



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 152

BETWEEN:

BS&R GROUP LIMITED

Plaintiff/Defendant by Counterclaim

-and-

FREDERICK STEPHEN WEST (Trading as “Westport Architecture”)

First Defendant/First Plaintiff by Counterclaim

- and -

C.W. CONSTRUCTION AND LANDSCAPING LIMITED

Second Plaintiff by Counterclaim

RULING

Date of Hearing: 4 March 2021

Date of Ruling: 12 March 2021

Appearances: Allan Doughty, MJM Limited, for the Plaintiff

Frederick Stephen West, Litigant in Person

**Arthur West, Litigant in Person, for C.W. Construction and
Landscaping Limited and for Frederick Stephen West**

*Mid-trial application by Plaintiff to amend Specially Indorsed Writ (RSC 20/5), Defendant a
partnership not a sole proprietorship (RSC 81/1), Partnership Act 1902*

Ruling of Mussenden J

Introduction – Application to re-amend the Specially Indorsed Writ

1. By a Summons dated 1 February 2021 the Plaintiff BS&R Group Limited (“BS&R”) made an application seeking leave to re-amend their Specially Indorsed Writ. Both parties filed written submissions. On 4 March 2021 I heard oral submissions after which I reserved my Ruling.

2. On the 25 January 2021 the trial of this matter commenced before me by Zoom video link. Mr. Doughty appeared for BS&R. The First Defendant Frederick Stephen West (“Stephen West”) (trading as “Westport Architecture” (“Westport”)) was being assisted by his son Mr. Arthur West (“Tripp West”), who is not an attorney. Tripp West, who is centrally involved in the dispute and litigation between the parties, was also assisting on behalf of the Second Defendant C.W. Construction and Landscaping and Limited (“CWC”) of which he and his father Stephen West are directors.

3. On the 26 January 2021 the trial continued when Mr. Stephen West was giving evidence in chief and on 27 January 2021 when he was being cross-examined. During that evidence Stephen West made some statements to the effect that Westport was a ‘partnership’ between him and his son Tripp West. Those statements caused Mr. Doughty to request an adjournment of the verbal evidence to allow an application for leave to re-amend the Amended Specially Indorsed Writ.

4. Mr. Doughty made outline submissions on the proposed application to amend, which in effect, was to replace the original Defendant Stephen West (trading as “Westport Architecture”) to “Westport Architecture, a firm”, that is, a partnership of Stephen West and Tripp West. Tripp West made some brief submissions – but did not give evidence - to seek to clarify the issue. I adjourned the trial so that the Plaintiff could file its application for leave to amend and for Stephen West and Tripp West to take legal advice on such application as it was known that they have taken legal advice at various stages of the litigation. I wanted to ensure that they had the benefit of legal advice, if they wanted, on what may be an amendment with potential consequences later on.

Background

5. By a Specially Indorsed Writ of Summons (“SIW”) issued on 20 April 2015, BS&R commenced the present action for damages for breach of contract against Stephen West (trading as Westport Architecture). The central allegation is that Stephen West was a sole proprietor architect trading as Westport who had contracted with BS&R to provide carpentry services to him on three construction projects and had failed to pay BS&R in full for their services for each project.
6. On 25 June 2015 a Defence and Counterclaim was filed by Defendant Stephen West who, in asserting that his construction company CWC contracted with the Plaintiffs, added CWC as the Second Defendant¹. In the same pleading, CWC made a counterclaim against BS&R although it was set out that if Stephen West was found by the Court to be the proper defendant then he would be the counterclaimant.
7. Therefore, from the start of the matter, an issue to be resolved by the Court after trial is the question of who or what is the actual defendant to BS&R’s claim – in other words is it Stephen West (trading as Westport Architecture) or is it CWC, the construction company.

¹ BS&R have not conceded that CWC is the proper and/or only defendant.

8. The litigation continued over time and on 21 January 2019 leave was granted to amend the Writ to an Amended Specially Indorsed Writ (“ASIW”).

BS&R’s application to amend

9. On the basis of the evidence of Stephen West in the trial, BS&R submit that they should be granted leave to re-amend the ASIW for several reasons.
10. First, the pleadings and affidavit evidence set out that Westport was a sole proprietorship as follows: (a) when the SIW was first filed, it was BS&R’s understanding that (i) Stephen West traded as a sole proprietorship under the name of Westport Architecture; (ii) Stephen West employed his son Tripp West as his servant and agent within Westport. (b) Stephen West in his Defence (i) admitted that he is an individual trading under the name Westport in relation to his architectural services; (ii) averred that BS&R had sued the wrong party and that it was CWC that had contracted with BS&R; (c) In the affidavits of Stephen West and Tripp West as their evidence in chief, no indication was given that Tripp West was anything other than Stephen West’s servant or agent within Westport.
11. Second, in light of the pleadings and affidavit evidence, BS&R proceeded to trial on the understanding that at all material times, Stephen West operated Westport as a “trading name” and he was the proper Defendant.
12. Third, on 26 January 2021, Stephen West in his evidence in chief stated for the first time that that Tripp West is his business partner in the running of Westport. On 27 January 2021 on cross-examination Stephen West admitted that he and Tripp West are partners in relation to Westport and that the issue of Westport being a partnership was never pleaded. Tripp West in his brief submissions (not evidence) on 27 February 2021 stated that (a) he and Stephen West were partners in Westport; (b) BS&R should have known that Westport is a partnership; and (c) Westport being a partnership was never pleaded.

13. Fourth, Mr. Doughty submits that the Court has wide discretion to allow for a party to amend or re-amend a pleading in the middle of a trial pursuant to Order 20, Rule 5(1) of the Rules of the Supreme Court (“RSC”) which states:

“20/5 (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

14. Mr. Doughty also cited *Darrell v The Human Rights Commission* [2018] SC Bda 74 Civ where, in the middle of the hearing to strike out the pleadings, leave was granted to the Plaintiff to amend his writ per RSC Order 20, Rule 5.

15. Fifth, Mr. Doughty submits that the amendment is necessary because BS&R always thought that it was dealing with Westport when the contracts for all three carpentry jobs were first agreed. As there was nothing to indicate that Westport was a company or a registered partnership, Stephen West was accordingly sued in his personal capacity “trading as” Westport. BS&R was then led to believe it was correct in identifying Westport as being a sole proprietorship through the admissions made in Stephen West’s Defence and Counterclaim and later in his sworn affidavit where Stephen West wrote:

“C.W. Construction is the corporate entity through which my son and I provide our building and construction services. My son and I also provide architectural and design services. These services are provided separately under the trading name “Westport Architecture”.

16. Sixth Mr. Doughty relied on the Partnership Act 1902 to assert that had BS&R known that Westport was a partnership, then it should have and would have been named as a party to the proceedings. He relied on the Partnership Act 1902 and RSC Order 81, Rule 1 as follows:

“4. Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.”

“RSC Order 81/1 (1) Subject to the provisions of any enactment, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.”

17. Seventh, Mr. Doughty submitted that the RSC Order 20, Rule 5(2) grants the Court the discretion to grant leave for an amendment even where the proposed amendment is time-barred.

“20/5 (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.”

18. Eighth, Mr. Doughty submits that the status of Westport being a partnership was concealed from BS&R in the pleadings and affidavits filed on behalf of Stephen West and CWC. He also submits that BS&R have taken immediate steps to seek leave to amend.

Stephen West and CWC – Objection to Leave to Amend

19. Stephen West and CDC object to BS&R’s application for several reasons.

20. First, they submit that the amendment is unnecessary in that it achieves nothing in real terms. This is on the basis that their case is that CWC, a limited company, is the proper Defendant, and that it makes sense for builders to use limited liability companies for construction projects thus avoiding personal liability. They submit that there is a strong inference that the Plaintiff only included Stephen West as the Defendant in a misguided attempt to apply pressure on him to settle as any successful judgment against CWC might be avoided through insolvency. Also, they submit that both Stephen West and Tripp West have confirmed to the Court in pleadings and sworn evidence, that despite their defence that CWC is the proper defendant, they have agreed personally to stand behind any judgment the Court might make in favour of the Plaintiff. In support of this ‘undertaking’ they refer to the following:’

a. Tripp West Statement dated 21 July 2016:

i. *“... both my father and I are prepared for the purposes of these legal proceedings to stand behind any judgment made against CWC.”*

ii. *“.... As I have said we both stand behind any order the Court shall make in these proceedings against CWC.”*

b. Stephen West statement dated 21 July 2016 – *“... in any case, both my son and I personally stand behind any judgment that the Court should choose to make in these proceedings.”*

c. Skeleton Argument - *“... both Mr. Stephen West and Mr. Tripp West have agreed to personally stand behind any judgment the Court may make against the contractor D2.”* For clarity ‘D2’ is CWC.

21. Further, they submit that it is trite law that a partnership is not a separate legal entity in that it is the general partners who are liable. Therefore, any judgment entered against Westport would be a judgment against Stephen and Tripp West.

22. Second, they submit that the application is woefully late on the basis that Stephen West and Tripp West told the Plaintiff long ago that they were in business together at Westport Architecture. They refer to various documents:

- a. Stephen West statement dated 21 July 2016 – *“CWC is the corporate entity through which my son and I provide our building and construction services. My son and I also provide architectural and design services. These services are separately provided under the trading name ‘Westport Architecture’.”*
 - b. Tripp West statement dated 21 July 2016 – *“CWC is the corporate entity through which my father and I provide our building and construction services. All our jobs when we build/construct go through this company. My father and I also provide architectural and design services. These services are separately provided under the trading name “Westport Architecture”. Westport Architecture has never been incorporated.”*
 - c. The Skeleton Argument dated 17 January 2019 – *“Mr. Stephen West and his son Mr. A.W. ‘Tripp’ West both practice architecture services under DI’s trading name. Both men are also directors of D2.”*
23. They also submit that it is BS&R’s burden to ensure that it sues the correct parties. They complain that since 2015 BS&R have been contending that it contracted with Stephen West personally but now want to drag Tripp West into the litigation, although he has already confirmed to the Court that he will stand behind any judgment. Further, they submit that the suggestion that BS&R or its Attorney only discovered for the first time during cross-examination of Stephen West that Tripp West practiced architectural services at Westport Architecture cannot be sustained.
24. Third, they submit that the application is a disproportionate distraction, which serves to waste more time and costs, particularly given the small size of the claim. This is on the basis that both Stephen West and Tripp West have confirmed to the Court on oath that they will personally stand behind any judgment against CWC. Also, they submit that legal costs are being incurred unnecessarily by BS&R and it is anticipated that such costs may well exceed - significantly – the amount in dispute in the claim, which the Court rightly discourages. Further, claims of this size must be dealt with proportionately and in accordance with the Overriding Objective. They submit that the Court should simply note for the record that Stephen West and Tripp West have long ago confirmed that they

personally stand behind any judgment, dismiss the late application, and determine the matter based on the evidence.

Assessment of the Submissions

25. I am mindful of the Overriding Objective in enabling the Court to deal with cases justly. In particular, saving expense, dealing with the case in ways which are proportionate and the Court's duty to manage cases by identifying the issues at an early stage. Having had written and oral submissions, I am of the view that the application to amend should be granted for several reasons.
26. First, in this case, once the Defence and Counterclaim was filed, it was always going to be an issue as to who or what was the proper Defendant. In my view, there was an onus on the parties to clarify who the participants were as soon as possible separate from any role, involvement or liability.
27. Second, in the Statement of Claim dated 20 April 2015, BS&R set out that the defendant Stephen West "is an Architect who trades as "Westport Architecture" ..."². On the face of it, I take that to mean that Stephen West was trading as a sole proprietorship. In the Defence and Counterclaim dated 25 June 2015, Stephen West and CWC admitted that point³ subject to setting out that (a) Stephen West was not the proper defendant and (b) BS&R and CWC were the parties to the three agreements. Also, it was averred that Tripp West was a director of CWC⁴. I accept Mr. Doughty's submission that BS&R took that to mean that Stephen West and CWC admitted that Stephen West was trading as a sole proprietor in the name of Westport Architecture. It follows then that it was proper for BS&R to conduct their case on the basis that Westport was a sole proprietorship.
28. Third, during oral submissions before me, I asked Tripp West if the word 'partnership' had been used in any of the pleadings or in any of the affidavits. He confirmed to me that neither

² Statement of Claim para 2

³ Defence and Counterclaim para 3

⁴ Defence and Counterclaim para 5

he nor Stephen West had used the word 'partnership' in any pleading or affidavit. In my view, that supported the submission of Mr. Doughty that it was only during trial that for the first time there was any statement that Westport was a partnership.

29. Fourth, Tripp West submitted throughout that he and Stephen West had always been clear that it was their partnership that offered their architectural services while their construction company provided their building services. However, in my view, the statements made in Stephen West's witness statement, Tripp West's witness statement and Skeleton Argument do not clarify that Tripp West was a partner in the Westport partnership. It was therefore open to BS&R to conclude that Tripp West was an employee or agent of Westport. Further, the best way to be clear about the partnership would have been for Stephen West to plead it in the Defence and Counterclaim. Instead of admitting to 'trading as Westport Architecture' and therefore confirming the sole proprietorship, Stephen West had the opportunity at the earliest point, in the Defence and Counterclaim, to set out that Westport was in fact a partnership. In my view, just as Stephen West and CWC pleaded that Tripp West was a director in CWC, they could have pleaded that Stephen West and Tripp West were partners in Westport Architecture. On this basis, I accept the submissions by Mr. Doughty on the Partnership Act 1902 of how Westport should have and may have been sued in the name of the firm.

30. In respect of the contention that the application to amend is unnecessary, I disagree with Tripp West. It may very well be that builders and architects use limited liability companies so not to be held personally liable for mishaps and therefore their case is that the proper defendant is CWC. However, that is not the focal point of the application which is about the proper legal status of the First Defendant, that is, Westport. Even though Tripp West submits that he is prepared to stand by any judgment the Court may make in favour of the Plaintiff, I find it necessary to review what in fact has been said on this point as set out above. I note that Tripp West says twice that he and his father will stand behind any judgment against CWC. The Skeleton Argument states that Stephen West and Tripp West will personally stand behind any judgment the Court will make against CWC. But it is only Stephen West who states that both he and his son Tripp West will personally stand behind

any judgment the Court should choose to make in these proceedings. In my view, (a) I have not seen before me a statement by Tripp West that he will personally stand behind a judgment the Court may make against Westport Architecture and (b) the question begs if Stephen West can give such a personal undertaking for his son Tripp West. Out of an abundance of caution as to what these undertakings may mean later on in any further proceedings, I am of the view that it is necessary to bring clarity as to the entity Westport at the earliest opportunity. For the same reasons, I prefer to exercise my discretion to allow the amendment now rather than there be potentially lengthy and costly proceedings at a later stage about Tripp West and the partnership Westport Architecture.

31. Tripp West submits that the application is woefully late. I disagree. Mr. Doughty requested an adjournment to make the application as soon as he received the evidence on cross-examination of Stephen West. On the basis that the word 'partnership' had never been used before in pleadings or affidavits, then in my view that was indeed the appropriate point to identify the issue and start to make the application. If Mr. Doughty did not do such, then it is likely that he would be open for criticism and objection at a potential later stage by Stephen West and moreso by Tripp West.
32. Tripp West submits that the application is a disproportionate distraction which gives rise to incurring extra costs. I am not inclined to agree. When the point was first raised in the middle of the evidence, if there was counsel on both sides then perhaps the matter could have been disposed of in quick time. However, as I stated in the opening paragraphs of this Ruling, I was concerned that Stephen West and CWC as well as Tripp West, have the opportunity of taking legal advice on the application and make whatever decision they wanted in respect of the application before the Court. The Court is mindful of the Overriding Objectives as it relates to costs but in my view, this issue is a matter that should be settled now before the Court has to determine whether Westport or CWC are liable, if either are liable at all. I am of the view that any costs incurred now, could assist in avoiding costs in the future. Further, I note that the cost on this point could have been avoided altogether at the time of preparing the Defence and Counterclaim.

33. I am satisfied that I have the jurisdiction under RSC Order 20, rule 5(1) to grant the application to amend at this point of the proceedings on the grounds that the evidence of partnership has just been raised. Also, in respect of any relevant period of limitation, I am satisfied that in the circumstances it is just to allow the amendment at this time under RSC Order 20, rule 5(2) in order to clarify the legal status of Westport Architecture.

Conclusion

34. In light of the above reasons I make the following orders:

- a. Leave is granted to the Plaintiff BS&R to re-amend the Specially Indorsed Writ in terms of the Summons issued 1 February 2021.
 - b. BS&R shall file a Re-Amended Specially Indorsed Writ within seven (7) days of the date of this Ruling; and
 - c. Leave is granted for Westport Architecture to file an Amended Defence and Counterclaim within fourteen (14) days thereafter.
35. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff BS&R on a standard basis, to be taxed by the Registrar if not agreed.

Dated 12 March 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**