IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-04344

BETWEEN

KERRON HUTCHINSON

Claimant

AND

NU-IRON UNLIMITED

Defendant

****

Before: Master Alexander

Delivery date: **April 30, 2019**

Appearances:

For the claimant: Mr Yuri Saunders instructed by Mr Andre Rudder

For the defendant: Mr Shankar Bidaisee instructed by Ms Rachael Jaggernauth

DECISION

1. The defendant sought by notice of application filed on September 28, 2018 to strike out paragraph 4 of the claimant's reply or alternatively, permission to file and serve a rejoinder in response to the said paragraph 4. The application was supported by the affidavit of Rachael Jaggernauth filed and sworn on even date. The claimant filed an affidavit in opposition to this application by Andre Rudder (the Rudder affidavit) on October 01, 2018.

FACTS

2. The claimant alleged that on December 01, 2013, while he was acting in the course of his employment, he fell from a ladder platform and injured his ankle.

The defendant denied the circumstances resulting in the claimant's injury and averred that, at the material time, the claimant had stepped off the ladder onto a hose that was lying at the base of the ladder, and thereby sustained injury to his ankle. The claimant filed his claim on November 30, 2017, in which he alleged inability to find alternative employment because of his disability and, in response, the defendant filed its defence on February 15, 2018. By its defence, the defendant refuted the claim that the claimant was unable to find employment, averring instead that it had offered suitable alternative employment. Subsequently, with the permission of Rahim J at a case management conference, the claimant filed a reply on April 18, 2018. Thereafter, parties settled the issue of liability on a contributory basis and the issue of quantum was sent to this court.

3. The application to strike out or alternatively permit service of a rejoinder came at the assessment. At the bedrock of this application was the shifting reasons, advanced by the claimant, in support of the plea that he was unable to find alternative employment. The initial plea by the claimant that he could not find alternative work because of his disability was set out in his statement of case at paragraph 8(e). The defendant responded to this allegation in its defence to wit that, to the contrary, it had offered suitable alternative employment to the claimant directly and through his attorney by letters dated April 21, 2016 and April 27, 2016 respectively. Neither the claimant nor his attorney responded to the letters. Then in his reply filed on April 18, 2018, the claimant responded to the defence that he had not accepted the defendant's offer of alternative employment because of a lack of trust. The reply stated specifically that, "*his prior experience with the Defendant and Dr. Maharaj had demonstrated that they could not be trusted to act in his best interests in such matters.*"

4. The defendant pointed out that this was the first time the issue of lack of trust in the defendant and/or Dr Maharaj's actions arose in any pleading. It was not set out and/or never arose in the statement of case, although the claimant was fully aware at that time that a suitable alternative position had been offered to him by the defendant, prior to the filing of his claim. The defendant, therefore, had no opportunity to respond to this in its defence and when the reply was filed, parties pursued settlement without addressing this issue at liability. As it was a critical issue for the assessment, the defendant filed its application to have it disposed of by this court.

CLAIMANT'S CASE

5. The claimant opposed the current application on four principal grounds viz:
   a) pleadings were closed;
   b) the issue as to paragraph 4 of the claimant's reply never arose during negotiations;
   c) the defendant's application was now too late in time; and
   d) no prejudice would accrue to the defendant, as matters likely to be contained in the rejoinder could be dealt with during cross-examination.

DEFENDANT'S CASE

(a) STRIKING OUT APPLICATION

6. The defendant sought first to have the offending paragraph 4 in the reply, containing the allegation of lack of trust, struck out by this court. It pointed out that the court has the power under Part 26.2(1)(a) CPR to strike out a statement of case[1] or part thereof, if there is failure to comply *inter alia*, with a rule. Implied was that the claimant might have been in breach of the rule as to the purpose of the reply, which would be employed only where matters raised in a defence

[1] Part 2.3 CPR defines a statement of case to include a defence and reply.

required a response. The defendant sought in its submissions to impress upon this court that the allegation of lack of trust was a new and material averment, and it sufficed to have the offending paragraph 4 struck out or for permission to serve a rejoinder allowed.

7. The learning was clear that the reply should not be filed in a bid to expand upon or bolster allegations made previously in a statement of case[2]. It existed solely to deal disjunctively with matters, which could not have been dealt with in the claim, but which once raised in the defence required a response[3]. If a defence raised an issue with a fact set out in the claim, and the claimant accepted that it was stated incorrectly in his claim, then the proper course would be to amend the statement of case and not deal with it in his reply[4]. Where the reply raised new particulars, not previously set out in the claimant's statement of case, an application to strike out parts of the reply would be allowed, even if it came after compliance with standard disclosure and statement of issues[5]. In ***Mayfair Knitting (Trinidad) Limited* v *McFarlane's Design Studios Limited***[6], the claimant sought permission to file a reply to a particular paragraph of the defence, to provide information that should have been pleaded in the statement of case. The defendant objected to the contents of a paragraph in the draft reply being allowed in, on the basis that it was "tantamount to it (the claimant) getting a second bite of the cherry or to get information into consideration through the back door." Pemberton J (as she then was) allowed the claimant to file the reply, but not in terms of the draft reply, since the information should have been pleaded in the statement of case. She also granted permission to the defendant

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[2] *Jermaine Raymer* v *Lex Caribbean* CV2015-01621

[3] Blackstone's Civil Practice 2018 page 208 paragraph 27.2

[4] Blackstone's

[5] *Continental Corporation Ltd* v *North Plant LPG Co-operative Society Ltd* CV2015-02802 where des Vignes J (as he then was) allowed a notice to strike out parts of a reply eight months after the reply was filed and just prior to compliance with directions for witness statements.

[6] *Mayfair Knitting (Trinidad) Limited* v *McFarlane's Design Studios Limited* CV2007-002865

to file a rejoinder, so as to ensure that the defendant had an opportunity to respond to the claimant's reply. Of note was that in ***Mayfair*** the permission for the rejoinder was given during a case management conference, at the liability stage, and not as in the present matter, where liability was already determined. Of note also was that the general plea of inability to find alternative employment was set out in the statement of case, but it was the reasons for this claim that allegedly were "altered" or expanded upon in the reply.

8. The issue in contention was whether at this stage and in the circumstances where the offending part of the reply was not pleaded in the statement of case but in the reply, the application to strike out or for a rejoinder should be allowed? In the view of this court, this issue ideally should have been addressed at liability, but as it critically affected the issue of quantum, it should be allowed to be ventilated in the interest of justice. In the present matter, the claimant advanced two distinct reasons for not accepting the alternative employment offered by the defendant. First, his refusal was linked to his disability, in his statement of case, and secondly, to his lack of trust in the defendant, in his reply. The defendant submitted that a non-acceptance of an offer of alternative employment was a fundamental averment and that the claimant was duty bound to plead and particularize it in setting out his mitigation of losses. In further submissions, the defendant argued that as the claimant's claim was for damages, which he had a duty to mitigate, he should have set out the allegation of lack of trust in his claim, particularly as the offer of suitable alternative employment came prior to the filing of the statement of case. The claimant's non-acceptance of this offer because of a lack of trust should not have been raised for the first time in the reply. This averment was an important issue when assessing the quantum of damages. By introducing this second/different reason for the non-acceptance of the alternative employment in the reply, he denied the defendant an opportunity to respond in its defence to this issue.

9. Further, the defendant submitted that by failing to properly plead these facts in his claim, the claimant was not in compliance with Part 8.6(1) of the CPR so this court was now empowered by Part 26.2(1)(a) of the CPR to strike out paragraph 4 of the claimant's reply. The defendant alleged that it would be prejudiced and its case negatively impacted if its application to strike out was not granted and/or it was denied an opportunity to file a rejoinder. In effect, should this court rule against it, the defendant would not be able to respond positively to the claimant's lack of trust allegation in its witness statement at the assessment stage. It was advanced further that to allow paragraph 4 in the reply to stand would be essentially to afford the claimant a "second bite of the cherry" in relation to his pleadings. Thus, this court seriously considered whether paragraph 4 afforded the claimant an opportunity to restate, expand, buttress or clarify his case and so denied the defendant a response.

10. In the view of this court, the defence advanced a full and proper case to the plea of inability to find alternative employment, by stating that to the contrary the claimant was offered suitable alternative employment with it. The issue of disability creating a challenge for the claimant to find alternative employment was answered in the defence. The court, therefore, examined the different reason advanced in reply to the defence to see if this materially affected the plea of inability to find suitable employment and required a further response from the defendant. It was felt that by offering the reason of lack of trust, the claimant was replying to the defendant's case that he had not accepted a suitable offer of employment. In so doing, the claimant tacitly was acknowledging and conceding that an offer of suitable alternative employment was made to him, despite his disability. He sought in answer to the claim in the defence to clarify that this offer was rejected for a specific reason. This might have rendered as nugatory

or jeopardized his plea of inability to find alternative employment, in terms of its ability to stand untouched, but did not change his plea.

11. The claimant then sought to advance in submissions that there was no inconsistency in its pleadings, as the reasons of "disability" and "lack of trust" in the defendant were not inherently contradictory. The claimant was unable to find alternative employment because of his disability and the defendant's offer was not viable, given that he could not trust the defendant and its doctor. This court considered whether the different versions averred to by the claimant for inability to find alternative employment amounted to a double "bite of the cherry" in terms of his pleadings. As a corollary, it considered if the different versions for claiming inability to get employment gave a distinct advantage, at the stage of the reply, to the claimant. It considered whether by raising lack of trust in the reply, which went to his state of mind, this operated to deny the defendant an opportunity to respond in its defence to this different fact now being alleged for his refusal of the alternative offer of employment. This court felt that the claimant was providing an answer to a specific issue raised in the defence, not changing his plea of inability to find alternative employment as set out in his claim, nor launching a defence to the defendant's defence. The purpose of a reply was not to provide a claimant with an opportunity to restate his claim but to respond to a fact raised in a defence, without crossing into evidentiary issue. A reply, therefore, should never be drafted as a 'defence to the defence'[7]." Was the reason advanced for the non-acceptance of the defendant's offer of alternative employment a response to a claim raised in the defence or something that should have been dealt with in the statement of case, so that the defendant would have had an opportunity to address this in its defence? The rule was clear that the reply could only be filed to respond to

[7] Blackstone's

matters raised in the defence that should not have been dealt with in the statement of case. This court viewed the plea of inability to find alternative employment as critical to set out in the statement of case. This material averment was incorporated in the claim, but it was linked only to his disability. In the view of this court, the issue of lack of trust in the defendant and its doctor, provided a further explanation as to why the claimant remained unemployed. But this explanation was specific to the defence that he had failed to accept the defendant's offer of employment. The different reasons advanced in support of the claim of inability to find alternative employment failed to qualify as the provision of "a second bite of the cherry". That plea was neither withdrawn nor upset by the allegation in paragraph 4 and remained the case the defendant still had to answer. The reason in the reply would not bar the defendant from testing in cross-examination the claim of inability to find alternative employment, and the credibility of any responses given by the claimant.

12. The defendant also raised the issue of an abuse of process should the new or distinct allegation in the reply be allowed to stand untouched, as it had no opportunity to respond to it in its defence. It submitted that under the inherent jurisdiction of the court or **Part 26.2(1)(a) CPR**, paragraph 4 of the claimant's reply ought to be struck out. This court accepted that a distinct explanation was provided in answer to the defence that the defendant had offered alternative employment, and that the claimant was allowed to so reply. In this context, the issue of abuse of process was not sustainable, and, particularly more so as no step was taken at liability to have the offending paragraph 4 of the reply struck out. The application to strike out would not be allowed.

(b) REJOINDER

13. Alternatively, the defendant sought permission to serve a rejoinder in response to the allegations made in paragraph 4 of the reply. In this jurisdiction, the rules

do not explicitly contemplate service of a rejoinder and there is limited precedent of same. For this alternative request, the defendant relied on a statement in ***Regal Films Corp (1941) Limited* v *Glens Falls Insurance Co***[8] as to when a rejoinder should be permitted. ***Regal*** stated that leave to deliver a rejoinder should only be granted in exceptional circumstances, where there is good cause shown, and where the reply introduces new and important matters. In ***Toronto (City) Non-Profit Housing Corporation* v *Toronto Electric Commission***[9] a three-pronged test to determine if permission to file a rejoinder should be allowed was set out. This test required proof that (i) the reply introduced some new and important matter; (ii) the event occurred subsequent to the loss in respect of which the action was brought; and (iii) it would be unreasonable to conclude that the defendant should have anticipated such a matter and pleaded it in its defence. Subsequently, this test was challenged as being the viable test for permitting a rejoinder in ***Green* v *Green***[10]. In ***Green***, the applicable test for delivery of a rejoinder was: (i) proof that the reply introduced new and important matters, such as new pleas and events subsequent to the loss in question and (ii) proof that it would be unreasonable to conclude that the defendant should have anticipated such pleas and events, and so pleaded them in its defence. The concepts of "new" and "important" as used in this legal context were defined to mean distinctive things. New meant "*an entirely new set of facts justifying the existing claimed relief*" and important referred to something that could "*potentially jeopardize or prejudice the defendant's case, procedurally or substantively*".

[8] *Regal Films Corp (1941) Limited* v *Glens Falls Insurance Co* (1945) OWN 130
[9] *Toronto (City) Non-Profit Housing Corporation* v *Toronto Electric Commission* (1986) 7 CPC (2d) 305 per Master Clark
[10] *Green* v *Green* (2013) ONSC 5164 per Master Wiebe

14. Counsel for the defendant argued that while the CPR does not provide for the filing of a rejoinder, the court might nevertheless give permission for this under its inherent jurisdiction. In support of this, counsel pointed to ***Mayfair*** where Pemberton J granted permission for delivery of a rejoinder. In the view of this court, the circumstances for the grant of the rejoinder in ***Mayfair*** are distinguishable from the present matter. It dealt with whether a reply should be allowed to a certain paragraph in the defence, and the defendant was permitted a rejoinder. The undergirding conditions for the application in ***Mayfair*** and, even the stage reached in the proceedings, were dissimilar to the present matter.

RESPONSE TO THE REJOINDER

15. Counsel for the claimant submitted that the application was misconceived and, as no objection was taken to the reply, it should be struck out. The Rudder affidavit averred that first it was common knowledge that the reply would specifically address the issue of suitable alternative employment raised in the defence . Yet objection was not taken when permission was given or when it was served or at any point during the liability stage. The court was asked to deem this non-action by the defendant as significant, as the defendant was at all times in negotiations with the claimant to settle liability. Secondly, the claimant's position that the application should not be allowed was tethered firmly on the argument as to the impropriety of revisiting the pleadings at this stage, and more particularly where a consent order was entered on liability. Pleadings having been closed since April 18, 2018, it was not now permissible to re-open it via this application, as it had progressed to disclosure based on the pleadings.

16. Thirdly, the claimant denied the existence of any inconsistency between the statement of case and the reply. In a rather ingenious argument, counsel for the claimant posited that the defendant's submissions were misplaced , as there was no new plea advanced in the reply. In fact, counsel argued that the reply was

merely the answer to the defendant's plea of failure to mitigate, and that it was the claimant who was taken by surprise by this allegation that a rejoinder was necessary. Moreover, the defendant could not rely on ***Green*** to get permission to file a rejoinder, as the first limb of that test was that the reply must introduce new and important matters, such as new pleas and events subsequent to the loss in question. The claimant's reply to the defendant's allegation of failure to mitigate was not a "new matter". It was in fact a response to a matter raised by the defendant itself, which portrayed the state of mind of the claimant at the relevant time. In support of this argument, counsel for the claimant pointed to ***Geest Plc v Lansiquot***[11] which settled the law that it was the claimant who has the prerogative to reply to the substance of a plea of failure to mitigate. The defendant has no right to a rejoinder to the claimant's response or an inevitable circle of rejoinders/replies will result. Counsel for the claimant firmly submitted that paragraph 4 of the reply does not constitute a departure from the claimant's pleaded case of inability to find alternative employment. Paragraph 4 of the reply had not change that pleading, but clarified that the offer of alleged alternative employment by the defendant was not viable, which was why it was ignored. The claimant thus provided the reason for the defendant's offer being unworkable, which was a lack of trust. The allegations in the reply and statement of case were thus entirely consistent.

17. Fourthly, counsel submitted that the protracted length of time taken by the defendant to raise the issue with the reply and the fact that pleadings were closed should cause this court to be disinclined to revisiting the pleadings. Further, the matter had progressed some distance on the understanding that the state of the pleadings would not change, so any attempt by the defendant to alter this would be to upset the consent order. Counsel was insistent that a

[11] *Geest Plc v Lansiquot* [2002] UKPC 48

revisiting of the pleadings would upset the consent order, negotiated and entered into with full knowledge of the content of paragraph 4 of the reply, and on the understanding the evidence to be led at the assessment was defined by the pleadings as at July 3, 2018 in the statement of case and/or reply. If paragraph 4 of the reply was struck off or a rejoinder allowed then the evidence to be led at the assessment would change significantly. Thus, the claimant would be required to meet a different case at assessment to the one he had compromised at liability. In support of this argument, he relied on ***Augustine Prime* v *The AG***[12] where Mohammed M (as she then was) stated that the appropriate time for a claimant to make an application to challenge a defendant's ability to lead any positive evidence or cross-examine the claimant on liability or quantum was prior to the receipt of such evidence. Counsel pointed out that it would be unfair to the claimant who had compromised his case on liability, on the belief that the nature of the evidence to be led at the assessment was set by the terms in the order to now have an expanded case to meet. It was submitted that the defendant could probe the issue of lack of trust during cross-examination, without the need to alter the pleadings at this stage. There was, therefore, no need to strike out paragraph 4 or serve a rejoinder to it, there being no inconsistency between the reply and statement of case and pleadings were closed. Thus, the Rudder affidavit averred that the defendant would suffer no prejudice, as it retained its rights to probe the issue of failure to mitigate during cross-examination, which will go to the claimant's credibility.

DISCUSSION

18. This court considered and agreed with the argument of counsel for the claimant that the allegation of lack of trust in paragraph 4 of the reply provided a response to the defence of mitigation, in the form of a specific reason for the non-

[12] *Augustine Prime* v *The AG* CV2006-01057

acceptance of the defendant's offer of employment. It did not change his plea of inability to find work due to his disability. It was a direct answer or response to the defendant's claim that it had offered suitable alternative employment, but got no response. While this reason for the non-consideration of the defendant's offer was not set out in the statement of case, it was not an entirely new matter that was being pleaded in the reply. There was an existing claim for inability to find work, which was previously pleaded in his statement of case, and for which damages would likely be pursued at the assessment. At that point, the claimant was required to prove his claim that he was unable to find alternative employment. He would have to satisfy this court as to the reasons for this claim. A defence in mitigation having been set out to the plea of inability to find employment, it was open during the cross-examination of the claimant at the assessment for the defendant to probe this claim and to file its witness statements evidencing its offer of suitable employment to the claimant. It would be left to the claimant to convince this court as to why he could not have or had failed to mitigate his losses, and to justify his allegation of lack of trust. To allow parties to revisit the pleadings at this stage was felt unnecessary because mitigation was a viable defence before the court. It was an issue of evidence to be advanced to show whether it was reasonable for him not to mitigate or accept the offer of alternative employment claimed in the defence. In effect, paragraph 4 of the reply does not derogate from the claimant's duty to prove this loss.

19. This court was of the view further that the allegation of lack of trust failed to qualify as a new or important issue or event under ***Green***, and that it was incapable of jeopardizing, whether procedurally or substantively, the defendant's case on mitigation. The defence having been raised and evidence of letters offering suitable alternative employment being available in support, the claimant would have to satisfy this court as to why he had rejected the offer or that his plea of being unable to find alternative employment could stand in the

face of a clear offer of suitable employment by the defendant. Further, the issue of whether the defendant could have reasonably anticipated the lack of trust allegation so as to respond to it in its defence does not arise. The defence raised the issue of mitigation, supported by an allegation that it had offered suitable employment and the claimant would have to satisfy this court as to whether it was reasonable of him to reject that offer. It puts in issue also his plea that he was unable to find work because of his disability, when despite this claim an offer of employment was on the table.

20. In the view of this court, the defendant's submissions on the allegation of lack of trust warranting a substantive response by way of rejoinder or that it would be severely prejudiced were not accepted by this court. There was a defence of mitigation raised that would allow it to test the evidence and credibility of the claimant on this point. Further, this court accepted the defendant's submissions that the explanation of lack of trust in the defendant and its doctor was disclosed for the first time in the reply. It also accepted that the defendant could not reasonably have anticipated that the claimant would raise this to justify his non-response to the offer of suitable alternative employment, but it was unable to find that there was any prejudice made out. In fact, the reply confirmed the defence of failure to mitigate. It confirmed also that the defendant was given no response to its offer of alternative employment, so could not address same in its defence. At this stage, it remained for the claimant to prove, by credible evidence led, the damage and loss he suffered. By raising lack of trust in his reply, the claimant was not shielded from having to prove his case or justifying his failure to mitigate. In the circumstances, this court could find no prejudice made out as against the defendant in not being allowed to serve a rejoinder, as it has an opportunity to cross-examine the claimant on mitigation, and the reasonableness of his failure to so do.

21. Further, the defendant took no issue with the reply at the liability stage and prior to the close of pleadings. Having failed to raise an objection then, it cannot now claim prejudice in being denied an opportunity to respond, when with full knowledge and sight of the reply it settled liability. In any event, the parameters of the case were defined at liability and there was no new plea advanced in the reply that justified service of a rejoinder. This court was unable to accept the defendant's argument that unless a rejoinder was allowed at this stage, the defendant would have no response or could lead no rebuttal evidence at the assessment against the unreasonableness of claiming lack of trust. Further, while lack of trust was raised in the reply, it was not a departure from the claimant's pleaded case of inability to source alternative employment. This court found that it was not in the interest of justice to revisit closed pleadings to serve a rejoinder, as no prejudice to the defendant was made out and as its defence of mitigation remained untouched. Further, the more appropriate time for a challenge to paragraph 4 of the reply would have been after it was served or prior to the close of pleadings, during the liability stage. It was felt that the further reason for not finding alternative employment was not a new claim but a response to mitigation raised in the defence. This court could find no prejudice to the defendant in refusing its application to serve a rejoinder to address lack of trust in the offer for suitable alternative employment. For these reasons, this court was not prepared to give permission for a rejoinder to be served.

ORDER

22. It is ordered that the defendant's notice of application filed on September 28, 2018 is dismissed. I will hear attorneys on the issue of costs of the application.

Martha Alexander

Master