. At the end of the day, despite the submission reflected at (i) above, it is clear that the Claimant concedes that what was supplied is not in fact particulars of its claims as ordered and relies on its application to amend as an answer to the Defendant’s submissions the effect of which would be to strike out these two claims.

19. In the circumstances I am satisfied that the contents of the document filed by the Claimant on the 31st of May are not in fact particulars of the relevant claims made in the amended statement of case and do not comply with my order of the 1st May 2012.

The Claimant's application to amend

20. The rules provide that permission shall not be granted to change a statement of case after the first case management conference unless the Court is satisfied of two things (i) that there is a good explanation for the change not being made prior to the first case management conference and (ii) that the application to make the change was made promptly.[1] In considering whether to give permission a court is mandated to have regard to:

(a) the interests of the administration of justice;

(b) whether the changes 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.[2]

[1] Part 20.1(3)
[2] Part 20.1 (3A)

21. It is clear therefore that before a court exercises its discretion whether or not to grant permission it is incumbent upon a Claimant to first establish that (i) there is a good explanation for the change not having been made prior to the first case management conference and (ii) the application to make the change was made promptly. In this regard I agree with the decision of **Kokaram J.** in **Gafoor v The Attorney General of Trinidad and Tobago and the Integrity Commission**[3]. Once the Claimant has attained this threshold then in determining whether or not to exercise my discretion to allow the change I am is required to have regard to (a) to (f) above.

Has the Claimant met the threshold required (a good explanation-promptness)

22. Evidence in support of this application was by way of an affidavit of Marcia Romain ("Romain") a director of the Claimant filed on 27th July 2012. Romain deposes that prior to his death on 21st May 2010 the Claimant's day to day operations were run and managed by her husband who was at the time the managing director. She says that until that time she was not intimately involved in the day to day affairs of the Claimant but was forced to get involved upon his death.

23. The original claim in this action was filed on 30th August 2010 and she needed to defend the claim. According to her "the immediacy of responding to the claim, the limited availability of the Ancillary Claimant's personnel to provide pertinent details of the various projects and the overwhelming nature of the grief she was experiencing..... did not allow for comprehensive obtaining and supply of all the information and documents existing."

[3] Ruling dated 6th June 2012 CV 2012 – 00876.

24. As well she says that the enforcement of a judgement against a company which shared accommodation with the Claimant resulted in a temporary misplacement of the Claimant's records and documents. The copies of the documents exhibited with respect to the execution of the judgement are dated May 2009. According to Romain since the order to submit further particulars she has discovered that she has valuable information related to the case which was not originally submitted.

25. In essence, therefore, the explanation proffered by the Claimant for its failure to make the application to amend by 16th January 2012 is: (i) the death of the managing director in May 2010; and (ii) a temporary misplacement of documents as a result of a levy of execution in or around May 2009. With respect to (i) Romain says her husband's death created a vacuum in management and required her to take on that role while still grappling with her grief. With respect to (ii) she does not indicate the length of this temporary misplacement. The only further information given by her by way of explanation is that it is only when the Claimant was required to provide further particulars that in searching for the relevant documentation she found the additional information. It is clear therefore that Romain is not saying that these documents were unavailable to her after the temporary misplacement but rather that she did not make a search for the documents until required by my order of 1st May 2012.

26. It is clear from the affidavit, however, that in September 2010 Romain attended a meeting at the Defendant's premises for the purpose of resolving the issue of the outstanding claims. Thereafter she says she had follow-up meetings in this regard and satisfied the Defendant's requests for further information including the resubmission of certified copies of the

invoices allegedly mislaid by the Defendant. On her evidence therefore it would seem that by September 2010 Romain had sufficiently recovered from the setbacks experienced by the death of her husband and the levy of execution on the other company to engage in detailed negotiations on the Claimant's behalf with the Defendant.

27. In any event, it is clear that by 21st May 2011, when the ancillary statement of case was filed, information and documentation was available to her. Further, on 30th July 2011, the Claimant availed itself of the opportunity provided by the rules to place additional information before the court. Nowhere does Romain state that the information now sought to be placed before the court was not available at that time. From her evidence, however, it can be reasonably inferred that this information was not placed before the court because it was unavailable but rather because she did not look for it.

28. In the circumstances while I am cognisant that there is no time limit on grief, it seems to me that there was sufficient time for Romain to sufficiently come to terms with her husband's death so as to deal with the management of the company or employ someone to do so. More importantly, however, is the admission by Romain that by September 2010 she was meeting with the Defendants on the outstanding claims and in this regard had satisfied the Defendant's request for information and resubmitted copies of the invoices allegedly misplaced by the Defendant.

29. In my opinion therefore it is clear that by September 2010 Romain had not only assumed the mantle of managing the company but was sufficiently familiar with the claims

against the Defendant and the documents in furtherance of these claims to meet and treat on them in a face-to-face meeting and provide whatever information and invoices requested by the Defendant. I find that the explanation proffered that the death of her husband and temporary dislocation of files resulted in the Claimant being unable to make the application by 16th January 2012 is not credible.

30. Further it would seem to me that the decision to pursue an ancillary claim itself would have required the identification and location of all relevant documents over and above those required merely to defend the original claim. This decision would have been made sometime prior to 21st March 2011. It is at this stage that the Claimant ought to have made the necessary enquiries and searches with respect to the claims it wished to make against the Defendant.

31. In any event the first case management conference was not until 16th January 2012. By the 17th October 2011 when the ancillary defence and counterclaim was filed Romain, as the driving force behind the Claimant, would have been aware that the matter was being heavily contested by the Defendant and that the Defendant was in fact claiming that it was the Claimant who owed the Defendant money pursuant to the Cumuto contract and that it had no knowledge of the oral contract relied upon.

32. To my mind even if, given the circumstances of the original claim and the requirements of the rules with respect to time, the Claimant was required to rush to file its ancillary claim the Claimant had almost 10 months to make the necessary amendments to its

claim. In these circumstances it cannot be that the fact that these documents were only discovered because of the order for particulars made on the 1st May 2012 presents a good or reasonable explanation.

33. Even if I were to accept the explanation given by the deponent the particulars which she says triggered the search were filed on 31st May 2012 surely by that time it would have been painfully clear that the information provided did not amount to particulars of the claims in the amended statement of case but in fact amounted to particulars of new claims and that in the circumstances a further change to the statement of case was required. Despite this the application to amend was only made on 27th July 2012. The deponent has failed to provide an explanation for this delay. To my mind it is clear that given the sequence of events this application to change the amended statement of case was only prompted by the applications to dismiss made by the Defendant.

34. Consequently I am satisfied that the Claimant has not provided a good explanation for its failure to make the changes to the statement of case by the 16th of January 2012. For much the same reasons I am not satisfied that this application is made promptly. At the end of the day the reality is that the Claimant is in July 2012 now seeking to re-amend a claim made since 21st March 2011 and doing so in circumstances where the relevant information and documentation would or ought to have been available to her at least by September 2010. By no stretch of the imagination can this application be considered to have been made promptly.

35. In my opinion the Claimant has not satisfied me that there is a good explanation for the change not having been made prior to the first case management conference or that the application was made promptly. In the circumstances the Claimant having failed to meet the threshold required there is in my opinion no need to consider the requirements of Part 20.1(3A). For completeness, however I intend to consider these requirements in relation to the facts of this case.

The application of Part 20.1 (3A)

36. The first stop is, in my opinion, the overriding objective. Part 1.2 of the rules requires me to give effect to the overriding objective when I exercise any discretion given by the rules. In exercising this discretion the overriding objective requires me to deal with the case justly. In this regard "justly" mandates that I look at the application from both sides. From the perspective of an applicant it is important that the real dispute between the parties be identified and adjudicated upon. From a respondent's perspective a respondent is entitled to know at the earliest opportunity the case it is required to meet.

37. The rules require a court to consider all the circumstances including the objectives identified at Part 1.1(2) that is: (a) ensuring, as far as practicable, that the parties are on an equal footing; (b) saving expense; (c) proportionality; (d) expedition; and (e) allotting to the case an appropriate share of the court's resources in the context of the demands made by other cases on these resources. Invariably these objectives require a court to consider conflicting facts and, at the end of the day, engage in a balancing act in order to arrive at what is just. In examining the

criteria set out in Part 20.1(3A) therefore I am required to bear in mind the overriding objective and in particular those considerations that will assist me in dealing with the case justly.

38. In the instant case it is clear that a lot of time and expense has been spent on applications which may not have been necessary had the Claimant properly identified its claims earlier, that is, when the ancillary claim was filed or at least by the first case management conference. In this regard therefore requirement of expedition and allotting to this case an appropriate share of the courts resources militates against the grant of the amendment.

39. On the other hand it cannot be disputed that the re-amended claim is a claim for a large amount of money made by a party who is clearly in a less fortunate financial position than its opponent. That said there is no doubt that this financial disadvantage is not reflected in the quality of the Claimant's legal representation. Neither has it been suggested that this disadvantage has prevented the Claimant from pursuing its claims. In this regard therefore the parties can be said to be as far as is practicable on an equal footing. It is equally clear that the issues to be determined are not complex. Neither can the case be said to be important to anyone else but the parties.

40. With respect to the specific requirements of Part 20.1 (3A) it is clear that the re-amendment will not affect the trial date since no trial date has as yet been fixed. It is as apparent that: (i) the changes have become necessary because of the failure of the Claimant to give full and proper instructions and (ii) while it may be suggested that the change was necessary because of circumstances, that is existence of these documents, which only became known to Romain

after the first case management conference it cannot be seriously submitted that this is as a result of anything but Romain's or rather the Claimant's failure to make a proper search or enquiry. In the circumstances the fact that Romain may not have known of the existence of these documents until the Claimant was required to file the particulars is of no assistance since the blame for such failure falls squarely at the feet of the Claimant.

41. The fact that the Claimant seeks now to amend its original case rather than give particulars of the facts originally certified to be true, to my mind, confirms that the change is factually inconsistent with what was certified by Romain to be true in the amended statement of case. An examination of both pleadings confirms this. With respect to the Cumuto contract, on behalf of the Claimant, Romain certified that the maximum due and owing was $73,168.75. In this regard I use the word maximum because the amended statement of case pleads that this sum was still owing and payable under two contracts, the Cumuto and Wallerfield contracts. With respect to the oral contract Romain certified (a) that the work was done at Production Well #1, Factory Road, Diego Martin and (b) that it was at a total cost of $1,286,144.19. According to the proposed re-amendment neither of these is true. The work was done to a different well and the sum claimed to be due is greater. In the circumstances, it is clear that the amendment sought is factually inconsistent with the facts certified as correct in the amended statement of case.

42. The requirement that I consider the effect on the administration of justice and prejudice to either party requires, however, a more in-depth consideration. In my mind to allow a change which has no chance of success does not accord with a proper administration of justice. Further it is necessary to consider the changes sought in the light of my ruling of the 1st May.

43. In my ruling of the 1st May I was satisfied that in its amended statement of case the Claimant had not provided proper particulars with respect to both contracts and in the circumstances had failed to comply with Part 8.6 of the rules. In accordance with the Court of Appeal decision in **Real Time Systems Limited v Renwar Investments Ltd**[4] I refused to strike out the claim with respect to those two contracts and exercised my discretion to order that the Claimant file particulars of both contracts within a certain time. I have now determined that the particulars purportedly filed pursuant to my order are in fact not particulars of the claim contained in the amended statement of case. By its application to change the amended statement of case the Claimant is seeking in effect yet another bite of the cherry in circumstances where it failed to take advantage of the order for the delivery of particulars made by me. In my opinion this application must be considered against that background.

The Cumuto Contract

44. In addition with respect to the Cumuto contract the real problem is that the application to amend is at odds with my ruling of the 1st May. With respect to this contract the effect of my ruling was that judgement was entered for the Defendant in the sum of $642,686.25 subject only to the determination of whether there ought to be set-off against that sum the sum of $73,168.75 claimed by the Claimant under that contract.

45. In this regard the Claimant submits that judgement on a claim and judgement on a counterclaim in the same action are not mutually exclusive and that, depending on the facts of the particular case, the court may grant judgement on the claim and judgement on the

[4] Civil Appeal No.238 of 2011

counterclaim. Depending on the respective sums claimed it submits one party may well set off the sum awarded for him against the sum awarded against him. While I accept that this submission is sound in law. The difficulty is that insofar as this cause of action, i.e. the Cumuto contract, is concerned there is already a judgement made by me in these proceedings in favour of the Defendant subject only to the question of whether the Claimant is entitled to set-off the sum of $73,168.75.

46. It would seem to me therefore that with respect to the Cumuto contract a situation akin to a cause of action estoppel arises preventing the Claimant from revisiting the Cumuto contract.

> "....."cause of action estoppel' is that which prevents a party to an action from asserting or denying against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, that is, judgement was given on it, it is said to be merged in the judgement....."[5]

47. It would seem to me therefore the effect of allowing such an amendment would be to set aside or ignore the judgement already obtained by the Defendant in these proceedings and fly in the face of my ruling that the only outstanding issue under that contract is whether the Claimant is entitled to set off against the sum of $642,686.25 due to the Defendant the sum of

[5] Per Diplock L.J. in Thoday v Thoday [1964] 1 All ER 341 @352.

$73,168.75 claimed. To allow the Claimant to now amend its claim with respect to the Cumuto contract will in my opinion not only be an abuse of the process of the Court and not in accordance with the proper administration of justice but there can be no doubt that by losing the benefit of the judgement already obtained by it in these proceedings the Defendant will suffer prejudice.

The Oral Contract

48. With respect to the oral contract the Defendant submits that:(a) the work identified as having been done under the oral contract is different from the work actually particularised as having been done. The oral contract refers to work done to Production Well #1, Factory Road, Diego Martin, while the particulars provided deals with work done on Diamond Vale Well#16 by way of a variation of contract WTC 108/2003; and (b) in any event the amendments proposed will not cure some of the problems with the amended statement of case. In this regard the Defendant points to the fact that as pleaded the claim remains incoherent and embarrassing in that: (i) the re-amended statement of case fails to set up the contractual basis for this new claim; (ii) the exhibits are not coherent; (iii) no clear breaches are alleged and consequently no clear connection between the breaches and factual consequences in terms of the damages claimed and (v) the issue of the claim being statute barred arises.

49. I accept that there is a disconnect between the contents of the paragraphs in the proposed re-amendment and the actual exhibits annexed. This, however, is not my main concern. Of greater concern is the obvious difference between the subject matter of the oral contract as

established by paragraph 7A of the amended statement of case and the subject matter of the oral contract in the particulars pleaded in the proposed re-amended statement of case. The proposed re-amendment does not seek to make any change to the existing paragraph 7A save to add the particulars. While not disputing that on the face of the pleading it appears that the particulars refer to a different well the Claimant submits that the well referred to at paragraph 7A, that is Production Well#1, and in the particulars of the re-amended statement of case, that is Diamond Vale #16 are the one and same well. In this regard the Claimant refers to the supplemental affidavit filed by Romain.

50. By her supplemental affidavit Romain states:

> "I say that the well described as well No.1 located at Diamond Vale Industrial Estate, Factory Road, Diego Martin and the well described as Diamond Vale well # 16 are one and the same. This has occurred since at the time of the drilling process the Ancillary Defendant described the well that was being drilled as No.1, Factory Road. This description was used because at that time there was no guarantee that there would be enough water to bring the Well into production. The Ancillary Defendant therefore did not treat this well as an asset. However, when the drilling was completed it was found to be satisfactory. The Ancillary Defendant therefore treated this well as a new asset. When the Ancillary Claimant subsequently turned the said well over to the Ancillary Defendant they named it Diamond Vale Well #16."

51. With due respect to the Claimant this just does not make sense. In the first place Romain is not saying that the well was referred to by two different names at the time of the oral contract. According to her the reference to the well by two different names occurred at different times. It was called Production Well #1 and then some time later Diamond Vale Well #16. As pleaded however the well is being described by reference to an oral contract made at a particular date. If what Romain is saying is correct it is either that at the time of the contract i.e. November-December 2007 the well was referred to as Production Well #1 or Diamond Vale Well # 16.

52. It is clear from both the amended statement of case and the proposed re-amendment that what is being referred to are the terms of the oral contract, that is, the work that was contracted to be done by the said contract. For the well to be one and the same then it would have had to be called by the two names at the same time, that is, at the time of the making of the oral contract but that is not Romain's evidence. Further it would seem to me that the fact that the sums claimed are different also suggests that the Claimant is referring to two different contracts. I do not accept the explanation proffered by Romain.

53. Further as best as I can understand the Claimant's submission in this regard it is that at the appropriate time the Claimant will lead evidence showing that the two wells are the same. It cannot be disputed however that the proposed re-amendment does not make this connection and in the absence of any averment in the pleaded case in this regard the Claimant will be unable to lead such evidence. In these circumstances in so far as the particulars under paragraph 7A of the proposed re-amendment refer to a contract for work on a different well and claim the entitlement to a different sum to that claimed at paragraph 7A therefore I accept the

Ancillary Defendant's submissions that: (i) the particulars provided are in respect to a different well; and (ii) the re- amended statement of claim fails to set up the contractual basis for the claim for monies to be paid for work done to the Diamond Vale Well #16.

54. With respect to the limitation point the proposed re-amendment seeks to claim for works done and for payments due up to the end of June 2008. According to the proposed re - amendment payment of the sum of $474,173.75 was requested on 20th November 2007. This sum was not paid. According to the Claimant monies are also outstanding at a rate of $195,316.00 a month for the months of February to June 2008. With respect to the monthly sums due the Claimant annexes invoices requesting payment dated the 20th of each month for the months of February to April 2008. As well the Claimant annexes invoices all dated 6th June 2008 for each month from February to June 2008. According to the plea these sums, amounting to $976,580.00, are still outstanding.

55. It is not in dispute that the Claimant's cause of action is in contract. In the circumstances the Claimant is required to commence litigation within four years from the accrual of the cause of action[6]. On the facts as pleaded it is also clear that the Claimant's cause of action would have accrued by the 6th June 2012 at the very latest. By the 6th June 2012 therefore all the Claimant's claims under the oral contract as particularised by the proposed re-amendment would have been statute barred.

56. The Claimant however submits that the Defendant's letter dated 24th November

[6] Section 3 of the Limitation of Certain Actions Act Chapter 7:09

2008 expressly or impliedly acknowledges its indebtedness so as to extend the time for bringing the claim. In order to constitute an acknowledgement sufficient to prevent time running the Act provides that the acknowledgement must be in writing and signed by the person or the agent of the person making the acknowledgement and shall be made to the person or to an agent of the person whose claim is being acknowledged.[7]

57. While no particular form is required by the Act the question as to whether the document is or is not an acknowledgement depends on what the document says. The amount of the debt must however be quantified or be capable of ascertainment by calculations or extrinsic evidence without any further agreement between the parties.[8]

58. The letter of 24th November 2008 is addressed to the Claimant and refers to named invoices for wells at Diego Martin and River Estate and is signed by the Acting Manager Programme Development for the Defendant. In this regard therefore it is signed by an agent of the Defendant and made to the Claimant. The letter states:

> "Please be advised that we are unable to process invoices.....dated 6th of June 2008 and 18th August 2008 due to the following:
>
> 1. Submission of Bill of Quantities
> 2. A recommendation of variation form.
>
> The invoices were forwarded to Curtis Crichlow for submission of the necessary documents. Should you require further clarification please

[7] Section 13 of the Limitation of Certain Actions Act Chap. 7:09
[8] Halsburys Laws of England, fourth edition, volume 28, paragraph 881 and 882.

contact the undersigned at..... We apologise for any inconvenience caused".

59. In support of its submissions that this letter amounts to an acknowledgement the Claimant relied on statements made by Diplock L.J. in the case of **Dungate v Dungate**[9] in which, he says that there is clear authority, that the acknowledgement under the Limitation Act 1939 need not identify the amount of the debt and may acknowledge a general indebtedness provided that the amount of the debt can be ascertained by extraneous evidence.

60. In fact what was said by Lord Diplock is in accordance with the Halsbury's referred to above. The acknowledgement need not identify the amount of the debt and will be sufficient if the amount **for which the writer accepts legal liability** can be ascertained by extrinsic evidence. There is no plea or allegation in the proposed re-amendment that the Defendant ever accepted that it owed the Claimant any money nor is there any admission by the Defendant in this regard. In those circumstances the question of ascertaining the amount accepted by the Defendant by extrinsic evidence does not arise.

61. The Claimant also relies on the case of **Bradford and Bingley plc v Rashid (FC)**[10]**.** In that case references in two letters to "the outstanding balance" and "the outstanding amount" were found to be an admission of the debt sufficient to found

[9] [1965] 3All E.R. 818
[10] (2006)UKHL 37.

an acknowledgement pursuant to the relevant limitation act. In my view, from a comparison of the letters in that case with that of the instant case it is clear that the Bradford case is distinguishable on the facts.

62. There is no general acknowledgement or admission of a debt to be found in the letter of the 24th November 2008. It is clear to me that this letter does no more than advise that the Defendant has been unable to process certain invoices and requires the Claimant to submit the necessary documentation before it could consider its claim. There is no reference is made to the monies claimed and certainly no acknowledgement of a debt, outstanding balance or amount owed to the Claimant. In this regard I accept the Defendant's submissions that at best the letter amounts to a request for documents in order to validate a claim made. It suggests a willingness to consider the claim if the relevant documents are provided rather than an admission of a debt. In my opinion, this letter does not amount to an acknowledgement within the meaning of the Act.

63. It seems to me therefore that in circumstances where on the face of the amendment sought the claim is statute barred to permit the Claimant to amend its statement of case to include such a claim is contrary to the administration of justice, which requires a party to prosecute its claim, if based on contract, within four years of the accrual of the cause of action. Further, particularly in circumstances where the Defendant has raised the plea of limitation, to allow such an amendment will also be prejudicial to the Defendant who if the amendment is allowed would be then be required to respond to the pleading by way of an amended defence and then take the point once again. This prejudice in my view cannot be compensated for in costs.

64. I accept that the rule requires me to consider prejudice to both sides. In engaging in the balancing act required is clear to me however that with respect to the change sought to paragraph 7A to plead particulars in the all the circumstances as outlined above it is more prejudicial to the Defendant for the re-amendment sought to be granted than to the Claimant should the re-amendment not be granted. To my mind for the reasons adduced this proposed re-amendment will not assist the Claimant.

65. Accordingly I am satisfied that to allow the Defendant to re-amend its statement of case in the terms of the draft filed will be contrary to the administration of justice and prejudicial to the Defendant. In all the circumstances of the case therefore, and bearing in mind both the overriding objective and the considerations raised in Part 20.1 (3A), I am of the opinion that the amendment ought not to be allowed.

66. At the end of the day therefore the particulars filed by the Claimant on the 31st of May 2012 are all struck out except paragraph (vi) under the heading "as regards the Cumuto contract". In the circumstances, it would seem to me that the Claimant has been given the opportunity to provide further and better particulars of its claim pursuant to both contracts but has failed to do so. The only pleaded fact, paragraph (vi) of the particulars of the Cumuto contract, which survives my order striking out does not assist the Claimant in that as it stands paragraph 7 of the amended statement of case fails to particularise the work done under the contract or the facts upon which the Claimant relies to establish its conclusion that the sum claimed is due to it. Accordingly, paragraph 7 and paragraph 7A of the amended statement of case are struck out. Consequently also struck out are the reliefs sought at paragraphs 30 (c) and

(c)(i) of the amended statement of case. For the reasons stated herein the application to re-amend the statement of case is refused.

Dated this 14th day of November, 2012.

.....
Judith Jones
Judge