



[2019] JMSC Civ 137

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 02035

BETWEEN	NIGEL CARTER	CLAIMANT
AND	NORTON SMITH	1ST DEFENDANT
AND	CHARLES BAXTER	2ND DEFENDANT
AND	THE ATTORNEY GENERAL	3RD DEFENDANT

IN CHAMBERS

Mr Rudolph Francis instructed by Rudolph Francis and Co, Attorneys-at-law for the Claimant/Respondent

Ms Deidre Powell instructed by the Director of State Proceedings, Attorneys-at-law for the Third Defendant

The First and Second Defendants being served but not appearing

Heard: 28 March 2019, 9 April 2019, 25 April 2019 and 14 May 2019, 21 May, 2019

Civil Procedure - Application to amend Further Further Amended Particulars of Claim dated August 9, 2016 - Civil Procedure Rule 20.4

MASTER T. MOTT TULLOCH-REID (AG)

[1] By Notice of Application filed on April 16, 2018, which is supported by an Affidavit filed on April 5, 2019, the Claimant has sought the Court's permission to amend a Further Further Amended Particulars of Claim dated August 9, 2016. The amendment that is being sought is for paragraph 16(iii) of the Further Further Amended Particulars of Claim to read as follows:

"Damages against the Third named Defendant for negligence resulting in the wrongful conversion of the said Motor Truck, causing loss of income to the Claimant amounting to the sum of Fifty four Million, Four Hundred and Thirty-two Dollars (\$54,432,000.00), as pleaded".

[2] The Claimant it seems wishes to have the Amended Particulars of Claim further amended to include the words noted at paragraph 1 above. The current wording is as follows:

"Alternatively damages against the Thirddnamed (sic) Defendant for negligence amounting to the sum of \$850,000.00 being the value of the said Motor Truck."

[3] The Claimant now wishes to further amend the Particulars of Claim to ensure that the Third Defendant is made liable to pay damages in excess of \$54,000,000.00 if he is successful in his claim. He wishes to have this amendment after the limitation period has passed and when the Third Defendant would have, based on the Particulars of Claim already before the Court would have filed a Defence limited to quantum.

[4] Of note are the following:

(a) The Notice of Application filed on April 16, 2018 does not set out any grounds on which the application is being sought;

(b) Although permission is being sought for the Further Further Amended Particulars of Claim to be amended, the amendment that is being sought is already set out in the Further Further Amended Particulars of Claim which was filed on April 16, 2018, which leaves me to conclude, that the

application is perhaps really for the Further Further Amended Particulars of Claim dated April 12, 2018 and filed April 16, 2018 to be allowed to stand;

(c) There is no Further Further Amended Particulars of Claim on file dated April 9, 2016 on file. The Further Further Amended Particulars of Claim dated April 9, 2016 that is on file, was never filed but was exhibited to a Claimant's Affidavit in Support of Application for Order to amend a Further Amended Particulars of Claim that was filed on August 12, 2016. On October 24, 2016, Master Mason (Ag) as she then was, allowed the amendment that was sought in the application dated August 9, 2012 and filed on August 12, 2016. That amendment would have seen the insertion of paragraphs 14A and 14B into the Amended Particulars of Claim. Paragraph 14B is significant as it pleads in detail the items of special damages with the resulting loss of income of \$54,432,000.00. Prior to that amendment, there was no particular pleading for special damages in general or for loss of income in particular. While there was the amendment to include that sum, the prayer still remained the same and the claim against the Third Defendant was for Damages for negligence amounting to \$850,000.00 being the value of the truck.

[5] The application that the Claimant is making is somewhat strange to me. He is asking for permission to amend the prayer. The prayer is a summary of what has been pleaded in the body of the particulars of claim and as such I am not sure that the amendment that is sought is a necessary amendment.

[6] The Claimant has sought to recover damages jointly and/or severally against all three defendants. His problems arose when in the particulars of claim, with all the amendments, he then particularises how the Court is to apportion the damages. Damage are sought against the First named Defendant for breach of contract, against the First and Second Defendants jointly and severally for conversion of his motor truck in the value of \$850,000.00 and damages against the Third Defendant

for negligence amounting to the sum of \$850,000.00 being the value of the said motor truck.

- [7]** Damages are at large and the amount of the remedy is to be decided by the Court, the measure of which, is to put the Claimant back into the position he would have been had the breach of contract or tort not occurred. For a Claimant to quantify in his pleadings what the General Damages should be is incorrect. That quantification is, in my experience, set out in submissions that will guide the Court at Trial in its assessment of damages.
- [8]** If the total of \$54,432,000.00 which is now being sought from the Third Defendant is a type of Special Damages, it must not only be particularly pleaded but it must also be particularly proven. This is a matter for the trial judge on the evidence presented to the Court and as such the figure need not be specifically set out in the prayer as it has already been pleaded in the body of the claim.
- [9]** The Claimant has not pursued the First Defendant who he has indicated was served but has never put forward a defence to the claim. The claimant has not requested a default judgment against the First Defendant.
- [10]** The Claimant's case against the Second Defendant has not yet been resolved. The Second Defendant has raised a defence and the matter ought to be referred to mediation pursuant to Part 74 of the CPR. If mediation is not successful a Case Management Conference is to be held and trial dates set. No mediation or Case Management Conference has been held with respect to the Claimant's claim against the Second Defendant. The Second Defendant had failed to attend the Case Management Conference hearing which was scheduled for March 28, 2012 and Master Bertram- Linton, as she then was, made orders that the Case Management Conference was to be adjourned to a date to be set by the Registrar and for the Claimant to proceed to Assessment of Damages against the Third Defendant.

- [11] Counsel for the Claimant and the Third Defendant have relied on the cases of *George Hutchinson v Everett O'Sullivan* Claim No 2013 HCV 00152 the judgment of Mrs V Harris J delivered on June 25, 2017, *Peter Salmon v Master Blends Feeds Limited* Suit No CL 1991/S163 the Judgment of Mr Sykes J (as he then was) delivered on October 9 and 26, 2007 and *Judith Godmar v Ciboney Group Limited* SCCA 144 of 2001 the judgment of Bingham JA delivered on October 22, 23, 24, 2002 and July 3, 2003. All three cases were useful in assisting me to come to my decision as they concerned amendments to statements of case sought after the limitation period had passed.
- [12] Counsel Ms Pinnock has indicated that the amendment being sought is prejudicial to the Third Defendant as it is seeking to introduce a new claim of conversion against the Third Defendant. I do not agree with Ms Pinnock. I am of the view that the Claimant is now seeking to say that as a result of the negligence of the servants/agents of the Third Defendant the First Defendant was able to wrongfully convert the motor truck and as a result of the negligence of the Third Defendant's servants and/or agents, the Claimant has suffered loss in the amount of \$54,432,000.00. It is my opinion that the Claimant is seeking, in his application, to cause the Third Defendant to be held liable for the sum of \$54,432,000.00 and he is doing this by seeking an amendment in the prayer. The claim for negligence remains the same but the amount of damages being sought has increased substantially.
- [13] I however agree with Ms Pinnock that permitting that amendment after the limitation period would be prejudicial to the Third Defendant and that that prejudice could not be compensated in an order for costs. The Claimant may not be seeking to introduce a new claim of conversion against the Third Defendant but I believe that the Claimant is seeking to increase the amount of damages that the Third Defendant is being asked to pay. If he is permitted to do this, he would, after the limitation period has passed, be allowed to recover from the Third Defendant a sum which is 64 times greater than that which he had previously sought to recover.

[14] The limitation period defence protects a defendant from claims being brought against him after the limitation period has expired. The sum now being sought against the Third is significant in comparison to that which was previously sought and the Third Defendant would have to be given an opportunity to amend its defence. There is an Assessment of Damages hearing which is scheduled to take place on Friday, May 24, 2019. This claim was started in this court in 2006 and concerns a matter that happened in 2000. The matter has come up for Assessment of Damages on several occasions and has been adjourned for various reasons. My review of the file has informed me that Master Bertram-Linton (Ag) as she then was, had ordered the Claimant and the Third Defendant to proceed to Assessment of Damages on May 9, 2012. Seven years later there has still been no assessment of damages.

[15] As I indicated above, the amendment sought is in my view unnecessary. Even if it were necessary, it is my opinion that that the prejudice that it would cause to the Third Defendant would be too great and so I am not able to allow the amendment sought.

[16] I therefore order as follows:

(a) The Claimant is not permitted to amend his Further Further Amended Particulars of Claim so that the words

“Damages against the Third named Defendant for negligence resulting in the wrongful conversion of the said Motor Truck, causing loss of income to the Claimant amounting to the sum of Fifty four Million, Four Hundred and Thirty-two Dollars (\$54,432,000.00), as pleaded”

are substituted for the words

“Alternatively damages against the Third named (sic) Defendant for negligence amounting to the sum of \$850,000.00 being the value of the said Motor Truck”.

(b) The Claimant and the Third Defendant are to proceed to the Assessment of Damages on Friday, May 24, 2019.

- (c) The Claimant and the 2nd Defendant are to attend Mediation on or before July 12, 2019. The Dispute Resolution Foundation is to treat this matter as a priority. If any party fails to attend mediation, his statement of case will be struck out.
- (d) Should mediation fail the Claimant and the 2nd Defendant are to attend Case Management Conference on July 29, 2019 at 11:00am.
- (e) The Claimant is to file and serve relevant documents as it relates to his claim against the First Defendant on or before July 12, 2019, failing which the Claimant's claim against First Defendant will be struck out for the Claimant's failure to prosecute the claim against the First Defendant.
- (f) The Claimant is to pay the Third Defendant costs in the application in the amount of \$30,000.00.
- (g) The Claimant's attorneys-at-law are to prepare, file and serve the Formal Order.