THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-02194

Between

GLOBAL COMPETITIVE STRATEGIES LIMITED

Claimant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Defendant

TOBAGO HOUSE OF ASSEMBLY

Third Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: February 11, 2019

Appearances:

Claimant: Ms. M. Burgess

First defendant: Mr. N. Byam instructed by Ms. K. Seenath

Third defendant: Ms. R. Caesar instructed by Ms. R. Ramsingh

REASONS

1. On January 22, 2019 the court dismissed the first and third defendants' applications filed on December 21, 2018 and October 24, 2018 respectively wherein both defendants applied to the court for permission to amend their respective Defences. Costs of both applications were reserved. The following are the reasons for this decision.

PROCEDURAL HISTORY

2. The claimant filed its Claim Form and Statement of Case on June 13, 2017 approximately one year and seven months ago. On July 27, 2017 the first defendant filed a notice of application for dismissal of the claim against it. On September 8, 2017 the third defendant filed its Defence.

3. On November 1, 2017, the claimant filed an Amended Claim Form and Statement of Case. On December 5, 2017 the claimant filed a Re-amended Claim Form and Statement of Case.

4. At the first case management conference ("CMC") held on January 11, 2018 the first defendant's application of July 27, 2018 was dismissed with no orders to costs and the first defendant was ordered to file and serve a Defence by February 28, 2018. The claimant was ordered to file and serve a further Amended Claim Form and Statement of Case to amend the intituling in relation to the name of the third defendant. The third defendant was granted leave to file and serve an Amended Defence by March 2, 2018.

5. The second CMC was set for March 13, 2018. On March 5, 2018 the third defendant filed a notice of application for an extension of time to file its

Amended Defence and on March 13, 2018 the first defendant filed a notice of application for an extension of time to file its Defence. On March 14, 2018 the court heard both applications and granted an extension of time for the first and third defendants to file their Defence and Amended Defence by March 23, 2018 adding that in default no such Defence and/or Amended Defence were to be filed. The first and third defendants filed their Defence and Amended Defence on March 23, 2018.

6. At the third CMC held on April 19, 2018 the claimant was ordered to file and serve a reply to the Amended Defence of the third defendant. Standard disclosure was ordered by June 8, 2018. The claimant filed its list on June 7, 2018 and the third defendant filed its list on June 8, 2018. The claimant filed supplemental lists on July 17 and October 15, 2018.

7. On June 13, 2018 the claimant filed an application for specific disclosure. At the fourth CMC held on June 13, 2018 the first and third defendants were ordered to file and serve affidavits in reply to the claimant's application for specific disclosure. The third defendant filed an affidavit in reply on June 26, 2018 in which it indicated that it searched through its records but could not find the documents requested by the claimant. The third defendant averred that all it could find were two agreements and interim payment certificates which it claimed did not concern the claimant and refused to disclose same to the claimant.

8. At the fifth CMC held on October 16, 2018 submissions were heard on the claimant's application for specific disclosure and the CMC was adjourned to October 24, 2018 for the decision of the court. On October 24, 2018 the court ordered the third defendant to carry out a search for and disclose the documents listed in the claimant's application for disclosure.

9. Also, on October 24, 2018, the third defendant by notice of application applied to the court pursuant to Parts 20.1(3) and 26.1(1)(d) of the CPR for permission to amend its Defence to plead that the claim is barred by the provisions of Section 3(1) of the Limitation of Certain Actions Act Chapter 7:09. The third defendant's application was supported by affidavit of Ms. Reshma Ramsingh. In opposition to the third defendant's application, the claimant relied on an affidavit sworn to by Kenrick Harrison Burgess and filed on November 27, 1018.

10. On December 3, 2018 the first defendant applied and was granted leave to make an application to file and serve an Amended Defence by December 21, 2018 and the claimant was ordered to file and serve an affidavit in opposition to the first defendant's application to amend by December 8, 2018.

11. By Notice of Application dated December 21, 2018 the first defendant applied to the court pursuant to Parts 20.1(3) and 26.1(1)(d) of the CPR for permission to amend its Defence to plead that the claim is barred by the provisions of Section 3(1) of the Limitation of Certain Actions Act Chapter 7:09. The first defendant's application was supported by affidavit of Ms. Amrita Ramsook. In opposition to the first defendant's application, the claimant relied on an affidavit sworn to by Kenrick Harrison Burgess and filed on January 7, 2019.

12. The first and third defendants' applications to amend were heard and dismissed on January 22, 2019.

THE CLAIM

13. By its further Amended Claim Form filed on January 16, 2018 the claimant sought to recover inter alia, outstanding payments for project

management services it rendered to the third defendant in the sum of $8,826,004.07 VAT exclusive. According to the claimant, the services it rendered to the third defendant were provided under an agreement which was supplemental to a contract executed on July 12, 2006 to provide project management services to the Ministry of Education ("MOE").

14. The project management services comprised of the following tasks;

A. Task A: twenty priority projects as follows;

i. A1: supply, delivery, installation commissioning and maintenance of lighting for twelve community playing fields in Tobago located at;

a) Mt. Pleasant,
b) Lambeau,
c) Signal Hill,
d) Speyside,
e) Mt. Grace,
f) Calder Hill,
g) Mt. St. George,
h) Montgomery,
i) Shaw Park,
j) Moriah,
k) Mason Hall.

ii. A2: Construction of five ECCE centres;

a) Roxborough,
b) Whim,
c) Smithfield,
d) Charlotteville,
e) Belle Garden.

iii. A3: Mason Hall Pavilion;

iv. A4: Scarborough RC Primary School;

v. Whim Skills Centre;

B. Task B: project capability analysis and project maturity assessment of the Division of Education, Youth Affairs and Sports now Division of Sports and Youth Affairs ("DEYAS") project implementation and facilities management units;

C. Task C: Training;

D. Task D: Strategic facilities plan;

E. Task E: Procurement review: deliverables;

F. Task F: manuals for Tobago DEYAS;

G. Task G: projecting in the DEYAS , Tobago House of Assembly;

H. Task H: project taking and monitoring DEYAS;

I. Task I: asset register and computerized maintenance management system.

15. At paragraph 56 of the further Amended Statement of Case, the claimant averred that problems with the payment of fees for the project management services to the DEYAS of the third defendant arose. That there had been late payments of fees by the DEYAS of the third defendant which appeared to be as a result of the frequent changes in administrators.

16. At paragraph 59, the claimant claimed that some progress was made after over twenty settlement meetings were held in Tobago which resulted in the part payments of the sum of money due and owing to the claimant. At paragraph 63, the claimant claimed that to date it has been paid the sum of $1,667,564.29 VAT exclusive and at paragraph 64, the claimant claimed that at present the following remains outstanding;

i. $8,826,004.07;

ii. Interest on the said outstanding sum at the rate of 9.75% per annum from the last date of payment, that is, February 14, 2014 to the date of judgment;

iii. Interest on certified invoices in the sum of $564,196.25;

iv. Outstanding payment from the MOE for assessments conducted on thirty-two primary schools in Tobago under the MOE's primary schools computerization project 2006 to 2009 in the sum of $82,000.00;

v. Loss of income and loss of profit for breach of contract with regard to the supervision of the implementation phase of the contract with the third defendant for the supply, delivery, installation, commissioning of flood lights for twelve community playing fields in Tobago in the sum of $2,469,350.00 plus interest.

17. A summary table of the fees due and owing to the claimant was exhibited to the Further Amended Statement of Case at GCSL 43 and an amended table of the project management fees due to the claimant as at October 27, 2017 was exhibited to the Further Amended Statement of Case at GCSL 43 A.

THE CPR

18. If permission to amend is sought after the first case management conference, Parts 20.1(3) & 20.1(3)(A) of the CPR provides as follows;

"20.1 (3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that-
(a) There is a good explanation for the change not having been made prior to that case management conference and
(b) The application to make the change was made promptly.

(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."

GOOD EXPLANATION

19. In accordance with Part 20.1 (3), 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. However, 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).

20. Whether a good explanation has been shown is a question of fact to be determined in all the circumstances of the case, and is therefore a matter of judicial discretion.[1]

[1] See The Attorney General of Trinidad and Tobago v Miguel Regis Civil Appeal No 79 of 2011.

21. In ***Roopnarine and ors v Kissoo and ors***[2], Mendonca JA explained as follows at paragraph 33:

"An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in Regis, supra, what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subjected to such scrutiny so as to require a standard of perfection."

The application of the first defendant

22. The first defendant's grounds for its application were as follows;

i. The pleadings are very long, are not in chronological order and very difficult to follow. Counsel for the first defendant had to read each amendment and is of the view that the statement of case is unintelligible and that it is not possible to determine exactly what the claimant's case is from them. Some things had to be inferred, but there could be no certainty that the inferences are correct and it is not the duty of the defendant to make inferences as to what the claimant's case is. It is the claimant's duty to be very clear.

ii. Counsel for the first defendant is of the view that the court would be right to strike the statement of case out on the ground that it is prolix and an abuse of process.

[2] C.A.CIV.52/2012

iii. One of the things that was not clear from the pleadings is when the causes of action arose and whether they were statue barred. There were however indications in the statement of case and the attached documents that they are statue barred. Counsel for the first defendant did not pick up on those indications from the outset and only realized what they were reading on the statement of case after the hearing on October 16, 2018.

iv. One of the indications that the actions are statue barred is the exhibit "GCSL 43A" which shows several different debts which are statue barred and not one consolidated debt on a current account which could be revived by part payment. The statement of case does not explicitly state there was a current account but treated the debts as if they were part of one.

23. The claimant's arguments in opposition to the first defendant's application were as follows;

i. The first defendant failed and/or omitted to identify the documents to which it refers are statue barred and has neglected to provide any evidence of the purported documents. The first defendant ought to be aware that the issue of statute bar arises from the date of the cause of action that is, breach of contract and not from the date of the documents.

ii. The claimant refuted the allegations that its statement of case is unintelligible and prolix and averred that when one considers and comprehends the portfolio of the project, the number and size of the tasks to be managed and the number of deliverables produced to date by the claimants' team, the statement of case was merely an overview or summary of the high volume of work completed by

the claimant in accordance with international best practice in project management in the construction industry. According to the claimant, its pleadings are clearly written and the facts are stated and dated in chronological order and supported by evidence as required by CPR 8.6.

iii. The first defendant has neither shown how the statement of case is an abuse of process nor provided any evidence of that allegation. The first defendant is now seeking to amend its defence so that it can strike out the statement of case notwithstanding the fact that its previous application to strike out the claim was dismissed which in itself may amount to an abuse of process.

iv. It was incumbent on Counsel for the first defendant to utilize the State's resources available to facilitate comprehension of the pleadings. It is inexcusable to now claim that the pleadings were not understood. That amounts to ineptitude of Counsel which does not amount to a good explanation for the failure to plead the limitation defence nor can it amount to a good explanation for allowing an amendment to the Defence after the first CMC.

v. The first defendant's interpretation of the claim as exhibited by "GCSL 43A" is misconceived. The outstanding sum due to the claimant is one debt for project management services under tasks A to I as stated in the supplemental agreement and described at paragraph 16 above. The sum was determined by the final account on the project and not several debts as alleged by the first defendant.

vi. The first defendant ought to be aware that it is standard procedure in construction industry that interim certificates or invoices are submitted for payment based on deliverable as the project proceeds and on the completion of the project, the final payment

is made based on the final account which represents the total cost of the project. On the facts, interim payments were made to the claimant as follows; 1) three payments on September 23, 2011 and 2) a fourth payment on February 14, 2014. The claim was filed on June 13, 2017 and as such there was no period of four years between the interim payments neither was there a period of four years between the last interim payment and the filing of the case.

vii. Notwithstanding the problem with late payment of the interim invoices for project management services which resulted in two pre-action protocol letters being issued by the claimant to the first defendant on April 2, 2012 and July 15, 2016 the cause of action did not arise until after March, 2017 when all steps for settlement of disputes required under clauses 32 and 33 of the General Conditions of the Contract between the parties were exhausted. The claimant averred that paragraph 67 of its further Amended Statement of Case it was stated that no further steps were taken by the third defendant to make outstanding payments to the claimant and therefore it was at point in time when the cause of action arose.

Findings

24. The court found that the first defendant's explanations were insufficient to constitute a good explanation.

25. Firstly, the court found that the Further Amended Statement of Case of the claimant was lengthy but that for the most part it is in chronological order and not unintelligible. Further, the court agreed with the claimant that a limitation defence has nothing to do with the merits of the claim or

whether the first defendant understood same. In that regard it is somewhat disingenuous for the first defendant to come at such an advanced stage of the case to make this application on the basis that the first defendant's attorneys did not understand the case. The explanation simply is not logical in the court's view.

26. As a consequence, the court found that the first defendant's application to be given permission to amend its Defence to plead that the cause or causes of action in this claim are statute barred appeared to reflect a mere oversight and/or administrative inefficiency on the part of Counsel for the first defendant. In ***AG v Universal Projects Limited***[3], the Privy Council had the following to say at paragraph 23;

"The Board cannot accept these submissions. First, if the explanation for the breach ie the failure to serve a defence by 13 March connotes real or substantial fault on the part of the Defendant, then it does not have a "good" explanation for the breach. To describe a good explanation as one which "properly" explains how the breach came about simply begs the question of what is a "proper" explanation. 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."

27. The court understood the first defendant's submission that its Counsel did not pick on the purported indications of statute bar in the statement of case and the attached documents from the onset and only realized what they were on reading the statement of case again after the hearing on October 16, 2018 was that there was an oversight and/or administrative inefficiency prior, which has since been addressed leading to the filing of

[3] [2011] UKPC 37

the application to amend the Defence. The court found that such circumstances were insufficient to constitute a good explanation for the belated application to amend the defence. As such, the court agreed with the claimant that it was incumbent on Counsel for the first defendant to utilize all the State's resources available to facilitate the comprehension of the pleadings and the claim that the pleadings were not understood amounted to failure of Counsel which did not amount to a good explanation for failure to plead the limitation defence.

28. Thirdly, the first defendant submitted that one of the indications that the actions were statute barred is exhibit "GCSL 43A". Exhibit GCSL 43A was annexed to the Amended Claim Form which was filed since November 1, 2017. As such, the first defendant would had had knowledge and sight of GCSL 43A since November 1, 2017. Consequently, if the first defendant wished to avail itself of the statutory defence based exhibit GCSL 43A, it had ample opportunity to so do and should have pleaded same since March 23, 2018 as part of its Defence filed in response to the court order made on March 13, 2018. Having omitted and/or overlooked the limitation defence, the first defendant must now bear the consequences of its carelessness. As such, the court found that the failure and/or omission of the first defendant to plead the limitation defence was an inexcusable oversight which did not amount to a good explanation for an amendment of its Defence after the first CMC.

<u>The application of the third defendant</u>

29. The third defendant's grounds for its application were as follows;

i. The Further Amended Claim Form and Statement of Case consists of sixty-eight large paragraphs and is extremely voluminous and prolix.

ii. In March, 2018 the third defendant retained the services of the Firm Alexander Jeremie and Company ("the firm"). By the time the firm was retained and the directions of the court were ascertained, the time for filing the Amended Defence had expired on March 2, 2018. Counsel was required to travel to Tobago to take instructions to complete the Amended Defence. Voluminous papers had to be reviewed and instructions had to be obtained from personnel who were no longer in the employ of the third defendant.

iii. The Amended Defence was filed on March 23, 2018 and in the Amended Defence, the third defendant put the claimant on notice of the possibility of striking out the claim. As such, the claimant would not be prejudiced if the third defendant was allowed to amend its pleadings to state that the claim is statute barred since it was put on notice of the third defendant's intention to strike out the claim.

iv. The parties embarked on disclosure after the claimant filed its Reply to the Amended Defence. Having had the opportunity to further review the claimant's pleadings and more importantly its disclosure, it came to the third defendant's attention that the claimant's case is predicated on documents and materials which may cause its claim to be statute barred in law.

v. The third defendant reviewed the recent case law in the Court of Appeal that states that limitation point must be pleaded. That position is different from the position that pertained previously which was that limitation point could be taken at any time.

vi. The amendment would assist the court to deal with the case justly by narrowing the issues to be determined.

vii. The third defendant would be prejudiced if the amendment is not allowed since it would be forced to defend a claim of over 8.8 million dollars that may be barred in law.

viii. No trial date will be affected by the amendment and witness statements have not been filed.

30. The claimant's arguments in opposition to the third defendant's application were as follows;

i. The Further Amended Statement of Case is not voluminous and prolix but is best practice in project management in the construction industry.

ii. All events referred to in paragraph 31(ii) amount to administrative inefficiency and do not amount to a good explanation for seeking to amend the Amended Defence after the first CMC.

iii. The third defendant failed and/omitted to identify the documents to which it refers may cause the claimant's case to be statute barred and has neglected to provide evidence of such documents.

iv. The third defendant failed and/or omitted to disclose the fact that all documents on the claimant's standard disclosure list had already been submitted to the third defendant during the project. Further, all documents listed were exhibited to the claimant's Statement of Case filed on June 16, 2017, Amended Statement of Case filed on November 1, 2017 and Re-amended Statement of Case filed on January 16, 2018 all of which were served on the third defendant. Therefore, disclosure on June 7, 2018 was more in form than substance since the third defendant already had all the documents

in its possession and there were no new documents that was disclosed in the claimant's list.

v. The third defendant is aware that the issue of statute bar arises from the date of the cause of action that is, breach of contract and not from the date of the documents. It is standard procedure in construction industry that interim certificates or invoices are submitted for payment based on deliverable as the project proceeds and on the completion of the project, the final payment is made based on the final account which represents the total cost of the project. No final account has been done to date. Interim payments were made to the claimant as follows; 1) three payments on September 23, 2011 and 2) a fourth payment on February 14, 2014. The claim was filed on June 13, 2017 and as such there was no period of four years between the interim payments neither was there a period of four years between the last interim payment and the filing of the case.

vi. The cause of action did not arise until after March, 2017 when all steps for settlement of disputes required under clauses 32 and 33 of the General Conditions of Contract between the parties were exhausted and it became clear to the claimant that the then administrator, Diane Baker Henry had no intention of approving any further payments. As such, the issue of statute bar did not arise in the circumstance.

vii. It was clear that the third defendant chose not to plead the limitation point in its Defence filed on September 8, 2017 and Amended Defence filed on March 23, 2018 because it was determined that the issue was not relevant in the circumstances, particularly in light of the 2014 payment made by the third defendant to the claimant.

viii. The contract between the claimant and the third defendant is still subsiding and there was no final account on the project management services or any element of the project. Notwithstanding those facts which go towards the merits of the claimant's case, the third defendant could have still pleaded the limitation point and had four opportunities to so do, namely in response to the two pre-action protocol letters, the Defence filed on September 8, 2017 and Amended Defence filed on March 23, 2018.

ix. The third defendant cannot assert that an amendment to its Defence is necessary because of any purported circumstances which became known to it after the first CMC from the claimant's disclosure since there was no new information disclosed by the claimant and no change of circumstances after the first CMC.

x. Failure to understand the claimant's case in circumstances where the third defendant had in its possession the documents of the claimants for at least twelve months from the date of filing and serving of the claim and statement of case speaks to the ineptitude of the third defendant and its counsel and is not accepted by the courts as a good explanation.

Findings

31. The court also found that the explanations given by the third defendant were insufficient to amount to a good explanation. The third defendant's explanation that by the time the firm of Alexander Jeremie was retained and the directions of the court were ascertained, the time for filing the Amended Defence had expired on March 2, 2018 and that Counsel was

required to travel to Tobago to take instructions to complete the Amended Defence and that voluminous papers had to be reviewed and instructions had to be obtained from personnel who were no longer in the employ of the third defendant amounted to administrative inefficiencies on the part of legal counsel. This certainly did not amount to a good explanation for seeking to amend after the first CMC. In the court's view, there is no logical link between the matters set out by the third defendant and the decision to raise the limitation point which is essentially a decision made by lawyers who are aware of the law.

32. The court further found that the third defendant's explanation that having had the opportunity to further review the claimant's pleading and its disclosure it came to the third defendant's attention that the claimant's case is predicated on documents and material which may cause the claimant's case to be statue barred in law was also an oversight and/or administrative inefficiency on the part of the third defendant's previous attorneys in the preparation of the original Defence. As was correctly pointed out by the claimant, there were no change of circumstances when disclosure occurred as all documents listed were exhibited to the claimant's Statement of Case filed on June 16, 2017, Amended Statement of Case filed on November 1, 2017 and Re-amended Statement of Case filed on January 16, 2018 all of which were served on the third defendant.

33. As such, the court found that the failure and/or omission of the third defendant to plead the limitation defence was an inexcusable oversight which did not amount to a good explanation for an amendment of its Amended Defence.

PROMPTITUDE

34. Promptitude is influenced by the context and facts of each case

35. The first defendant alleged that its Counsel did not pick up on the purported indications of statute bar in the Statement of Case and the attached documents from the outset and only realized what they were on reading the Statement of Case again after the hearing on October 16, 2018. However, as correctly submitted by the claimant, the issue of whether the first defendant's Counsel understood the case is of no relevance to the issue of whether the limitation defence should have been pleaded or not as it is well established that pleading of the limitation defence has nothing to do with the merits of the case.

36. Consequently, the court found that in the case of the first defendant, promptitude must be measured from the date on which it should have been pleaded that is, on March 23, 2018 when the first defendant filed its Defence. The first defendant's application to amend was filed on December 21, 2018 which was almost nine months after the date when the limitation defence should have been pleaded. As such, the court found that in those circumstances, the first defendant's application was not made promptly.

37. The third defendant claimed that the claimant filed its list of disclosure on June 7, 2018 and having had the opportunity to further review the claimant's pleadings and more importantly the claimant's disclosure, it came to the third defendant's attention that the claimant's case is predicated on documents and material which may cause its case to be statue barred in law. The third defendant's application to amend was filed on October 24, 2018 which was approximately four months after the third

defendant had determined that the change to its Amended Defence was necessary.

38. In the case of ***Novo Technology Incorporation Limited v the Attorney General***[4]***,*** Justice Honeywell relying the case of ***Estate Management and Business Development Ltd v Saiscon Ltd***[5] found that a delay of three to four months between when the changes became apparent or necessary and when the defendant's application was filed cannot be considered prompt. Each case must however turn on its own facts. In this case, the third defendant's application falls almost squarely in keeping with the decision set out In ***Saiscon Ltd.***

39. As the defendants failed to meet the threshold criteria for an amendment of the defence to be allowed after the first CMC, there was no need for the court to go further in its analysis to consider the requirements of Part 20.1(3)(A). However, out of an abundance of caution the court examined the issue of prejudice as it relates to the limitation point in the event that such prejudice outweighed any other consideration in this case. It also considered that prejudice may in appropriate circumstances be a factor when considering the issue of promptitude.

Prejudice and the limitation point

40. The first and third defendants submitted that the claimant would not be prejudiced if permission is granted to it to amend since the claimant was put on notice of the third defendant's intention to strike out the claim. According to the third defendant, it would be prejudiced if the amendment

[4] CV2016-02903
[5] CA Civ P104 of 2016, para 114, per Jones J.A.

is not allowed since it would be forced to defend a claim of over 8.8 million dollars that may be statute barred.

41. The third defendant relied on the case ***Vilca and others v Xstrata Ltd. and another***[6] wherein Stuart-Smith J had the following to say at paragraph 24,

"…It is implicit in the passages I set out below that the effect of granting the amendments would have been to cause the trial to be delayed. In giving the decision of the Court in Worldwide Corpn, Waller LJ said:
…"Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

42. Later on at paragraph 48, Stuart-Smith J had the following to say;

[6] [2017] EWHC 2096 (QB)

"On the other side of the scales, however, is the fact that the Peruvian law limitation is a real and important issue. Its importance lies in the fact that, if it is well-founded and is admitted, the Court will reach the right and just outcome that no claims under Peruvian law should have been advanced or entertained because they were barred by limitation. Conversely, if it is well-founded but the amendment is excluded (other than in relation to the 2017 Amendments) the Court will knowingly run the risk of permitting the Claimants to achieve a windfall to which they should not be entitled, which is inherently unjust. What is more, it will be seen to be a windfall to which they should not be entitled because the issue will be determined, though only by reference to the 2017 Amendments. The artificiality of such an outcome should be avoided if reasonably possible. If the limitation defence is ill-founded but the amendment is allowed, it will be rejected without adversely affecting the effectiveness or duration of the trial to any material extent. To my mind, excluding the amendment when it is not shown to have had or that it will have any adverse impact on the wider interests of the Court or that it will cause significant prejudice to the Claimants runs the risk of causing serious injustice by excluding an issue which should be before the Court and can readily be accommodated despite that lateness of the amendment. The weight to be attributed to this factor is reduced because, in the absence of any explanation, it has come about as a result of the Defendants' own inaction, for which there is no apparent justification. It remains, however, significant."

43. The third defendant further relied on the case of ***Topaz Jewelers and another v National Commercial Bank Jamaica Limited***[7] wherein the respondent was granted permission to amend to include the issue of the limitation period. At paragraph 6, the Court of Appeal opined that as the

[7] Civil Appeal No. 127/2010

appellants stated that they had a good defence to a plea in relation to limitation, there could be no prejudice to the appellants by allowing the amendment to stand and giving the respondent the opportunity to contest the plea. Later on at paragraph 12, Their Lordships stated that there was no good reason for the respondent to wish the continuance of legal proceedings that may have been brought out of time. That the principle that there has to be an end to litigation ought not to be ignored in such circumstances. Moreover, at paragraph 15 the Court of Appeal set out as follows;

"…In summary, we accepted that the trial not having commenced and given the stated position of the appellants on the question of whether the action was statute-barred, there was no injustice done to the appellants in allowing the amendment. In any event, limitation is a very relevant point as if it is valid it will bring an end to litigation that ought not to have been started. In the circumstances, it cannot be said that the decision of the learned trial judge had not been properly exercised…"

44. The claimant submitted that great prejudice would be caused to it if the amendment is allowed and its claim is determined to be statute barred since it has fulfilled its obligations under the contract as far as it has been allowed by the third defendant to so do and ought to be paid under the terms of the contract and compensated for the flagrant breaches of contract committed by the third defendant.

Findings

45. Firstly, the court found that based on the facts alleged by the claimant, when the two contracts are read as a whole, the breach alleged (yet to be proven) may have occurred at the point in time when it was clear to the claimant that no further payments were forthcoming on the contract sum. The submission of the first defendant in that regard is that essentially each IPC carries with it a cause of action in contract. With the greatest of respect to Counsel for the first defendant, this view appears to be a strained one having regard to the pleadings. In that regard it is also the evidence that several sums were also paid by agreement subsequent to discussions between the claimant and the third defendant prior to the filing of the claim. Whether the sums so paid on the payments outstanding are in respect of individual IPCs on the FIDIC contract or sums owing on the written contract has not been disclosed to the court. Suffice it to say that in the court's view the breaches pleaded are breaches to the contracts as a whole and not to individual payments on their own. In that way the court was of the view that the limitation argument was in any event misconceived.

46. Secondly, even if court was wrong to so find and in any event a balance had to be struck between the competing arguments as the court is concerned with the delivery of justice to all litigants and ensuring that as far as is practical the parties are on an even footing. On the one end of the scale, was the claimant whose claim was filed since June 13, 2017. A claimant who on January 16, 2018 filed its Further Amended Claim and attached all documents upon which it intended to rely to prove its claim. Both defendants would have had those documents in their possession for the latest as at January 16, 2018. The claimant would have been actively

pursuing the claim since June 2017 and was entitled to have its matter proceeded with. On the other end of the scale, were the defendants who both asked and were granted extensions of time to file their Defence and Amended Defence and who filed their Defence and Amended Defence on March 23, 2018 without any regard for limitation.

47. While the court accepted that the defence of limitation may bring with it a swift end to some of the issues in any given case or to the case entirely, the court considered that having regard to the case as pleaded, this case was not one of those cases. In carrying out its balancing exercise, the court found that in all of the circumstances, including the absence of a good explanation for the amendment at this stage and the pleaded case, to allow the amendment would be to tip the scale in favour of the defendants who had more than ample opportunity to plead the limitation point and failed so to do. Bringing an end to the pleadings after all this time far outweighed the opportunity to plead limitation in the context and circumstances of this case. Had the application been brought much earlier in these proceedings its success would have been certainly more likely.

48. For these reasons, the court dismissed the first and third defendants' application to amend.

Ricky Rahim

Judge