COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 188 of 2014

B E T W E E N

BAHAMAS TELECOMMUNICATIONS COMPANY LTD.
Appellant

AND

ISLAND BELL LIMITED
Respondent

BEFORE: **The Honourable Dame Anita Allen, President**
The Honourable Mr. Justice Isaacs, JA
The Honourable Ms. Justice Crane-Scott, JA

APPEARANCES: **Mr. Raynard Rigby with Ms. Magan Taylor, Counsel for the Appellant**
Mr. Carl Bethel, QC with Mr. Michael Foulkes, Counsel for the Respondent

DATES: **29 January 2016; 10 March 2016; 7 February 2017**

Pleading – Amendment – Civil Appeal – Appeal against grant of leave to amend – Amendment at trial – Order 20 Rules of the Supreme Court – Whether statement of case should be allowed to be amended after the close of case – Misfeasance

This case was commenced by way of Writ of Summons filed 15 September 2004.The plaintiff/respondent then filed the Statement of Claim on 5 January 2005 alleging that the failure of the defendant/appellant as regulator and principal to effectively address the matters particularised where in the face of repeated written complaints and evidence received from the claimant constituted Misfeasance in a Public Office; and claimed that it suffered loss, damage and economic loss. The Defence to the Statement of Claim denied each allegation made in the Statement of Claim. On 15 June 2005, the respondent filed a Reply, and also filed Further and Better Particulars of the Statement of Claim on 9 February 2011. The trial commenced on 15 October 2011, and on 7 November 2011, the appellant filed an Amended Defence and the respondent filed an Amended Reply thereto on 8 November 2011.

The trial of the matter took place over a period of twenty days spanning between 15 November 2011 and 30 October 2013 when the appellant closed its case. At the close of the case for the defendant/appellant the plaintiff/respondent made application by Summons filed 30 October 2013 for leave to amend its Statement of Claim pursuant to Order 20 r.5 of the Rules of the Supreme Court. The summons for leave to amend was heard on 31 October 2013, and on 7 July 2014, leave was granted to the plaintiff/respondents to amend its statement of claim in terms of the draft attached to the application filed. The reason given for the grant of the amendment was "that it is necessary in order to determine the real controversy between the parties", stating the original statement of claim as drafted did not do. The judge granted leave on the basis that there would be no injustice to the appellant. The appellant filed an appeal against the decision.

Held: Appeal allowed. Costs of the appeal and occasioned by the application to amend in the court below to be the appellants, to be taxed if not agreed.

Clarapede v Commercial Union Association (1883) 32 WR 262 mentioned
Cropper v Smith (1883) 26 Ch. D. 700 applied
Edevain v Cohen (1890) 43 Ch. D. 187 applied
James v Smith [1891] 1 Ch 384 mentioned
Ketteman v Hansel Properties [1987] A.C. 189 mentioned
Rainy v Brave (1872) LR 4 PC 287 applied
Soar v National Coal Board [1965] 1 W.L.R. 886 applied
Three Rivers District Council v Governor and Company of The Bank of England (No.3) 2003 2 A.C 1 applied

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J U D G M E N T

Judgment delivered by the Honourable Dame Anita Allen, P

Introduction

1. This appeal challenges the decision of Bain J. of 7 July 2014, to grant leave to the respondent to amend its Statement of Claim.

2. The respondent's Summons for leave to amend its statement of claim was filed on 30 October 2013 at the close of the appellant's case and more particularly, on the last day of the trial which had by then, already lasted some 15 days. The application was instituted under Order 20 of the Rules of the Supreme Court and accordingly, the appeal will require an examination of the Rules and a discussion of the matters to be taken into account by a court in exercising the discretion to amend confound by the Rules.

3. Before delving into the merits of the appeal, it is necessary to set out the particulars of the Statement of Claim, and how the respondent proposed to amend it.

4. On examining the pleadings filed in this matter, and in particular the Writ of Summons filed on 15 September 2004 by the respondent, I found it significant that the only cause of action pleaded is misfeasance in a public office; although damages are also claimed for economic loss, with no indication of what caused the economic loss. It is a generally endorsed writ, which says simply;

> **"THE Plaintiff's claim is against the Defendant for:**
> 1. **Damages for misfeasance in a Public Office;**
> 2. **Damages for economic loss;**
> 3. **Aggravated damages;**
> 4. **Exemplary damages;**
> 5. **Interest;**
> 6. **Costs; and**
> 7. **Further or other relief."**

The original Statement of Claim

5. The relevant Statement of Claim was that filed on 5 January 2005 in which the respondent pleaded a contract between the parties, which it said included that all Automated Operator Services (AOS) were to be installed on hotel premises only; a prohibition against the use of toll free numbers; the published Operator Assistance Call Rates were not to be exceeded; the use of voice over the internet platform (Voice Over IP) was prohibited; the operator had to be a Bahamian Company/business as defined by the Companies Act.

6. The respondent further pleaded in that Statement of Claim that each and every licensed AOS operator became an agent of the appellant; that by virtue of the appellant's statutory duty and licensing powers, it was responsible for regulating these operators and was charged with the duty of ensuring that all AOS operators

complied with all the terms and conditions of the contractual licenses issued by the appellant: the respondent alleged that in breach of its statutory duty as regulator, and its contractual duty as principal, the appellant knowingly failed to prevent one of its licensees and agents, namely One World Communications (OWC) from breaching the terms and conditions of its contractual license with the respondent, thereby causing loss, damage, and economic loss.

7. The Statement of Claim further set out under "Particulars of Statutory Duty", the following:

> **" A. The defendant knowingly permitted OWC to:**
> **(i) provide AOS services without having any equipment installed in any hotel premises as required by the contract;**
> **(ii) persistently and habitually charge rates for long distance international calls upwards of 500% above the Defendant's published operator assisted call rates, contrary to the terms and conditions of the contractual licence; and**
> **(iii) breach the Public Policy of Bahamianization by use of the device of incorporation of a "Bahamian" company under the Companies Act, which definition of "Bahamian" is inconsistent with the definition of a Bahamian entity for the purposes of the Business Licence Act, and which definition allows for the practice of illegal "fronting".**
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> **B. In so doing the Defendant knowingly failed to perform its duty as regulator to ensure that required Foreign Investor Approvals were in place to permit non-Bahamians to participate in a telecommunications service provider and that in the absence of such approval only fully Bahamian entities competed in the provision of telecommunications services in and from The Bahamas; that an illegal "Call-back" service was not being offered by OWC and, further, that unsuspecting consumers were not being "priced-gouged" by any of the Defendant's licensees. The Defendant was repeatedly informed by the Plaintiff and by Departments of Government of the many complaints received from**

tourists who were the victims of the aforesaid price-gouging by OWC, yet the Defendant failed to take any or any effective measures to prevent the same.

C. The Defendant failed to ensure that OWC was a fully Bahamian-owned Company, when presented with evidence to the contrary, and failed to ensure that OWC was, in fact, entitled to be a licensee of the Defendant in the absence of the required Foreign Investor approvals.

D. The Plaintiff repeatedly presented the Defendant with documentary evidence supporting each of the above contentions between the years 2000 and December 2003.

E. Notwithstanding the above, the Defendant failed and refused to prevent the matters complained of, revoke the licence of OWC, and/or to otherwise ensure that there was a level field of competition for all AOS licensees regulated by the Defendant.

8. The respondent further claimed in the Statement of Claim that the failure of the defendant as regulator and principal to effectively address the matters particularized, in the face of repeated written complaints and evidence received from the respondent constituted Misfeasance in a Public Office; and claimed that it suffered loss, damage and economic loss.

9. In the respondent's particulars of damage, it claimed that its annual net ordinary income fell from more than $400,000.00 in 1999 to $3,005.00 in 2003 through loss of market share, and that it was forced out of business.

10. The appellant filed a Defence to the Statement of Claim denying each and every allegation made in the Statement of Claim. In particular, it denied each and every particular breach of statutory duty alleged, contending that whenever it discovered that an AOS Operator was not in compliance it acted swiftly and decisively, and took all appropriate steps to ensure strict compliance.

11. The appellant further denied being statutorily responsible for regulating the telecommunications sector, averring that since 22 September 2002, that responsibility rests with the Public Utilities Commission. The appellant further denied

entering into any formal contract or issuing any licenses to the respondent or any aos operator admitting only that it issued letters of authorization to such persons to provide AOS services. The appellant also put the respondent to strict proof of its allegations made in its Statement of Claim.

12. On 15 June 2005, the respondent filed a Reply, and also filed Further and Better Particulars of the Statement of Claim on 9 February 2011. The trial commenced on 15 October 2011, and on 7 November 2011, the appellant filed an Amended Defence and the respondent filed an Amended Reply thereto on 8 November 2011.

13. Evidence was adduced in the trial on 15, 16 and 17 November 2011, at which time the respondent sought an adjournment to call witnesses from Atlantis and Breezes who gave evidence of receiving deposits from OWC. Thereafter, the trial continued on 17 to 20 September 2012, at which time the respondent made a further application for further documents to be produced, and the trial continued thereafter on 7, 8, 9 March 2013, 1 May 2013, and 9, 10, 28, 29, with the appellant closing its case on 30 October 2013.

The proposed amendments

14. On that day however, the respondent filed a summons for leave to amend its Statement of Claim pursuant to Order 20 r.5 of the Rules of the Supreme Court, returnable the next day for hearing at 10 am. The matter was heard on 31 October 2013, and the learned judge on 7 July 2014, granted leave to the respondents to amend in terms of the draft attached to the application filed on 30 October 2013.

15. The essence of the amendments for which leave was granted by the learned judge was to add particulars of 'breach of duty', which included the allegation that the appellant had breached the Telecommunications Sector policy; that it had knowingly failed as regulator to ensure that unsuspecting consumers were not being price-gouged in breach of the terms and conditions of its own licences and the Telecommunications Sector policy; that the appellant had failed properly to investigate and or make inquiries so as to ensure that OWC was a fully Bahamian owned and operated Company, when presented with evidence to the contrary, and failed to ensure that OWC was in fact entitled to be a licensee of the appellant in the absence of Foreign Investor approvals, contrary to Bahamian law, the Telecommunications Sector Policy (TSP) and the terms of its own licence issued to OWC.

16. The leave granted also allowed the following amendments to be made:

6. B. "(iii) The Defendant knowingly failed, properly or at all, to utilize its full authority as Principal, Licencing Entity and de facto Regulator to investigate the aforesaid complaints and consequently failed to discover that OWC, its agent and licensee, was paying, or causing to be paid, hundreds of thousands of United States dollars per annum to hotels as advance deposits, or pre-authorised credits, for AOS provision; and paying hotel operators in United States Dollars in respect of the provision of AOS services in The Bahamas, or otherwise breaching Bahamian Law, thereby securing to itself an illicit competitive advantage over the Plaintiff which adversely and fatally affected the Plaintiff's AOS business."

17. After the hearing of the application vigorously defended on behalf of the appellant, the learned judge acceded to it, and granted leave to the respondent to amend as indicated above for the reason "that it is necessary in order to determine the real controversy between the parties", which she said the original Statement of Claim as drafted did not do. It further appears that the learned judge granted leave on the basis that there would be no injustice to the appellant since, notwithstanding the lateness of the application, some eight years after the original Statement of Claim was filed, the evidence which supports the new allegations was already before the Court through discovery in 2011 of certain correspondence by Peter Lorandos, the president of the respondent company who died in 2005.

18. To the latter argument, Counsel for the appellant responded that not only had discovery been made since 2011, but that the new evidence had been given by witnesses since November 2012 and March 2013, yet it took another seven months before the application to amend was filed.

19. Notably, the learned judge did not identify what was the real controversy between the parties; and indeed, the amendments went further than simply that which was required to take into account the late discovery of evidence.

20. The amendments also sought to add new causes of action such as breach of the Telecommunications Sector Policy (TSP), of which there were no particulars; breach of the terms and conditions of the licence to OWC; breach of the law relating to foreign investor approvals in that the appellant had allegedly failed properly to investigate and/ or make inquiries to ensure that OWC was a fully Bahamian owned

and operated Company; and failed to ensure that OWC was in fact entitled to be a licensee of the appellant in the absence of Foreign Investor approvals, and pursuant to the Telecommunications Sector Policy (TSP) and the terms of its own licence issued to OWC.

Discussion

21. As noted, the application was made pursuant to Order 20 rule 5 of the Rules of the Supreme Court, which provides:

> **"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.**
> **(2) Where an application to the Court for leave to make the amendment mentioned in (3), (4) or (5) is made after any relevant period of limitation current at the date of the 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.**
> **(3)...**
> **(4)...**
> **(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to amend. "**

22. The Notes in the White Book (Supreme Court Practice 1993) which explain the operation of Order 20 rule 5 suggest that the aforementioned rule ought to be read together with rule 8, which states:

> **"8. - (1) for the purpose of determining the real controversy between the parties to any proceedings or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the**

proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (2)..."

23. Bowen L.J in **Cropper v Smith** (1883) 26 Ch D. 700 at 710- 711 stated the general principles for granting leave to amend. He said:

> **"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...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 of controversy, and I do not regard such amendment as a matter of favour or grace...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."**

24. Indeed, in coming to her decision, the learned judge appeared to rely on the dictum of Bramwell LJ in **Tidesly v Harper** (1876) 10 Ch D 393, at pages 396, 397, where he 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."**

25. In the same vein, Brett M.R said in the later case of **Clarapede v Commercial Union Association** (1883) 32 WR 262, at page 263:

> **"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."

26. The application of the above general principle is also subject however to the other side of the coin, namely, the admonition of Lord Griffiths in **Ketteman v Hansel Properties** [1987] A.C. 189, that there is a clear difference between allowing amendments to clarify the issues in dispute, and those that allow distinct defences or claims to be raised for the first time. The learned judge exercised her discretion on the basis that the amendments were necessary to deciding the real controversy between the parties.

27. Suffice it to say, that the claim against the appellant in this case is the tort of 'Misfeasance in public office' which is disclosed in the Writ as the only cause of action.

28. Misfeasance in public office is a tort remedy for harm caused by the acts or omissions which amount to an abuse of public power or authority by a public officer who either knew he was abusing his power or authority or was recklessly indifferent as to the limits of, or the restraints upon, that power or authority and who acted or omitted to act with either the intention of harming the claimant (so-called targeted malice); or with the knowledge that his acts would probably harm the claimant, or with a conscious or reckless indifference to the probability of harming the claimant.

29. As an intentional tort, misfeasance in public office requires proof of bad faith both in terms of the unlawful conduct or omission, and in relation to the harm suffered. The importance of sufficiently particularized pleadings in intentional torts was emphasized in **Three Rivers District Council v Governor and Company of The Bank of England (No.3)** 2003 2 A.C 1 [185-186] as follows:

"185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

30. Having examined the amendments allowed, it is my considered view, that none of the amendments sought were occasioned by the new evidence adduced, and can truly be said to be necessary to formulate the real issues between the parties on the pleaded case. In my view, the amendments add entirely new claims of unlawful conduct against the appellant, and substantially change the case against it; so that after the close of its case, the appellant is confronted with an entirely new case to defend.

31. Indeed, the respondent sought to add new breaches of duty, which include, as previously noted the allegation that the appellant had breached the Telecommunications Sector Policy (TSP); failed properly to investigate and or make inquiries so as to ensure that OWC was a fully Bahamian owned and operated Company; that when presented with evidence to the contrary, failed to ensure that OWC was in fact entitled to be a licensee of the appellant in the absence of Foreign Investor approvals, contrary to Bahamian law, the Telecommunications Sector Policy (TSP) and the terms of its own licence issued to OWC; and further failed to investigate the breach of the law by OWC which secured to OWC an illegal competitive advantage over the respondent which adversely and fatally affected its business as an AOS services provider.

32. Indubitably, the amendments granted require a significant adjournment of the trial, in as much as the defence will have to be amended, and both parties will possibly find it necessary to adduce new evidence to meet the newly pleaded case.

33. In any event, even if the amendments were occasioned by the new evidence already adduced on the pleaded case, leave, in my view, ought to have been sought at the latest after the close of the claimant now respondent's case as per **Rainy v Brave** (1872) LR 4 PC 287, 292 "The Appellant according to the proper rule of practice ought, in their Lordships' opinion, to have applied for the amendment at the end of his case". Instead, the respondent waited until the close of the appellant's case, some 8 years after the discovery of the evidence, and nearly a year after the evidence was adduced. Indeed, authorities, such as **Edevain v Cohen** (1890) 43 Ch. D. 187,190; **James v Smith** [1891] 1 Ch 384, 389; and **Soar v National Coal Board** [1965] 1 W.L.R. 886, suggest that after all the evidence has been taken, leave to amend is, as a rule, refused as "it would not be right to allow a new case of the kind to be raised at a late stage...", Lord Denning M.R., **Soar v National Coal Board** at 890.

34. As previously noted, such amendments should only be allowed if they can be done without injustice. In determining whether there is injustice, the court must consider the lateness of the application; the sufficiency of the reasons for the late application; whether a fair trial and the determination of the issues would be compromised by the granting of leave; and whether costs would compensate.

35. It does not appear from the learned judge's decision that she seriously considered these matters. Indeed, she gave costs of the amendments only without any consideration that the respondents should also pay the costs thrown away by the adjournment which would inevitably have ensued, and which did ensue.

36. In my view, the learned judge did not reasonably exercise her discretion in granting leave to amend, as she failed to take into account matters that she ought to have in coming to her decision. In the premises, I would set aside the leave granted to amend the respondent's statement of claim. I would further order that the trial continue and a decision given on the evidence of the pleaded case, post haste. I would also order the costs of the appeal and the costs occasioned by the application to amend in the court below to be the appellants, to be taxed if not agreed.

The Honourable Dame Anita Allen, P

37. I agree.

The Honourable Mr. Justice Isaacs, JA

38. I also agree.

The Honourable Ms. Justice Crane-Scott, JA