In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2017 No: 295

BETWEEN:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

THE CORPORATION OF HAMILTON

Defendant

RULING

Dates of Hearing: Wednesday 23 October 2019
Date of Judgment: Thursday 16 January 2020

Plaintiff: Mr. Keith Robinson / Mr. Sam Stevens (Carey Olsen Bermuda Limited)
Defendant: Mr. Mark Diel / Ms. Katie Tornari (Marshall Diel & Myers Limited)

Application for Leave to Amend Writ
Guiding Legal Principles on Amendment of Pleadings

RULING of Shade Subair Williams J

Introduction

1. These proceedings were started by a Generally Indorsed Writ of Summons filed on 17 August 2017 ("the Writ") when the Plaintiff was represented by Conyers Dill & Pearman Limited. Just

short of two years later, the Plaintiff, now represented by law firm Carey Olsen Bermuda Limited, filed a summons application, dated 21 August 2019, seeking to amend the Writ. The proposed amendments were placed before the Court in the form of a draft amended writ annexed to the summons.

2. The Defendant objected to the application to amend through written and oral submissions. At the close of the hearing, having heard from Counsel for both parties, I reserved my ruling so to provide this decision and these written reasons.

Factual Background:

3. In *Fidelity National Title Insurance Company v Trott & Duncan Limited [2019] Bda LR 8 [at paras 5-7]* ("the Fidelity Ruling") I provided the following summary of the factual background relevant to this litigation:

   5 The dispute between the parties to these proceedings is an offspring from the hard-fought litigation between Mexico Infrastructure Finance LLC ("MIF") and the Corporation of Hamilton ("the COH"). The facts giving rise to this battlefield have been summarized in various written judgments of the Courts which have been later rehearsed by media outlets in Bermuda and beyond.

   6 It all started with ambitions for Par-La-Ville Hotel and Residences Ltd ("PLV") to build and develop a five-star hotel complex on the site of the Par-La-Ville car park in the City of Hamilton ("the Car Park") which was to open on 31 August 2016. It was envisaged that the new hotel would attract and accommodate the needs of opulent business travelers. The COH aspired to collect rental profits from the leasing of the Car Park and revenue stemming from the use of a new underground car park. The COH's general outlook on the project was that the new hotel would increase the vibrancy of Hamilton City and result in enhanced revenues for other city services.

   7 For these reasons, on 11 April 2012 the COH entered into a development agreement and an agreement for the lease with PLV. The COH was further motivated to secure a loan agreement wherein MIF would lend an $18,000,000 sum to PLV to meet the anticipated cost of borrowing monies in the estimated sum of $350,000,000 for the building and development of the luxurious hotel complex. The security for the $18,000,000 loan was to take the form of a guarantee ("the Guarantee") and mortgage over the COH's freehold interest in the Car Park ("the Mortgage").

4. It is common ground between the parties that the COH sought and obtained legal advice from more than one law firm on its powers under the Municipalities Act 1923 ("the 1923 Act") to provide the security for the $18,000,000 loan ("the loan").

5. It is also factually non-contentious that MIF entered the loan agreement with PLV for the $18,000,000 sum and on 9 July 2014 the COH provided the Guarantee which was confirmed in a mortgage agreement dated 4 August 2014 ("the Mortgage"/ "the mortgage agreement") over the Par-La-Ville car park site ("the Car Park").

6. PLV defaulted on the loan and the Plaintiff commenced a separate Supreme Court action to recover the proceeds of the loan through enforcement of the security in the form of a guarantee ("the Guarantee"). After three tiers of litigation the Plaintiff proved to be unsuccessful in its efforts to enforce the Guarantee.

7. Notwithstanding, the Plaintiff in these proceedings is claiming relief for loss arising out of the Mortgage on the basis that the Guarantee and the Mortgage are legally separable and distinct.

Summary of the Plaintiff's Pleaded Case and the Proposed Amendments

8. The Plaintiff's currently pleaded case comprises of a contractual claim for breach of the mortgage agreement under which the Defendant conveyed the Car Park to the Plaintiff. On the proposed draft of the amended writ, the Plaintiff seeks to add a claim of negligence for breach of duty of care.

9. The contractual claims in the Writ are in part tied to clauses 2(a), 4(a) and 7 of the Mortgage.

10. Relying on clause 2(a), the Plaintiff avers that the Defendant covenanted to observe and perform its obligations under the Guarantee which entailed payment upon demand of all sums due under the terms of the Guarantee and under the terms of the loan agreement dated 9 July 2014 ("the loan agreement").

11. Invoking clause 4(a), the Plaintiff seeks to hold the Defendant to its agreement that if PLV defaulted on the loan, the Plaintiff would be lawfully entitled to sell the Property and appoint a receiver.

12. In relation to clause 7, the Plaintiff avers that the Defendant represented and warranted that it had the necessary power and capacity to enter the Mortgage.

13. The proposed amendment at paragraph 3 also deals with the Defendant's representations on its capacity to enter the relevant agreements. It states:

At all material times the Defendant represented to the Plaintiff that it had the capacity to enter into the Guarantee and Mortgage and obtained an opinion to this effect from its attorneys, Terra Law Limited, upon which it was expressly agreed by the Defendant that the Plaintiff could rely ("Capacity Statements").

14. The proposed amendment at paragraph 6 aligns with paragraph 3 on the subject of the Defendant's representations on capacity. At paragraph 9 the Plaintiff seeks to include an assertion that the Defendant knew or ought to have known that the Plaintiff would and did rely on those 'Capacity Statements'.

15. The intended new claim of tortious negligence appears at paragraphs 11 and 16 where the Plaintiff says that the Defendant owed a duty of care in making the 'Capacity Statements' and that in respect of the Guarantee, those statements were made wrongly and negligently, amounting to a breach of duty of care.

16. At paragraph 15 and in the prayer, the Plaintiff seeks equitable title to the Property, in the event that the Court finds that the Mortgage is not legally valid and enforceable. The Plaintiff further seeks new declaratory relief that the Defendant is estopped from denying the validity of Mortgage given that this was not pleaded in case No. 241 of 2016. A new claim for damages is also sought by the Plaintiff.

Guiding Legal Principles

<u>The Law on Amendment of Pleadings</u>

17. RSC Order 20/1(1) entitles a plaintiff to amend a writ once at any time before the pleadings are deemed to be closed and Rule 1(2) requires the amended writ to be served on each defendant unless the Court directs otherwise.

18. However, Rule 1(3) sets out three examples to which Rule 1(1) does not apply once the writ has been served. Thus, under Rule 1(3) leave is required where an amendment to a served writ entails any one of the following types of amendments:

    (a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued, or

(b) the addition or substitution of a new cause of action, or

(c) without prejudice to rule 3(1) an amendment of the statement of claim (if any) indorsed on the writ…

19. The Court's powers to allow the amendment of a writ are stated under RSC Order 20/5(1) which provides:

… 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.

20. The 1999 White Book commentary on the Court's power to amend appears at para 20/0/2:

… This principle is subject to the countervailing rule of practice that an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury which cannot be properly be compensated for by costs. Accordingly, as a general rule, either party is allowed to make any amendment in his own pleadings or proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of and occasioned by the amendment, mala fide provided there has been no undue delay on his part, and provided also the amendment will not injure or prejudicially affect any vested rights of his opponent. But if the application is made, or if the proposed amendment is sought to be made after undue delay, or will in any other way unfairly prejudice or cause detriment to the other party, or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused…

21. These general legal principles are not the source of dispute between the parties.

Analysis and Findings

22. The Defendant argued that the Court should refuse leave to amend on the basis that the proposed amendments are 'bad in law or on the undisputed facts'. Mr. Robinson's response to this submission is essentially that such an analysis is premature and ought to be reserved for an application for a strike-out application or for trial. Mr. Diel argued that it would be wrong for the Court to allow an amendment which could not later survive a strike-out application under RSC Order 18/19 or under the exercise of the Court's inherent jurisdiction to strike out.

23. Mr. Diel explained that the Plaintiff's intended claim for misrepresentation in tort is legally and visibly flawed because the alleged misrepresentation is a term of the mortgage agreement. Mr. Diel referred to my previous decision in *Smooth and Easy v Richardson* [2019] SC (Bda)

61 Civ (23 September 2019) where the Court was concerned with the distinction between the law on breach of contract and the law of misrepresentation in tort. At paras 90 and 91 I held:

90. While the Plaintiff did not specifically plead misrepresentation as a cause of action or claim rescission as part of its relief, it is clear enough on the face of the pleadings and it was obvious throughout the trial that the Plaintiff seeks to rescind the Agreement for misrepresentation of a material fact on the grounds that the Agreement is void ab initio.

91. In the absence of a modern statutory scheme akin to the English Misrepresentation Act, the common law and principles of equity apply to Bermuda law on misrepresentation. This means that the a (sic) *misstatement which was incorporated as a term of the contract gives rise to a cause of action based on breach of contract and not rescission arising out of misrepresentation.*

24. In summary, I found that under Bermuda law, the law relating to misrepresentation is not applicable if the misstatement was incorporated into the contract as a contractual term. In such circumstances, the case would have to be dealt with under contract law. In the *Smooth and Easy* case, I found that where the misrepresentation is non-contractual and constitutes a tort, the Court must determine whether the misrepresentation was innocent or fraudulent. The remedy for innocent misrepresentation in tort is ordinarily rescission since damages are usually reserved for cases involving fraudulent misstatements or concealment.

25. In the present case before me, the Plaintiff proposes to plead a new cause of action in tort which appears to arise out of a contractual term ('the Capacity Statements') stated in the mortgage agreement. Further, the relief sought for the alleged misstatement includes a prayer for damages. While the proposed pleadings may not appear to be compatible with my legal findings in the *Smooth and Easy* case, I must not lose sight of the proper considerations relevant to an application to amend a pleaded case.

26. At this stage, the Court is more concerned with whether the pleadings fairly state and represent the Plaintiff's true case than with whether the case has sufficient merit. After all, it would be most unsatisfactory for the Court to amputate the due presentation of a plaintiff's case well before the merits of the claim are argued e.g. a strike out application, an application for summary judgment or at trial. The Court must also determine whether the nature of the amendments are of the kind that would result in prejudice or injury which could not be properly be compensated for by costs.

27. On 21 January 2019 the Privy Council in *Mexico Infrastructure Finance LLC v Corporation of Hamilton* [2019] UKPC2 upheld the Defendant's case that the Guarantee was not valid in law. The effect of this recent decision has unsurprisingly led the Plaintiff to rely on a claim in negligence as an alternative to it contractual claims. Had the Privy Council instead found that the Defendant had the legal capacity to stand as the guarantor to the loan, there would be no

cause whatsoever for the Plaintiff to assert misrepresentation on the Capacity Statements. Given the current position, it is obviously desirable for the Plaintiff, in the presentation of its case, to demonstrate a severable legal status between the Guarantee, as a matter of contract law, and Mortgage, as a matter of both contract law and in tort. Without delving into the merits of the Plaintiff's case, I find that the proposed amendments are necessary for the due presentation of the Plaintiff's case and that the nature of the amendments are not of the kind that would result in prejudice or injury which could not be properly be compensated for by a costs order.

28. Of course, I have also considered whether the proposed amendments can be properly cast aside as 'irrelevant' or 'useless'.

29. The relevancy test poses no real analytical difficulty since the subject of the amendments all arise out of the mortgage agreement. The term 'useless', in my judgment, is applicable to pleadings which are non-coherent and are incapable of argument at any level of skilled advocacy. That is because a non-coherent pleading which is incapable of argument is of no use. With that said, I see no reason to characterize the negligence claim as irrelevant or useless. Wrong or not in substance, on its face, the pleading is legally coherent.

30. I have also had regard to whether there has been any undue delay. While no serious complaint is made on the subject of undue delay, I have considered the 7 month time frame between the judicial conclusions made by the Privy Council and the filing of the summons application to amend on 21 August 2019.

31. Given the nature of the amendments and the considerably large sums of money related to this litigation, I find that no fair criticism of undue delay can be laid against the Plaintiff for expanding its causes of action as proposed. Of course, I should underscore my acknowledgment that Mr. Diel did not object on the grounds of undue delay.

Conclusion

32. The Plaintiff is granted leave to file within 14 days of this Ruling an amended writ reflecting the proposed amendments which appear in the draft annexed to its summons dated 21 August 2019.
33. Either party may be heard on the issue of costs upon filing a Form 31TC within 7 days of the date of this Ruling.

34. Otherwise, costs of this application should follow the event and be granted in favour of the Plaintiff on a standard basis to be taxed if not agreed.

35. Costs of and occasioned by the amendment of the writ shall be paid by the Plaintiff.

Dated this 16th day of January 2020

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HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT