IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL-53/20

BETWEEN:

THE HONOURABLE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS — **PLAINTIFF**

-and-

SEAN SULLIVAN — **DEFENDANT**

DECISION

Before: **The Hon. Mr Justice Anthony S. Gruchot**

Appearances: **Mr Laurence Harris of Cooley (UK) LLP for the Plaintiff**

Mr Conrad Griffiths KC and Mr Devonte Smith of Griffiths & Partners for the Defendant

Hearing Date: **26th September 2023**

Venue: **Court 5, Graceway Plaza, Providenciales**

Handed Down: **31st October 2023.**

1. This is the decision following a further interlocutory application in this matter, on this occasion for leave to further amend the Attorney General's Amended Reply, filed on 23rd May 2023 pursuant to my Order of 11th May 2023, granting leave to Mr Sullivan to amend his Defence and leave to the Attorney General to consequently amend her Reply[1].

[1] See (CL 53/20) [2023] TCASC 55 (11 May 2023)

Introduction

2. The application is made pursuant to O.20 r.5 which provides:

> *"Subject to Order 15, rules 6, 7 and 8[2] 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."*

3. A draft of the proposed amendments is annexed to the summons, together with some further documents referred to in the proposed amendments which are documents also the subject of dispute herein. Mr Harris submits that the amendments have come about due to "*a number of facts and matters which arise out of documents disclosed by the Defendant recently in his supplemental disclosure*".

4. There have been several directions orders regarding disclosure, with both parties alleging the other of failing to comply with their respective obligations. This has resulted in Mr Sullivan serving a 3rd supplemental list of documents on 19th July 2023, a 4th supplemental list of documents on 11th September 2023 and the Attorney General filing a 3rd supplemental list of documents on 11th (or 12th) September 2023.

5. The documents relevant to the proposed amendments include an application form for a casino licence dated 20th October 2007 submitted by Mr Sullivan to the Turks and Caicos Islands Government ('TCIG'). This was included in Mr Sullivan's 3rd supplemental list and subsequently in the Attorney General's 3rd supplemental list. What is apparent is that this document has been in the possession of both parties since 2007, but has not previously been disclosed. Mr Harris submits that this was not a relevant document until the amended defence was allowed, and even then, not until it was disclosed by Mr Sullivan. The other disclosed documents relevant to the application are various evidence of expenditure incurred by Mr Sullivan (or his companies) and are included in his 4th supplemental list.

6. Additionally, Mr Harris refers to a number of US court cases and judgments which he alleges involve Mr Sullivan and also to an administrative complaint/decision against Mr Sullivan made in the Massachusetts Securities Division. It is these documents which have been

[2] Not applicable to this application.

annexed to the back of the proposed Re-Amended Reply. Mr Griffiths KC takes issue that these documents have not previously been disclosed and questions when they came into the possession of the Attorney General. He alleges a breach of the Attorney General's disclosure obligations and a breach of disclosure orders. Mr Harris responds that the documents are in the public domain and can be found by a simple internet search. He says that save for the administrative complaint/decision, these are not 'documents' but are simply a list of cases in which the Attorney General believes Mr Sullivan was involved. Further, he submits that Mr Sullivan must be aware of the administrative complaint and he takes issue that Mr Sullivan has not disclosed them as the complaint is referred to in Mr Sullivan's recently exchanged witness statement. He further submits that the documents all go to the character of Mr Sullivan which is a key issue in the case.

7. Mr Harris submits that the amendments do not necessitate any additional disclosure by either party, particularly as the substance of the US cases is not relevant and the Attorney General is not relying on the contents of the cases, the relevance being that their existence was not disclosed on the casino licence application, which, he submits if they had been then they would have characterised Mr Sullivan as not being a fit and proper person for the TCIG to do business with, a fact relevant to the equitable defence raised on amendment of the Defence; alternatively, the fact that they were not disclosed gives rise to the suggestion that Mr Sullivan does not come to equity with 'clean hands'.

8. Mr Griffiths KC submits that the amendments should not be allowed. He takes issue that the application is not supported by any affidavit evidence, in particular, to explain why the application has been made so late in the proceedings and immediately after Mr Sullivan served his witness statement/evidence, which he suggests, leads to an inference of *mala fides* by the Attorney General.

9. It is perhaps helpful to set out the chronology relevant to this application:

    a. Mr Sullivan served a supplemental list of documents on 19th July 2023 (which included for the 1st time the casino licence application, which as Mr Harris puts it, is the centrepiece of the proposed Re-Amended Reply).

b. There was an application for supplemental disclosure which was heard on 3rd August 2023[3].

c. Further disclosure was given by Mr Sullivan on 11th September 2023.

d. On 11th (or 12th) September 2023 the Attorney General served her 3rd supplemental list of documents (which also included a copy of the casino application).

e. Mr Sullivan served his witness statement on 20th September 2023.

f. On 21st September 2023 the summons giving rise to this application was filed and served.

10. Mr Griffiths KC takes issue that the application was filed very shortly after Mr Sullivan (who it appears may be the only live witness in this matter, hearsay notices having been served by both him and the Attorney General in respect of the Crown's evidence) had served his witness statement. This, he suggests, is a ploy by the Attorney General to set a trap for Mr Sullivan, by deliberately holding back the application and the additional documents until after the Defendant had served his statement, thereby prejudicing his position by depriving Mr Sullivan of the ability to answer the case that the Attorney General now wishes to bring against him. He fortifies his argument by submitting:

a. Mr Harris produced his summons and an extensive amended pleading (over 7 pages of amendments/additions), which refers to a significant number of documents within 24 hours of Mr Sullivan serving his statement;

b. That the issue of Mr Sullivan's good character was raised as long ago as 15th May 2023, in the Amended Defence in relation to the allegation of dishonest conduct made in the original Statement of Claim and so the subject matter of much of the proposed amendments was a live issue at that time;

c. The issue of 'good character' was addressed by the Attorney General in her Amended Reply by joinder of all issues in the Amended Defence;

d. Mr Harris has repeatedly referred to the issue of 'good character' in oral submissions in the numerous interlocutory hearings since May 2023; and

[3] [2023] TCASC 74 (24 August 2023)

e. The explanation (in the summons) that the issue has arisen from Mr Sullivan's recent disclosure is not accurate. This argument arises from Mr Griffiths KC taking "recent" to mean Mr Sullivan's 4th supplemental disclosure list whereas Mr Harris submits that he meant the 3rd and 4th supplemental disclosure lists, which he says he thought was an unobjectionable way of dealing with the matter.

11. He suggests the above is a deliberate *mala fide* step by the Attorney General which goes to the issue of whether leave to amend should be granted.

12. He says that this is a case of deliberate concealment and that the amendments will lead to a rejoinder, more discovery and further evidence.

13. Mr Harris observes that Mr Griffiths KC does not suggest that there is anything about the amendments which is not appropriate, but that his complaint is about the time it was served. In response to that charge, he explains that it was the casino licence application which gave rise to many of the amendments which was disclosed for the 1st time on the 19th July 2023. Before that date it was not a live issue in the case.

14. He goes on that it was served with some 60 or 70 documents and he had to prepare for the application for supplemental disclosure which was heard on 3rd August 2023. It then took time to consider the significance of the licence application and the additional disclosure which was served on 11th September 2023.

15. He says that it was only at that stage that it was apparent that there were almost no documents to support Mr Sullivan's pleaded case of having allegedly incurred significant expenditure in reliance of representations made to him by TCIG, which issue also forms part of the proposed amendments. He says that the amended pleading was finalised and served on the 21st September 2023, just 10 days after the 4th supplemental disclosure list had been given. He submits that rather than delaying matters, the timetable suggests that the Attorney General has proceeded expeditiously. He does not address the proximity of the filing of the application and the service of Mr Sullivan's witness statement.

Submissions

16. Mr Griffiths KC takes issue that the summons is not supported by any evidence to explain why the application has been made, as he suggests, late in the proceedings. He refers me to

Bramwell LJ in **Tildesley -v- Harper**[4] as authority that where a question about the motive of an application to amend is in question, an affidavit is needed to show the *bona fides* of the application.

17. **Tildesley -v- Harper** was a successful appeal against an order by Fry J refusing an application by the defendant to amend his statement of defence. Bramwell LJ stated:

> *"My practice has always been to give leave to amend, unless I have been satisfied that the party applying has been acting mala fide, or, by his blunder, has done some injury to the other side which cannot be compensated for by costs or otherwise. I confess that in this case I should have had some doubt whether there had been a bona fide mistake made by the defendant, as the mistake is so very obvious. I should have required some statement or affidavit by the solicitor to show that the slip in pleading was bona fide, and, if satisfied on that point, I should not have refused leave to amend."* (My emphasis)

I observe that Bramwell LJ was not delivering the judgment of the court, counsel for the plaintiff/respondent assenting to an order for the defendant/appellant to have leave to amend on an indication from the court during opening submissions, that the decision of Fry J could not be sustained. It is evident from the above, that the application in that matter was not supported by such an affidavit or statement.

18. I take from the above that I should grant the leave to amend (subject to any other arguments why it should be refused) unless I am satisfied that the Attorney General has acted or is acting *mala fide*, or that Mr Sullivan cannot be adequately compensated in costs or otherwise and if so, then further consideration is required[5].

19. Mr Griffiths KC submits that:

    a. The amendment application is made deliberately late because it could and should have been made much earlier before Mr Sullivan's evidence was served;

    b. That this is a case of deliberate concealment;

[4] [1874-80] All ER Rep Ext 1612 – This authority is referred to in the Supreme Court Practice 1999 ('White Book') at Note 20/8/6; "General principles for grant of leave to amend".
[5] See paragraph 28 *infra.*

c. The amendment will lead to a 'waste of work', a rejoinder, more discovery and further evidence.

20. He goes on to suggest that "*the concealment was to achieve an unfair advantage by making the Defendant exchange his evidence in response to the then pleaded case and documents when a proposed amendment and discovery were deliberately withheld by the Plaintiff*."

21. Mr Griffiths KC bases his allegation of deliberate delay on his submission that it is implausible that the amendments which amount to over 7 pages of drafting, were produced between noon on the 20th September and 10:00 a.m. on the 21st September and that it is implausible that the documents annexed to the proposed amendments were only in the possession of the Attorney General on the afternoon of the 20th September and further, it is implausible that the documents were not in the Attorney General's possession on the 11th September when she gave her supplemental discovery.

22. He continues that in the absence of affidavit evidence to assert that none of those documents existed on the 11th September and that the amendment was not in contemplation on the 11th September or much sooner, and certainly was not in contemplation before the exchange of evidence (given that there was no suggestion from the Attorney General before exchange of evidence that there were amendments afoot), the inference is that the documents and proposed amendment have been deliberately withheld. In those circumstances, he submits that this court ought to sanction the conduct of the Attorney General by declining to give leave.

23. Mr Griffiths KC submits that the dicta of Bramwell LJ in **Tildesley -v- Harper** noted in paragraph 17 above requires that if you are getting into an area where there is an accusation that the party seeking to amend has been acting *male fide* to cause damage to the other party then the Court should require an affidavit to explain what was done or what was not done.

24. He further submits that what the Attorney General has deliberately done is to deprive Mr Sullivan of the ability to answer the case that she now wishes to bring against him and he says what is more important is that the Attorney General has deliberately withheld the documents and it is that course of conduct which should deprive her of her ability to amend. He submits that if the amendments are allowed, Mr Sullivan has been deprived of the right to have his

witness statement formulated and prepared in a way which meets the case he has to answer and so to allow the amendments would give rise to irremediable prejudice.

25. In his skeleton argument but not expanded upon in his oral submissions, Mr Griffiths KC refers to the Court of Appeal of England and Wales decision in **ABP Technology Limited -v- (1) Voyetra Turtle Beach Incorporated (2) Turtle Beach Europe Limited**[6]. This was a case involving competing trademarks and an application to amend the defence and introduce a counterclaim. Birss LJ, giving judgment for the Court, overturning the grant of leave to amend, held[7]:

> *"… that the lateness of the application to amend **had been deliberately calculated to cause prejudice to the other party** and that no good reason had been provided for the lateness."* (Emphasis added)

26. In that case, the delay in making the application deprived the other party of a defence it would otherwise have had and the court held that amounted to irremediable prejudice and as such the amendment should not be allowed.

27. In his discussion of 'lateness' Birss LJ cites Coulson J (as he then was) in **CIP Properties -v- Galliford Fry**[8] and his summary of the relevant authorities on 'lateness'[9]:

> *"(a) The lateness by which an amendment is produced is a relative concept (Hague Plant). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment."*

28. Birss LJ went on to say[10]:

> *"The simple point about lateness is that it calls for an explanation justifying the lateness. That is because an amendment which might otherwise be allowed, could well be refused **if its lateness has caused unjustifiable prejudice to the other party**.*

[6] [2022] EWCA Civ 594.
[7] At paragraph 39.
[8] [2015] EWHC 1345 (TCC).
[9] At paragraph 19 of *CIP Properties*
[10] At paragraph 24

Therefore an explanation is needed in order for the court to work out whether or not it is a case in which, despite the prejudice caused by the lateness, nevertheless the balance comes down in favour of allowing the amendment." (Emphasis added)

29. Coulson J, again in **CIP Properties** gave examples of the kind of prejudice a late amendment might cause and said[11]:

"[A]t one end of the spectrum, the simple fact of being 'mucked around' (Worldwide), to the disruption of and additional pressure on their lawyers in the run up to trial (Bourke), and the duplication of costs and effort (Hague Plant) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments."

30. Mr Harris submits that there is no suggestion that the proposed amendments would lead to an adjournment of the trial and suggests that this application is in the territory of being 'mucked around'.

31. I note that both **ABP Technology** and **CIP Properties** were decided under the CPR now applicable in England and Wales and as such the considerations for this Court are to a degree, different.

32. Mr Harris in his skeleton argument also refers me to the reference to **Tildesley -v- Harper** in the White Book[12] which omits the further statement from Bramwell LJ quoted above from the words "I confess that …" onwards. The note goes on to quote Brett MR in **Clarapede -v- Commercial Union Association**[13] in which he held:

"However negligent or careless may have been the first omission, and however late the proposed amendment, ***the amendment should be allowed if it can be made without injustice to the other side****. There is no injustice if the other side can be compensated in costs."* (Emphasis added)

33. The above is cited with approval by the Court of Appeal of the Cayman Islands in **Swiss Bank & Trust Corporation Ltd -v- Iorgulescu**[14].

[11] At paragraph 19 of *CIP Properties.*
[12] Note 20/8/6.
[13] (1883) 32 W.R. 262 at 263.
[14] [1994-95 CILR 149] at page 154.

34. Mr Harris submits that the purpose of the pleadings is to ensure that the issues for trial are clear between the parties and that is what the Attorney General has sought to do. He goes on that there is no suggestion that the casino licence application was identified by the Attorney General as a relevant document before it was disclosed on 19th July 2023 and it could not be that the amendments could have been expected before that document was disclosed so, he suggests, that what Mr Griffiths KC is really saying is Mr Sullivan should have been notified about the proposed amendments at some point between the 19th July 2023 and the 20th September 2023, but he qualifies this submission to the extent that the financial information (such as it was) was only disclosed on the 11th September 2023, the summons being served on the 21st September 2023.

35. In reliance on **ABP Technology**, Mr Harris submits that the real question is whether allowing the amendments would give rise to prejudice to Mr Sullivan. He suggests there is no such prejudice and notes that Mr Griffiths KC has not pointed to any prejudice in his skeleton argument, the alleged prejudice being set out above from Mr Griffiths KC's oral submissions. Mr Harris submits that there is no prejudice because Mr Sullivan can in any event be cross-examined on the matters raised by the proposed amendments. Mr Harris submits that what the Attorney General has done is the proper thing by setting out the case that Mr Sullivan is going to have to meet in cross-examination, in advance so he has plenty of time to deal with it. Mr Griffiths KC does not make any suggestion that this is not correct.

36. Mr Harris submits that the only matter that Mr Griffiths KC has raised by way of prejudice is that he may have to serve a rejoinder and supplemental witness statement which he says the Attorney General has no issue with.

37. In response to the question from the Court as to why the application was made when it was, Mr Harris responded by stating that he was not going to give evidence about precisely on which date he looked at which question (in the licensing application) but explained that the Attorney General got the 1st batch of material on the 19th July 2023, that there was a lot of other stuff going on in the case in late July and early August, which required a lot of attention.

38. Mr Harris submits that there is no trick and says that Mr Sullivan has not dealt with the casino licence application at all in his statement so it cannot be said that Mr Sullivan can say that he has given one account and that he would have dealt with that account differently if he knew

that the Attorney General was going to amend. His point is that there is no account on that issue at present.

Discussion

39. In common with the previous applications in this matter, the parties have robustly argued their respective positions. The questions which fall to be considered are:

    a. Is the Attorney General in breach of her disclosure obligations by not disclosing the documents annexed to the proposed Re-Amended Reply earlier?

    b. Has the Attorney General deliberately held back the documents and the application to amend until Mr Sullivan had served his witness statement?

    c. Was an affidavit required:

        i. in support of the application generally;

        ii. to explain the timing of the application;

        iii. or to explain why the application does not give rise to irremediable prejudice?

    d. In any event, would allowing the amendments give rise to irremediable prejudice and if so, does the balance come down in favour of allowing them notwithstanding?

Disclosure Obligation

40. The arguments have been set out above. I do not find that there has been a breach of the Attorney General's disclosure obligations with respect to the documents attached to the proposed Re-Amended Reply.

41. I am not of the view that attaching documents to a pleading is a practice that is to be encouraged, notwithstanding Mr Harris's submission that this is now commonplace under the CPR in England and Wales. I refer briefly to the note[15] to O.18 r. 6 which deals with attaching schedules to a pleading which states:

> *"A schedule is information in documentary form which is annexed to a pleading. It does not itself fall within the definition of a pleading, and may be attached to a pleading only if leave of the Master has been obtained, which leave should be sought*

[15] Note 18/6/3

ex parte. A schedule may be usefully employed to deal with such matters as e.g. arrears of rent, dilapidations or calculations relating to interesting claims for a liquidated sum …"

42. Mr Harris submits, and I accept, that the documents in question are in the public domain. They can and have been obtained from publicly accessible online sources. I am not of the opinion that they are in the nature of "*documents which are or have been in their possession, custody or power relating to matters in question in the action*"[16] which a party can be compelled to disclose under O.24[17].

Withholding of the Application

43. The timing of this application is unfortunate, if for no other reason than it has given rise to this further interlocutory application being contested and the incumbent costs to the parties. No response has been given by Mr Harris with respect to Mr Griffiths KC's charge that there should have been some indication that there was to be an application to amend before the service of Mr Sullivan's evidence and I find considerable force in Mr Griffiths KC's submission that it is implausible that such extensive amendments could have been contemplated and drafted in a window of less than 24 hours.

44. I acknowledge Mr Harris's explanation of the chronology and take on board that the application was made within 10 days or so of the last supplemental disclosure list, which documents are significant to the proposed amendments but this does not to my mind displace Mr Griffiths KC's implausibility argument.

45. The question is, was this a deliberate ploy by the Attorney General, as Mr Griffiths KC puts it, an act of *mala fides* by the Attorney General and if so, does it cause irremediable prejudice to Mr Sullivan, such that the proposed amendments should be disallowed?

46. In **ABP Technology** the Court held[18]:

"The real issue in this case is that the lateness of the amendment manifestly deprived the other party of a defence which they would have had if the point had been raised when it could have been."

[16] O. 24 r. 1.
[17] Note 24/0/2.
[18] At paragraph 33.

47. It was accepted by the respondent in **ABP Technology** that the application had been deliberately held back until after the 3-month window. In paragraph 26 of the assessment, Lord Birss states:

> *"Counsel for Voyetra contended that Voyetra were entitled to do this in order to make what he called a 'meaningful amendment' to their defence, in other words one which could not be stymied by ABP Tech using s46(3) to revoke Mark 250."*

48. Mr Harris submits, and I accept, that the above is a very different case to the issue before me. Mr Griffiths KC submits that there is irremediable prejudice, in that Mr Sullivan has been deprived of the right to have his witness statement formulated and prepared in a way which meets the case that he has to face. I do not accept that argument. If the amendments are allowed, Mr Sullivan can put in a rejoinder and a supplemental witness statement dealing with the issues that arise from the proposed amendments. He is not being deprived of an opportunity to answer the amended pleading, and he is not deprived of running any case or defence which he would have otherwise had.

Requirement of an Affidavit

49. The general principle is that no affidavit is required on an application for leave to amend[19].

50. **ABP Technology** is authority that a supporting affidavit or explanation of delay is required where lateness has caused unjustifiable prejudice[20].

51. For the reasons stated above, I do not find that the proposed amendments in this application would cause such prejudice and as such I do not find that any supporting affidavit is required, but even if I am wrong on that issue, I am of the view that that the balance would come down in favour of allowing the proposed amendments so that the issues for trial are clear between the parties.

52. The prejudice to Mr Sullivan if the proposed amendments are allowed is that he is put to the trouble of filing a rejoinder if he considers that necessary and he can answer the issues raised by a supplemental witness statement. Mr Harris has no issues with either. In my judgment, any prejudice is compensated for, by an appropriate order as to costs.

[19] See the White Book, Note 20/8/4.
[20] See paragraph 28 supra.

Disposition

53. The Attorney General has leave to amend her Amended Reply in the form attached to the summons of 21st September 2023.

54. The Attorney General shall pay the costs of and occasioned by this application and the amendments.

55. The Parties shall have liberty to apply for any further directions which may arise as a result of this decision if the same cannot be agreed.

31st October 2023

The Hon. Justice Anthony S. Gruchot
Judge