CL45/2021

IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

BETWEEN

DRAG HOLDINGS LTD.

First Plaintiff

PAPARAZZI LTD.

Second Plaintiff

-and-

THE PROPRIETORS, STRATA PLAN NO.57

Defendant

DECISION

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| **Before:** | **The Registrar** |
| **Appearances:** | **Mr. Craig Oliver for the Plaintiffs/Applicants** |
| | **Ms. Monique Allan for the Defendant/Respondent** |
| **Hearing Date:** | **30th May 2024** |
| **Venue:** | **Court Room 5** |
| **Delivery Date :** | **5th July 2024** |

*Amendment-Delay-Materiality-Mala Fides-Strata*

***Cases***

*Pilmore v Hood (1838) 5 Bing N.C, 97*

Peek v Gurney (1873) L.R 6 H.L 377

Tilcon Ltd v Land and Real Estate Investments Ltd [1987] 1 WLR 46.

Derrick v Williams (1939) 55 TLR 676.

Baker Ltd v Medway Building and Supplies Ltd [1958] 1 WLR 1216.

Cropper v Smith [1883] 26 Ch.D 700

Tildesey v Harper (1878) 10.Ch.D 393

Ketteman v Hansel Properties Ltd [1987] A.C 189

Attorney General v West Ham Corp. (1910) 74 J.P 196

James v Smith (1891) 1 Ch. 384

Sinclair v James [1894] 3 Ch. 554

Jones v Hughes [1905] 1 Ch 180.

C.H Pearce and Sons Ltd v Stonechester (1983) The Times

Wood v The Earl of Durham (1888) 21 QBD 501

Signet Group Plc v Hammerson UK Properties Ltd [1997] Lexis Citation 4762,

Evans v Charrington & Co Ltd [1983] 1 QB 810,

Ketteman v Hansel Properties [1987] 1 AC 189, [1988] 1 All ER 38,

Liff v Peasley [1980] 1 All ER 623, [1980] 1 WLR 781,

The Al Tawwab [1991] 1 Lloyds Rep 201

## BACKGROUND

1. The Defendant filed an application to strike out the Plaintiff's claim on 25th March 2024 which was heard on the 30th of May 2024. At that hearing the Plaintiffs' Attorney made an oral application to "re-re amend" his statement of claim. This application was objected to by Ms. Allan for the Defendant.

2. Mr. Oliver was directed to file his application together with affidavit evidence as necessary, Ms. Allan was allowed to respond.

3. The Writ and Statement of Claim was filed on the 25th of May 2021. A first amendment was filed on the 9th of June 2021. A second amendment was filed on the 16th of December 2021.

## THE APPLICATION

4. Mr. Oliver for the Plaintiffs' filed a draft Re-Re-Amended Statement of Claim on the 6th of June 2024 purporting to make the following amendments to the Statement of Claim (insertions in bold)
   a. To insert as paragraph 3 "**the sole shareholder of the 1st and the 2nd Plaintiff is Mr. Bernard Drag (Mr. Drag)"**
   b. To insert at paragraph 12 "The Corporation acting through **Mr. Art Forbes and Ms. Carmen Tanous of the** Executive Committee agreed to the same and directed the First Plaintiff **and the Second Plaintiff through Mr. Drag** to ensure that the said exterior was painted in the colour white. **Mr. Art Forbes and Ms. Carmen Tanious represented to Mr. Drag that the monies expended would be re-imbursed. Evidence from Mr. Forbes and Ms. Tanious will be forthcoming at the trial of this matter"**
   c. To insert as paragraph 13 "**It is averred that Mr. Drag, the sole shareholder of the First and the Second Plaintiff, was thereby entitled to rely upon the representation made to him.**
   d. To insert in paragraph 14 "As a consequence thereof, the second Plaintiff was put to expense, **relying upon the representation of the Executive Committee."**

5. The grounds on which this application is made are as follows: -
   a. To allow the amendment of the Statement of Claim in the manner proposed will clarify the nature of the relationship and cause of action between the 2nd Plaintiff and the Defendant;
   b. The Plaintiffs, by virtue of the proposed amendments, do not seek to add any cause of action which has accrued since the issue of the Writ; and
   c. No injustice will be caused to the Defendant by the proposed amendments.

## SUBMISSIONS

6. Mr. Oliver submits that representations were made to Bernard Drag as the sole shareholder of each of the Plaintiffs relating to re-imbursement of costs and that where *"a representation is made by one party to another, that other party is entitled to rely upon it. The Plaintiffs did so, and accordingly incurred the cost of liability to repaint, to their detriment."* It was also submitted that the 1st Plaintiff is the registered proprietor of Building D and the 2nd Plaintiff is the owner and operator of a business from Building D and as a result the 2nd Plaintiff relied on the representations made by the Executive Committee.

7. Counsel referred to the case of Pilmore v Hood (1838) 5 Bing N.C, 97 and Peek v Gurney (1873) L.R 6 H.L 377 at Paragraph 9-037, Chitty on Contracts (34th Edition) and submitted this as authority for the proposition that the 2nd Plaintiff falls into a class of representees where the representor intended or expected the representation to be passed on or ought to have foreseen such communication.

8. In response Ms. Allan for the Defendant opposed the application on the following grounds: -
    a. The summons is misleading and inaccurate.
    b. The proposed amendments introduce a new cause of action which is "likely" to be statute barred.
    c. The proposed amendments are not adequately particularised.
    d. The proposed amendments do not cure the defects in the Plaintiffs' case.

9. In respect of the paragraph 3 amendments. Ms Allan submits that the fact that Drag is a shareholder in both Plaintiffs' Company does not create a cause of action for the benefit of 2nd Plaintiff, therefore the proposed amendment changes nothing.

10. In respect of the paragraph 12, 13 and 14 amendments she submitted that the amendments purport to change the nature of the Plaintiff's claim from a simple debt action to misrepresentation. It is also submitted that the representation is completely unparticularised, no authority is pleaded as to the standing of the representors and the representations are also undated and that it is for the amending party to prove the amendments did not introduce a cause of action which is not statute barred. Counsel also submitted that it is not good enough for the Plaintiffs to say that missing information would be forthcoming at trial, rather, affidavits should have been filed showing evidence of the representations and the date and time of it in order to prove that the new cause of action is not statute barred. Counsel further submitted that, no particulars of the Executive Counsel's representations are pleaded nor is there any reference to an invoice.

## THE LAW

11. The general rule on amendments pursuant to O.20 r. 5 is that the Plaintiff may not amend his writ by adding a cause of action which has accrued since the issue of the writ. Where however the amendment is related to the remedy sought, the court will grant leave in order to allege facts arising after the date of the writ per Tilcon Ltd v Land and Real Estate Investments Ltd [1987] 1 WLR 46.

12. Leave to amend is generally given only when the proposed amendments have been properly and exactly formulated see Derrick v Williams (1939) 55 TLR 676.

13. It is a general guiding principle that amendments ought to be made *"for the purpose of determining the real question in the controversy between the parties to any proceedings or of correcting any defect or error in any proceedings"* per L.J in G.L Baker Ltd v Medway Building and Supplies Ltd [1958] 1 WLR 1216.

14. In Cropper v Smith [1883] 26 Ch.D 700 Bowen L.J stated that the object of the court is to decide the rights of the parties and not to punish them for mistakes. He states *"I know of no kind of error or mistake, which if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy"* In Tildesey v Harper (1878) 10.Ch.D 393 Bramwell L.J said *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise"*. However, Lord Griffiths in Ketteman v Hansel Properties Ltd [1987] A.C 189 stated that "it *should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence of claim to be raised for the first time".*

15. Generally, it seems that leave is readily granted before trial, on the payment of the costs occasioned, unless some prejudice can be shown against the opponent. In Attorney General v West Ham Corp. (1910) 74 J.P 196 it was stated that a Plaintiff can add a new claim which is so *"germane to and so*

*connected with the original cause of action, that it would be a denial justice if leave was refused*." Difficulty arises if there is ground for believing that the application was not made in good faith.

16. On the point of delay, *in James v Smith (1891) 1 Ch. 384* it was stated that a slight delay is not sufficient ground for refusing leave. But if an application that could easily have been made at a much earlier stage of the proceedings be delayed till after evidence is given and a point of law argued, leave may be refused.

17. It is important to note that the Court will always look at the materiality of the proposed amendment. In Note 20/8/24 it is stated that *"an inconsistent or useless amendment"* will not be allowed see Sinclair v James [1894] 3 Ch. 554. Nor would an amendment raising a case which must fail see Jones v Hughes [1905] 1 Ch 180.

18. In Sinclair v James supra North J stated "*Then it is said there was a mistake in the pleadings, and I am asked to allow an amendment by the addition of a claim for redemption. If there were merely a slip, and the action would be right when amended, I should allow an amendment. But this is not so: for I do not think that a plaintiff mortgagor can combine in the same action a claim against his own mortgagee to redeem him with a claim for partition against another defendant. Though at the present time the rules as to pleading do allow claims to be combined in the same action to a greater extent than formerly, I do not see how this can be done in a case where a judgment for redemption and payment would have to be finally worked out against one defendant before any judgment for partition could be pronounced against the other. On the grounds I have stated I am of opinion that no reasonable cause of action is disclosed by the statement of claim against the parties moving, and the proper course is to dismiss the action against them."*

19. In C.H Pearce and Sons Ltd v Stonechester (1983) The Times, November 17 CA. The Court of Appeal allowed an appeal against amendments allowed by Judge Baker Q.C on the basis that "*It seems to me to be really impossible that this* ***amendment*** *can stand. The plaintiff, who has by his own pleading in the first instance indicated what his understanding of the agreement was, now puts forward in two mutually inconsistent clauses a claim for rectification on the basis of two different common intentions. It seems to me that that really is a perfectly impossible case to make and one which cannot possibly succeed at*

*the trial and, therefore, that, in those circumstances, the learned judge was wrong to allow these* ***amendments"****.* The amendments were disallowed on the basis that it be useless for such amendments to be made.

20. In Wood v The Earl of Durham (1888) 21 QBD 501 the Court of Appeal considered whether an amendment should be allowed. In that case a libel claim was made by the Plaintiff a jockey against the Defendant a member of the Jockey Club as to unfairness and dishonesty. The Defendant submitted a defence and later sought to amend the defence by inserting a paragraph relating to the general reputation of unfair riding in previous cases. The Master and a Judge both ruled that the amendment cannot be allowed. On appeal the Court of Appeal dismissed the appeal on the basis that the paragraph did not contain a statement of material facts on which the defendant could provide evidence for and therefore this paragraph ought not be pleaded. Manisty J in agreement with submissions of the Plaintiff stated "*that if this is pleaded, evidence could not be admitted, and if evidence could not be admitted it ought not to be pleaded".* Hawkins J said "*The defendant wants to add a further paragraph, which does not go to the cause of action, and which does not go to the defence, but which it is said goes to damages".* On this basis he also ruled that the amendment should not be allowed.

21. In a string of cases dealing with useless or immaterial amendments, including *Signet Group Plc v Hammerson UK Properties Ltd* [1997] Lexis Citation 4762, *Evans v Charrington & Co Ltd* [1983] 1 QB 810, *Ketteman v Hansel Properties* [1987] 1 AC 189, [1988] 1 All ER 38, *Liff v Peasley* [1980] 1 All ER 623, [1980] 1 WLR 781, *The Al Tawwab* [1991] 1 Lloyds Rep 201 they all dealt with the issue of amendments to parties names after a period of limitation, the theory of relating back and the uselessness of the amendment. In Ketteman the House of Lords ruled that if leave is given under Ord. 20 r.5 (3) substituting a new party, the amendment does not relate back to the date of the writ or originating summons and therefore any such amendment will be out of time. In such a case *"leave to amend should therefore be refused because it will be useless"*

22. In *Liff supra* Brandon LJ stated *"that it was a misconception to suggest that the reason for not allowing leave to amend once a limitation period had expired was because the amendment would relate back to the date of the writ thus defeating a right to rely on a limitation point. His preferred basis for refusing leave was because to allow the amendment at that stage would be a useless exercise since the date of the amendment would be the relevant date, at which date the defendant would have an unanswerable defence based on limitation."*

## DISCUSSION

*Mala Fides*

23. The standard in respect of allowing amendments to pleadings are generally quite low. In Tildesey (supra) Bramwell LJ stated that generally all amendments should be allowed unless mala fides can be found. I do not find that Mr. Oliver's request for leave to amend is motivated by mala fides. However, issues of delay and the materiality of the amendments do arise.

*Delay*

24. This case was filed in 2021 and two other amendments were made by the Plaintiffs, over three years later an amendment is now being sought in respect of the 2nd Plaintiff's role and the issue of representation. In James (supra) where leave to amend was applied for after evidence was disclosed or a point of law argued, leave was refused. The court takes note of the fact that only upon being questioned about the role and standing of the 2nd Plaintiff at the Defendant's striking out hearing, did Mr. Oliver make an oral application for leave to amend.

*Materiality*

25. The materiality of the amendments is questionable.

26. The First Plaintiff in this case is the owner of Building D (the Building) which forms part of the Queen Angel Luxury Condominium Resort and the Second Plaintiff as pleaded owns a business known as Paparazzi which operates from Building D. The First Plaintiff has a legal relationship with the Defendant as owner of premises within the resort and therefore subject to all rules and regulations forming part of the Strata plan. The Second Plaintiff from the pleaded facts, though unclear, has some sort of contractual tenancy relationship with the First Plaintiff.

27. The Plaintiffs now seek to re-re-amend the Statement of Claim to include a sentence that Bernard Drag is the sole shareholder of the 1st and 2nd Plaintiff. The First Plaintiff a company incorporated in the Turks and Caicos Islands has standing to the extent that it is the owner of Building D and subject to the Strata Plan Title Ordinance and rules of the Corporation . The Second Plaintiff being possibly a tenant of the First Plaintiff has no contractual or other

relationship with the Defendant. The amendment proposed here does not make clear nor does it provide or create any such relationship.

28. Mr. Oliver argues that the First Plaintiff instructed the Second Plaintiff who instructed Waves Realty to paint the external wall of Building D. The Second Plaintiff then paid Waves Realty and now seeks payment from the First Plaintiff who seeks payment from the Defendant. This does not create any contractual relationship between the Second Plaintiff and the Defendant.

29. The First Plaintiff, being a proprietor of a strata lot, argues that the external wall is part of the common property and therefore must be maintained by the Corporation. In support it argues that representations were made by the Executive Committee to the First Plaintiff for the 2nd Plaintiff to proceed to make arrangements for the wall to be painted white. In the Statement of Claim in its current form, there are no pleaded allegation which state that the Committee agreed to make payments to the First Plaintiff.

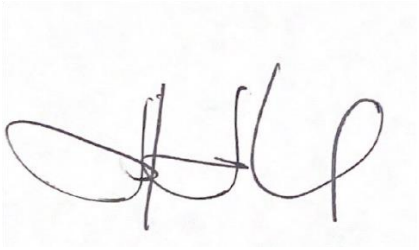
30. Mr. Oliver also seeks a further amendment to state that "*the Corporation acting through* ***Mr. Art Forbes and Ms. Carmen Tanious of the*** *Executive Committee agreed to the same and directed the First Plaintiff* ***and the Second Plaintiff through Mr. Drag*** *to ensure that the said exterior was painted in the colour of white"*. This amendment does not change the fact that there is no contractual relationship between the Second Plaintiff and the Defendant and therefore the Defendant can give no directions to the Second Plaintiff to do any act for and on behalf of the First Plaintiff. Any contractual relationship between the First and Second Plaintiff is only between them and does not involve the Defendant.

31. The amendments in regard to the 2nd Plaintiff may fall within the category of being immaterial or useless. In order for the 2nd Plaintiff to have a claim for re-imbursement against the Defendant, it must be shown that there were certain representations made to the 2nd Plaintiff by the Defendant, inducing the 2nd Plaintiff to contract with the Defendant and which representations of fact turned out to be false resulting in a misrepresentation. This is not pleaded as a cause of action. Alternatively, no contract or agreement is pleaded between the 2nd Plaintiff and the Defendant thus negating breach of contract as a cause of action. Therefore, seeking to clarify the position of the 2nd Plaintiff by this 3rd amendment by stating that Bernard Drag is a shareholder of the 1st and 2nd Plaintiffs and that representations were made to the 1st and Second Plaintiffs

through Bernard Drag does not add to the materiality of the Statement of Claim.

32. This Claim relates to whether the external wall of Building D is common property and whether the Corporation should pay for refurbishment works. I therefore find that issues of both materiality and delay arise in respect of the Plaintiff's application to amend.

33. In the circumstances leave to amend is refused. Costs to be paid by the Plaintiffs to the Defendant.



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Registrar