

COMMONWEALTH OF THE BAHAMAS

2014/CLE/gen/01620

IN THE SUPREME COURT

2015/CLE/gen/01451

COMMON LAW AND EQUITY SIDE

B E T W E E N

JUNKANOO ESTATES LTD

First Plaintiff

AND

YURI STAROSTENKO

First Plaintiff

AND

IRINA TSAREVA-STAROSTENKO

Second Plaintiff

AND

UBS (BAHAMAS) LTD. (In Voluntary Liquidation)

Defendant

(Actions and Counterclaim consolidated b Order of the Judge dated 4th November, 2015)

BEFORE Madam Justice Ruth M.L. Bowe-Darville

Appearances: The Plaintiffs – Pro Se

The Defendant – Ms. Chizelle Cargill

Hearing dates: 18th July 2019, 29th July, 2019, 30th July, 2019, 8th August, 2019 and 23rd September, 2019

RULING

RSC Order 18/12 - Request for Further and Better Particulars/Late filing of application and Inexcusable delay/ RSC Order 24/10 - Production and Inspection of Documents

1. By Summons filed herein on 17th April, 2019 the Defendant sought an Order pursuant to Order 18 rule 12 (O. 18/19) and Order 24 rule 10 (O. 24/10) of the Rules of the

Supreme Court that the Plaintiff provide further and better particulars of their Statement of Claim filed herein on 14th November, 2017.

2. The Summons referenced the following:

- i. The Plaintiffs do serve on the Defendant within seven days of an order of the Court issued pursuant to this Summons particulars in writing of its statement of Claim filed herein on 14th November, 2017, in the terms as set out at Exhibit RR 1 in the Affidavit of Renee Raeber.**
- ii. The Plaintiffs do within seven days of an order of Court issued pursuant to this Summons, make and serve an Affidavit stating whether any of the documents specified or described in Schedule 1 to this Summons or any class of documents so specified or described, are or have been at any time in its possession, custody or power, and if not in its possession, custody or power, when it passed with and what has become of the document or documents.**
- iii. An Order that the Plaintiffs do within seven days of the said Order file and serve further and better list of documents relating to the matters in question in this action which are or have been in its possession, custody or power including but not limited to those documents or class or document specified or described in the said Schedule 1 aforementioned to this Summons, and file an Affidavit verifying such further and better list of documents.**
- iv. The Plaintiffs do within fourteen days of the making of the orders aforementioned made pursuant to this Summons permit the Defendant to inspect and take copies of the documents identified in such further and better list of documents and all such documents as are referred to in the stated Affidavit of the Plaintiff as being in its possession, custody or power.**
- v. The costs of and occasioned by this application be the Defendant's in any event, such costs to be taxed if not agreed.**

3. The Schedule 1 referred to comprised the following and formed a part of the Summons:

SCHEDULE 1

- 1. Produce all documents wherein it is alleged that UBS made false statements, fraudulent states or fraudulent misrepresentations, and identify where in these documents the statements or misrepresentations are set out.**
- 2. Produce all documents relating to any demands made by Junkanoo Estates Ltd. for compensation from UBS for any losses that it allegedly incurred, including but not limited to any correspondence from UBS in response to such demands.**

3. **Produce all documents relating to the formal complaints purportedly filed by the Plaintiffs with UBS, UBS AG and/or UBS Financial Services Inc. (whether in The Bahamas, Switzerland and/or the United States of America) including but not limited to any correspondence from UBS, UBS AG and/or UBS Financial Services Inc. acknowledging and/or responding to such complaints.**
 4. **Produce all documents relating to any agreement by UBS to provide junkanoo Estates Ltd. with prime brokerage services, or any other services offered by UBS AG or UBS Financial Services Inc.**
 5. **Produce all documents relating to and/or demonstrating the contractual or other relationship that existed between the Plaintiffs and UBSAG and/or UBS Financial services Inc.**
 6. **Produce all documents relating to any agreement, assurance or commitment made by UBS to allow the Plaintiffs to trade on UBS AG's and /or UBS Financial Services Inc.'s electronic trading platform.**
4. The Defendant's Summons was supported by 15th April, 2019 Affidavit of Renate Raeber, the former head of Business Management with the UBS (Bahamas) Ltd. (In Voluntary Liquidation) ("the Raeber Affidavit").
 5. The Affidavit accounts for the following:
 4. **On 14th November, 2017 the Plaintiffs filed a 176-page Statement of Claim (SC) claiming inter alia damages for:**
 - a. **Breach of Contract**
 - b. **Specific Performance**
 - c. **Willful Misfeasance**
 - d. **Repudiatory breach of agreement**
 - e. **Conspiracy to injure**
 - f. **Fraudulent preference and fraudulent trading**
 - g. **Breach of the Fraudulent Disposition Act**
 - h. **Conspiracy to defraud**
 - i. **Fraudulent misrepresentation**
 - j. **Malicious institution of civil proceedings**
 - k. **Conspiracy to defraud a public authority, and**
 - l. **Malicious execution.**
 5. **On the 28th November, 2017, UBS filed its Defence and on 13th December, 2018, after having gone through discovery, it filed its Amended Defence.**
 6. **By letter dated 15th February 2019, Lennox Paton on behalf of UBS requested that the Plaintiffs provide further and better particulars of the allegations made in the Statement of Claim**

and further that they produce certain documents referred to in the Statement of Claim.

- 7. The letter requested that the Plaintiffs provide further and better particulars and produce the requested documents no later than 14 days from the date of the letter. The letter further provided that in the event the Plaintiffs failed to comply, UBS would make an application to the Supreme Court requiring the Plaintiffs to comply with its request. The Plaintiffs did not respond to UBS's request for further and better particulars.**
 - 8. On 8th March, 2019, Lennox Paton on behalf of UBS again wrote to the Plaintiffs requesting that they provide further and better particulars of their Statement of Claim and extended the time limit for doing so to 11th March 2019.**
 - 9. Notwithstanding the extension of time, the Plaintiffs have failed to provide the requested further and better particulars and have also failed to respond to the request at all. To date the Plaintiff has yet to furnish the requested information.**
6. The letter exhibited to the Affidavit contains requests for further and better particulars in respect of Paragraphs 17 to 563 of the Statement of Claim. The Defendant also filed Submissions in support of its application.
 7. This is a consolidated action. The genesis of the present application, 2014/CLE/gen/0162, can be found in an application made by UBS for final judgment in respect of a mortgage default. On 23rd March, 2015 the matter came on for hearing before Evans, J. (as he then was). He made an order for judgment of some \$920,164.87 together with interest and cost. He also ordered that if the judgment debt was not paid by 13th April, 2015 the defendants were required to vacate the premises and hand over all documents in their possession relating to the property. The Plaintiffs herein sought leave to appeal Evan, J's judgment and requested a stay of the order. Consideration was given to the several grounds of appeal cited and the judge granted leave to appeal but denied a stay of his order in December, 2017. As the default continued UBS was forced to take possession of the property known as "Jazz House" and owned by Junkanoo Estates Ltd. The Plaintiffs were finally evicted. However, this did not prevent them from instituting several other actions bearing the same factual matrix.
 8. In opposition to the Defendant's application for further and better particulars the Plaintiffs filed an Affidavit on 31st May, 2019; Preliminary Objection as to UBS's application for Further and Better Particulars filed 25 July, 2019; Submissions and Sample List of Particulars and Meanings filed 26th July, 2019; and Submissions and List of Particulars and Meanings filed 1st August, 2019 (likely duplication).

9. The Defendant has brought this application, firstly, pursuant to Order 18 rule 12 of the Rules of the Supreme Court. O. 18/12:

12. (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words — (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention of other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed 3 folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the document has already been served and, if so, when, or is to be served with the pleading.

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party — (a) where he alleges knowledge, particulars of the facts on which he relies; and (b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless of opinion

that there were sufficient reasons for an application by letter not having been made.

10. The Court has for its purposes the parties' Submissions and Affidavits and transcripts for its consideration.

11. In summary the Defendant submitted that The Plaintiffs' Writ of Summons filed on 14th November, 2017 was as noted in Paragraph 5 above. It submitted that the allegations contained therein were either improperly pleaded or deficient. The Defendant filed a Defence and after a slight process of discovery found it necessary to file an Amended Defence. On two occasions the Defendant made requests of the Plaintiffs by letter for further and better particulars. Those requests were ignored and consequent thereto an application was made to the Court.

12. The Affidavit of 31st May, 2019 sworn by the Second Plaintiff informed that they had no further information or particulars or further documents in their possession to supplement their Statement of Claim. Up to the date of hearing the Plaintiffs continue to maintain that they have no other documents in their possession. The Defendant submitted that it is fundamental in litigation to give full particulars of your action before the court so that the judge can conduct the matter as fairly and openly as possible; there should be no surprises and less costs. Counsel directed the Court to the rubric at O.18/12/3 of **the 1999 Supreme Court Practice Text ("the White Book")** which outlined the function of particulars:

- 1. "To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved.***
- 2. To prevent the other side from being taken by surprise at the trial.***
- 3. To enable the other side to know with what evidence they ought to be prepared and to prepare for trial.***
- 4. To limit the generality of pleading.***
- 5. To limit and define the issues to be tried, and as to which discovery is required.***

6. To tie the hands of the party so that he cannot without leave go into any matters not included.”

13. The rubric at O.18/12/2 went on further to say

“Whenever either party is imputing fraud, negligence or misconduct to his opponent, the facts must be stated with especial particularity and care”.

The Defendant continued that the Statement of Claim contains several allegations against the Defendant and which are without particulars thus hindering the Defendant in mounting its Defence.

14. The Defendant referred to the lack of particulars in the allegation of “conspiracy” as set out in the Statement of Claim (Paragraphs 116, 168.2,208,286,287,289, 293, 294, 296, 308, 340, 366, 373, 379, 382,530,597 and 600. The who, what, when and where of the conspiracy are left wanting. Using the decision in the Bahamian case of **Bassatne v Jabbour [1993] BHS J No 4 at page 11** and citing **Bullen & Leake & Jacobs Precedents of Pleadings (13th Edition) at page 221** the particulars necessary for an action in conspiracy are:

“The Statement of Claim should describe who the several parties to the conspiracy are and their respective relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued and the intent to injure. There is no call for a general plea of acting wrongly and maliciously” (Sorrell v Smith [1925] AC 700 at 714) nor is that sufficient. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff thereby.”

15. The Plaintiffs also alleged an Agreement and repudiatory breach of agreement by the Defendant and its affiliates without giving the particulars of the agreements (documents) or how the agreements were repudiated

(17, 28, 59, 84, 89, 91, 92, 95.7, 95.8, 95.9, 95.11, 97, 101, 103, 136.2, 200, 206, 207, 214, 220, 245, 333, 341, 368, 450, 472, 479 and 480) Again the counsel for the Defendant submitted citing the rubric in the White Book at O. 18/12/15 that when pleading an agreement-

“ The pleading should state the date of the alleged agreement, the names of all parties to it, and whether it was made orally or in writing, in the former case stating by whom it was made and in the latter case identifying the document, and in all cases setting out the relevant terms relied on (Turquand v Fearon (1879) 48 L.J. QB 703”

16. It is the Defendant's contention that the Plaintiff made allegations of representations and misrepresentations (Paragraphs (28, 290, 328, 338, 355, 367, 372, 376, 389, 391, 392, 393, 401, 407, 408, 410, 412, 418, 422, 424, 429, 452, 495, 497, 498, 504, 508, 604, 614) without giving particulars of the same. The allegations are general lacking particulars as to the representations whether fraudulent or not; reliance or inducement; whether made verbally or in writing; and if in writing there was no document referred to or produce.

17. As to the allegations of bad faith, Counsel for the Defendant stated that the Plaintiffs had failed to plead the particulars of the same (Paragraphs 331 and 358). She then directed the Court to the decision in **Cannock Chase District Council v Kelly [1978] 1 All ER 152** which sets out that an allegation of bad faith cannot be claimed loosely and without particulars and reliance was placed on the explanation given “bad faith” by Megaw L.J. in **Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1947] 2 ALL ER 690**

“Bad faith, dishonesty... It always involves a grave charge. If a charge of bad faith is made against a local authority it is entitled just as an individual against whom such a charge is made, to have it properly particularized. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularized, the pleading may be struck out.”

18. In examining the allegations of breach of duty/fiduciary duty (Paragraphs 68,95,136, 172, 176, 309, 352, 369, and 496) the Defendant requested particulars of the relationship as between the Plaintiffs and the Defendant. In this regard counsel relied on the decision in **Selangor United Rubber Estates Ltd. v Craddock and Others [1964] 3 ALL ER 709.**

19. The Defendant also requested particulars of the statutory obligations, security regulations and other regulatory instruments that the Defendant breached as alleged (paragraphs 84, 136.1, 136, 141, 143, 144.1, 144.3, 168.2, 172, 174, 300, 335 and 337).

20. The Defendant, in reviewing the allegations of fraud (paragraphs 324, 325, 330, 339,342,351, 352, 359, 377, 378, 429,430, 473, 539, 532, 539, 592, and 594), submitted that the Plaintiffs had failed to abide the pleading requirements as set out in O. 18/12. Likewise, in alleging knowledge (Paragraph 301 and 541) the Defendant further submitted that such an allegation requires statement/s of fact which is also a requirement of O.18/12.

21. The Court notes that the Defendant's demand for further and better particulars applies to most of the paragraphs in the Statement of Claim. The Defendant posited that the filing of the instant application post the filing of the Defence and Amended Defence should not prevent the Plaintiff from providing the requested particulars. Counsel then proffered the case of **Commission of Racial Equality v Ealing London Borough Council [1978] 1 WLR 112** in which it was found that it was not unusual for an order to be made for further and better particulars even after the Defence had been entered.

22. Lastly, the Defendant claimed that the Plaintiffs had referenced and seem to rely on documents (agreements, complaints, representations, misrepresentations etc.) purportedly as between them and the Defendant but has not produced any. This application for the production of the same was made pursuant to O. 24/10 and the Court can exercise its discretion for the production or inspection of the same.

23. The Plaintiffs in their 19th Affidavit -Voluntary Response to Request for Further Info sworn by the Second Plaintiff on 31st May, 2019 firmly states as follows:

“4. As it relates to paragraph (1) of the Summons, to the best of my knowledge, information and belief, other than what has already contained in the Plaintiffs’ Statement of Claim filed on 14th November, 2017 (the “Statement of Claim”), in all the affidavits filed during the period preceding this affidavit, in the Proposed trial Bundle of Documents for the Plaintiffs filed on 18th March, 2019, in the Witness Statements filed and served on the 23rd and 26th April, 2019, in the Expert Report filed on 27th May, 2019, served on 28th May 2019, the Plaintiffs do not have any additional particulars of the Statement of Claim.”

5. As it relates to paragraph (2) of the Summons, to the best of my knowledge, information and belief, other than that what has already [been] exhibited to all the affidavits filed during the period preceding this affidavit and contained in the Proposed Trial Bundle of Documents for the Plaintiffs filed on 8th March, 2019, the Plaintiffs do not have any additional document[s] that are or have been in any time in their possession, custody or power relating to the matters in question in this action specified in Schedule 1 to the Summons.

6. As it relates to paragraph (3) of the Summons, to the best of my knowledge, information and belief, the Plaintiffs do not have any further and better list of documents that are or have been at any time in their possession, custody or power relating to the matters in question in this action specified in Schedule 1 to the Summons.”

25. The Plaintiffs refer in the said affidavit to the Case Management Directions given which for all intents and purposes set the matter on track for trial save now for the instant application. Moreover, the Second Plaintiff averred that the Statement of Claim was sufficient in and of itself so much so that the Defendant was not only able to file a Defence but also an Amended Defence.

26. The Plaintiffs filed a Preliminary Objection to UBS’ Application for Further and Better Particulars on 25th July, 2019. The Plaintiffs stated therein that that

words should be taken in their plain and ordinary meaning and should be understood within their statutory context. In their Submissions and a Sample List of Particulars and Meanings filed on 26th July, 2019 the Plaintiffs set out a chart showing the construction of their pleadings as it related to the provisions of O. 18/12.

It was re-iterated that the Defendant was not entitled to the further and better particulars at this stage of the proceedings especially when the directions from the Case Management were in progress. They were well aware of the provisions of O.18 Rule 6 and 12, the purpose for which was to enable the other party to know what case it had to meet and that they were designed to ensure that the trial of the action was conducted fairly. The Plaintiffs then directed the Court to the provision of the O. 18/6 "Facts, not evidence, to be pleaded":

6.(1) Subject to the provisions of this rule, and rules 7, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

(2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading must, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.

(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

27. Further, the Plaintiffs stated in their brief about the Statement of Claim that the Statement of Claim contains:

7.1 statements in a summary form of the material facts, but not the evidence by which those facts are to be proved, and the statements are as brief as the nature of the case admits within the meaning of Rules 6(1) to (4) Order 18 the Rules of the Supreme Court (“Supreme Court Rules”); and

7.2. the necessary particulars of any claim within the meaning of Rules 12(1) and (2) of Order 18 of the Supreme Court Rules.

28. The Plaintiffs contended that initially in 2017 the Defendant sought an extension of time and then after fifteen (15) months it makes an application for further and better particulars. The Defendant filed its Defence, went through a period of discovery and filed an Amended Defence thereafter. While this instant application will not determine the matter, the Plaintiffs urged the Court to consider that they have a strike out application and other applications pending and that to grant this application will mean the loss of a trial date and that such should outweigh the need for further and better particulars. In all the Plaintiffs have been prejudiced by the delay caused by the instant application. The Plaintiffs maintained such a delay was inexcusable and inordinate and there was a probability of the Plaintiffs being unable to get a fair trial.

29. Continuing their submission, the Plaintiffs averted to the decision of Lyons, J. in **Central Bank of Ecuador v Conticorp Bahamas Trust [2004] BHS J No. 388** when considering a late-stage application for further and better particulars:

“... This application should be made in a timely fashion. Where the application is made after long and inexcusable delay, or if the making of an order would cause delay, the court may refuse to intervene and order that the particulars be answered. See *Astrovianis Compania Naviera S.A. v Linard [1972] 2QB 611.*”

Citing **Astrovaianis**, Lord Denning, M.R., said

“The appeal would be dismissed because the Plaintiffs had been guilty of inexcusable delay in leaving their applications for particulars until only shortly before the date fixed for the trial: they should have applied for them as soon as the defence had been delivered; to order particulars so close to the date ordered for the trial would probably mean that that date would have had to be vacated with the result that the defendant would have been put to an indefensible inconvenience and expense.”

In *Island Bell Limited v The Bahamas Telecommunications Company Limited* [2011] 3 BHS J No. 82 where a plaintiff applied for further and better particulars of a defence after an inexcusable delay of six (6) years and one month before the trial. Following Lord Denning M.R. as above, Bain J. noted that the application should have been made as soon as the Defence was served and that the application by the plaintiff for further and better particulars of the Defence at that late date was inexcusable and refused.

30. It was the Plaintiffs’ firm position that the Defendant could not now change its position as stated in its Amended Defence and thereby have an unfair advantage over the Plaintiffs simply because its interests had changed. Attention was drawn to the Affidavit of Renate Raeber filed 18th February, 2019 in which she averred:

“5. ... UBS has a very strong Defence to the Plaintiffs’ Statement of Claim and intends to lead evidence at the trial of this action to support this fact.

.....

10. UBS has... laid out its defence in clear terms and have pleaded specific points to the claims made by the Plaintiffs. It is evident on the face of the Amended Defence to the Plaintiffs’ claim and therefore the Plaintiffs’ application to struck out the Amended Defence is without merit.”

31. Having made such statements it was clear that the Statement of Claim contained the necessary particulars of the claims made and that there

was no need for the Court to make an Order as in the instant application. It was submitted that the Defendant was being disingenuous in its application and was intentionally trying to delay the matter further.

Conclusion:

32. The Writ of Summons in this action is extensive and exhaustive. While one would like to think the Plaintiffs have had benefit of legal advice, especially as to drafting and formulating their case, they still appear pro se and cannot be expected to produce pleadings that are of the standard expected of the trained legal professional. They do, however, possess the financial knowledge to advance their case. Suffice it to say that the Statement of Claim was of sufficient import and content to raise not only a Defence but also an Amended Defence by the Defendant. Most of the requests and or issues raised for further and better particulars can be tested at trial. Both sides now know what the challenges are. Litigants are always bound by their pleadings and any variance therefrom, unless with the leave of the Court, will not be heard or considered.

32. The Court agrees that the timing of the application was most unfortunate. The defendant said it was not "unusual" for the Court to hear and grant such an application at this stage in the proceedings not fully appreciating the implications of the inordinate and inexcusable delay. However, the authorities are clear on the matter of inexcusable delay and there is no doubt that there was inexcusable delay in the matter and then on the brink of a trial date. The Defendant in making this application seemed to be wanting a third chance at getting its Defence right even after the Raeber affidavit says that it had a good Defence to the Statement of Claim. The delay caused thereby has deprived the Plaintiffs of a trial date and to make an order in the Defendant's favour would only further delay the trial. The Court will in no way intervene causing the Plaintiffs further expense and inconvenience.

In all, the Plaintiffs have already been prejudiced by the application and the time it has taken to have the matter finally determined.

33. The Defendant's Summons of 17th April, 2019 is hereby dismissed.

34. The file will be returned to the Listing Office for reassignment for the renewal of Case Management Directions.

34. The costs of this application shall be the Plaintiffs to be taxed if not agreed.

Prepared by: Madam Justice Ruth Bowe-Darville (Ret.)



Delivered by: Hon. Chief Justice Sir Ian R. Winder

DATED this 8th day of May A.D., 2023