

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

**CV 2009-02074
(Formerly 1553/2005)**

BETWEEN

PAUL GUERRA

Claimant

AND

DELTA LOGISTICS LTD

Defendant

Before: Master Margaret Y Mohammed

Appearances:

Mr Shastri A Roberts for the Claimant

Mr Ravi Nanga instructed by Ms J Mohomed for the Defendant.

DECISION

THE PROCEEDINGS

1. Before me is the defendant's application filed on October 18, 2010 for permission to amend its defence pursuant to Part 20.1 (2) of the Civil Proceedings Rules ("the CPR"). The application was filed the day before the hearing of the fourth case management conference ("the CMC"). The defendant filed 2 affidavits of Alana Bissessar on October

18, 2010 (“the AB 1 affidavit”), and on April 14, 2011 (“the AB 2 affidavit”) in support of its application. In opposition is the affidavit of the claimant filed on March 20, 2011 (“the PG affidavit”).

2. To place the application in context, it is necessary at this point to briefly relate the history of this matter. This action was initiated by the claimant on June 29, 2005 under the Rules of the Supreme Court (“the RSC”) whereby he claimed damages for “severe injuries” sustained during the course of his employment due to the negligence and/breach of statutory duty by the defendant from an accident which occurred on May 14, 2002 aboard the MV Seacor Venture .
3. The statement of claim was filed on October 4, 2005 and served on October 6, 2005. An extension of time was granted by the claimant to the defendant to file its defence within 21 days from October 20 ,2005. On November 7, 2005 the defendant requested another extension of time to file its defence by 14 days but in the absence of a response on November 9, 2005 the defendant made a formal application for the said extension of time.
4. On December 6, 2005 before Master Paray-Durity both parties entered a consent order extending time for the defendant to file its defence to December 19, 2005. On December 16, 2005 the defendant filed its defence some 2 months after the defence was originally due. Pursuant to the provisions of the RSC, pleadings having closed, the action was set down on the general list of cases by the claimant on March 31, 2009 .
5. By notice dated June 10, 2009 the action was transferred to the CPR, a new case number was assigned and the first CMC was scheduled before the said Master for September 17, 2009. I will later revisit this event.
6. There were 3 hearings of the CMC before the defendant filed the instant application. They were on September 17, 2009, January 18, 2010 and May 4, 2010. At the first 2

hearings directions were given for the parties to file the list and bundle of documents and statements of issues and facts.

7. The original paragraph 4 of the defence did not admit the injuries, loss and damage allegedly suffered by the claimant. The proposed amendment¹ inserts one new paragraph and now alleges that the defendant was not present at work on May 14, 2002, he was not aboard the vessel on the said date and there were no accidents on the said vessel on the day in question. In essence it changes the nature of the defendant's case at this stage.

THE EVIDENCE

8. The reasons advanced by the defendant for making the application at that stage are contained in the AB 1 affidavit and AB 2 affidavit namely:

(a) On December 15, 2005 the defendant's attorney received information which indicated that the claimant had completed his tour of duty on the vessel on April 29, 2002 and resumed on May 27, 2002. However, none of the vessel logs submitted was in respect of the date of the alleged accident, May 14, 2002². In the absence of this information a defence was filed on December 16, 2005³ without reference to this information.

(b) In preparation for the first CMC the defendant's attorney wrote to her client on August 20, 2009 requesting a copy of the said vessel log.⁴

¹ AB 1 affidavit exhibit A.B.14

² AB 1 affidavit para 13

³ AB 1 affidavit para 14

⁴ AB 1 affidavit para 16

(c) The vessel log for May 14, 2002 was only received by the defendant's attorney around April, 2010 when the defendant's list and bundle of documents were being prepared.⁵

(d) Between April to October 2010 instructing attorney for the defendant was involved in several trials and other matters with pressing deadlines for witness statements and was not able to review the file to make the application to amend the defence until October 2010.⁶

9. The claimant's response in opposition to the application are set out in the PG affidavit namely:

(a) The documents in support of the defendant's instant application revealed that since December 2005 the defendant's attorney had a faxed copy of the vessel log for May 14, 2002.⁷

(b) The defendant's list of documents filed on April 30, 2010 disclosed the vessel log for May 14, 2002.⁸

(c) The defendant's intention to amend its defence was only brought to the claimant's attention on May 4, 2010 at the hearing of the third CMC.⁹

(d) The formal application by the defendant to amend its defence was served on October 18, 2010 the day before the fourth hearing of the CMC.¹⁰

⁵ AB 1 affidavit para 17

⁶ AB 2 affidavit para 5

⁷ PG affidavit para 10

⁸ PG affidavit para 10

⁹ PG affidavit para 8

¹⁰ PG affidavit para 9

- (e) The claimant has complied with all the directions given by the court at the CMC stage namely the list and bundle of documents were filed on November 30, 2009, the supplemental list, bundle of documents, unagreed statement of facts and issues were all filed on April 19, 2010.¹¹
- (f) The defendant to date has filed its list and bundle of documents on April 30, 2010 but has failed to file its statement of facts and issues.¹²

THE ISSUE

10. The issue which I am called to determine is whether the receipt of the vessel log for May 14, 2002 by the defendant in April 2010 is a “change in circumstance” which became “known to the defendant” after the first CMC.

THE LAW AND ANALYSIS

11. Both parties agreed in their submissions that the judgment of Sir John Dyson SCJ in **Charmaine Bernard v Ramesh Seebalack**¹³ has settled the position with respect to the inflexible interpretation of Part 20.1(3) CPR in this jurisdiction. It is common knowledge that Part 2 CPR includes “defence” in the definition of “statement of case”. Part 20.1(3) CPR sets out the condition which must be satisfied for the court to grant permission to amend a “statement of case” namely the “change is necessary because of some change in circumstances” which “became known” to the party making the application” after the first CMC”.
12. Part 10.5 CPR directs a defendant on the requirements which it must satisfy in filing its defence and Part 10.6 relates to the consequences for not setting out a defence. According to 10.6 (2) the court can still grant permission at the CMC for a defendant to

¹¹ PG affidavit para 6

¹² PG affidavit para 7

¹³ (2010) UKPC 15

rely on allegations not pleaded in its defence, however such permission cannot be given unless the defendant can satisfy the court that there has been a “significant change in circumstances which became known after the date of the CMC”¹⁴.

13. Pemberton J in **Rajesh Chitta v Point Lisas Industrial Port Development Corp. Ltd**¹⁵ was of the view that Part 10.6 is “to be read in conjunction with Part 20.1(3)” and that such interpretation would therefore mean that the CMC referred to in 10.6 was the first CMC and that a defendant has “a higher threshold to meet” for an amendment to be granted. It was undisputed by the parties that the instant application was made on the eve of the fourth CMC.

14. I pause at this juncture to make some comments which relate to the conduct of “hybrid” matters. This matter is what is often referred to as a “hybrid matter” since it was initiated and set down for trial following the RSC. However, since it was set down for trial after the date of the commencement of the CPR¹⁶, the transitional provisions Part 80.3 (1) (a) CPR applied. As a consequence a notice was issued by the court office on June 10 2009. This notice provides some important pieces of information for both parties. It contains the CPR case number which the Court Office has assigned to the matter, the next event in this matter which is the CMC, the judicial officer who will have conduct of the CMC and the date, time, courtroom and time allocated for the conduct of the CMC. The time period between the date of the notice and the date of the CMC has varied but it has not been any period less than 8 weeks. In the hybrid cases this is the first CMC. In this case there was an interval of 3 months from the date of the notice to the first hearing of the CMC.

15. Upon receipt of this notice, it is reasonable to assume that the attorney on record for a party ought to take certain steps in preparation for the CMC for example:

¹⁴ CPR Part 10.6 (3)

¹⁵ CV 2008-03628

¹⁶ September 16,2005

- (a) Review the documents filed in this matter, in particular the pleadings.
- (b) Contact his/her client to inform him/her of the scheduled CMC.
- (c) Enquire about any change in developments since the matter went into hibernation when it was set down for trial.
- (d) Review the provisions of Part 25 and 26 CPR and commence preparation for the CMC by identifying the issues, considering the time frame required to filing witness statements, list and bundle of documents.
- (e) Contact the attorney for the defendant to explore the settlement options.
- (f) Examine which regime of costs would be applicable to this matter i.e. the RSC or CPR.

It appears to me that this is the “proactive” approach to civil litigation by attorneys which the CPR mandates and parties should take note that any amendment to the pleadings can easily be done without permission of the court before the first CMC.

16. In light of the aforesaid expectation, there are several areas in the defendant’s evidence¹⁷ which concern me namely:

- (a) After the request for the said vessel log was made on August 20, 2009, what efforts did the defendant’s attorney or anyone from her office make to follow up with the defendant in order to ensure that the said log was received before September 17, 2009, the date of the first CMC.
- (b) Why didn’t the attorney or someone in her office call Mr Walcott and request him to have the said vessel log faxed to her office.

¹⁷ AB 1 affidavit and AB 2 affidavit

(c) If the attorney was actively pursuing the receipt of the said log why didn't she alert the claimant's attorney of the intention to amend its defence long before the first CMC and not wait until after the third CMC.

(d) After the receipt of the log in April 2010, at least 4 and 1/2 years after the defendant's became aware of its existence why did it take the defendant at least 6 months after receipt to file the instant application.

17. The Court of Appeal has repeatedly commented on the reason for the strict timelines of the CPR which is intended to bring about a positive change in the manner in which civil litigation is conducted in this jurisdiction¹⁸. The approach set out aforesaid is the expectation of the courts in this jurisdiction whether the matter was initiated under the CPR or "converted" from the RSC to the CPR. Jamadar JA in the well known case of **Trincan Oil Ltd v Keith Schnake**¹⁹ at paragraph 38 encapsulated the Court of Appeal's position when he said:

" The timelines in the CPR, 1998 are fair and are to be strictly complied with. The failure to do so without good reason and/or to act promptly to remedy any default can have serious consequences, especially at this time in Trinidad and Tobago when the civil litigation system is suffering the consequences of a laissez-faire approach to the conduct of civil litigation which is undermining public trust and confidence in the administration of justice."

18. There is no expressed provision in the CPR in Part 10.6 or Part 20.1(3) with respect to a time period within which such applications ought to be made. However, it is not unreasonable for me to infer that an application for an amendment ought to be made

¹⁸ Civ App. 91 of 2009 Trincan Oil Limited v Keith Schnake; Civ Appeal 65 of 2009 Trincan Oil Ltd v Chris Martin; Civ Appeal 158 of 2009 Andrew Khanhai v Darryl Cyrus and anor.; Civ Appeal 104 of 2009 The AG v Universal Projects.

¹⁹ Civ Appeal 91 of 2009

promptly. In the instant case, a delay by 4 and ½ months cannot be said to have been made “promptly”.

19. In the circumstances, I am constrained to dismiss the defendant’s application to amend its defence for the following reasons:

- (a) The defendant did not actively pursue obtaining a copy of the said document in preparation for the first CMC. The dilatory conduct by the defendant’s attorney after receiving notification of the first CMC, can only be described as “laissez-faire” and cannot be condoned.
- (b) Even after the log was received in April 2010, after the second CMC, the defendant further delayed by 6 months before making the application.
- (c) The defendant’s attorney failed to alert the claimant’s attorney of its intention to amend the defence which is unacceptable. A significant aspect of the “new civil litigation culture” is open communication between the parties since the days of ambush litigation are over.
- (d) Pressures of work of the attorney on record is an unacceptable reason for failing to meet deadlines in the CPR.
- (e) The defendant is also not without blame since the litigation is the client’s. Mr Walcott has a duty to ensure that the information which he forwarded to his attorney was accurate.

ORDER

20. The defendant's notice of application filed October 18, 2010 is dismissed.

21. The defendant do pay to the claimant's costs of this application to be assessed.

Dated this 9 May 2011.

Margaret Y Mohammed
Master of the High Court (Ag.)