

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE

2015/CLE/gen/No.01451
2014/CLE/gen/No.01620

BETWEEN

JUNKANOO ESTATES LTD

First Plaintiff

YURI STAROSTENKO

Second Plaintiff

IRINA STAROSTENKO

Third Plaintiff

AND

UBS (Bahamas) LTD (In Voluntary Liquidation)

Defendant

(Actions and Counterclaims consolidated by Order of the Judge dated 4 November 2015)

SUBMISSIONS AND LIST OF PARTICULARS AND MEANINGS

This *Submissions* is drafted after the hearings held on the 29th and 30th July 2019 in support of the position that the Plaintiffs carefully applied the principles of pleadings in their Statement of Claim filed and served on the 14th November 2017 (“Statement of Claim”) and the Plaintiffs’ objections to the Defendant’s application for further and better particulars of the Statement of Claim, raised by the *Summons* and *Preliminary Objection* by the Plaintiffs filed and served on 25th July 2019.

Additionally, a *List of Particulars and Meanings* (Schedule to this Submissions) has been made to specify reasonable meanings to the words of the Statement of Claim and indicate where the answers are in the Statement of Claim to all the requests set out in the Defendant’s application for further and better particulars which have been heard on the 18th and 29th July 2019 and the defendant raised 98 points, all of which are answered in the List.

The Plaintiffs respectfully ask the Court to weigh all of the considerations contained in this Submissions.

In brief

On 31st May 2019, the Plaintiffs filed 19th Affidavit of Yuri Starostenko which reads, among other things:

“This Affidavit is a voluntary response to a request for further information by way of an application by the Defendant pursuant to Order 18 rule 12 and Order 24 rule 10 of the Rules of the Supreme Court and/or the inherent jurisdiction of the Court made by a summons filed on 17th April 2019 (the “Summons”) with return date 15th July 2019, as follows from the Notice of Hearing filed on 23rd May 2019.

As it relates to paragraph (1) of the Summons, to the best of my knowledge, information and belief, other than that what has already contained in the Plaintiffs’ Statement of Claim filed on 14th November 2017 (the “Statement of Claim”), in all 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 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.”

First Objection

1. This Honorable Court has no jurisdiction under Order 18 Rule 12 in the circumstances in which UBS applied for further and better particulars.
 - 1.1. The request for further and better particulars of 15th February 2019 was made in opposition to the Plaintiffs’ application of 29th January 2019 for striking out of impugned paragraphs of the Amended Defence, as set out in Fourth Affidavit of Renate Raeber of 18th February 2018.
 - 1.2. The Defendant’s application for further and better particulars filed on 17th April 2019 was aimed at finding a backdoor to avoid a hearing of that Plaintiffs’ strike out application.

- 1.3. It was a bad tactic to oppose the striking out application.
2. The Plaintiffs respectfully submit, having regard to the plain (or literal) meaning of words as they were to be understood in their surrounding statutory context and to the statutory purpose of Rules 6 and 12 of Order 18, which involved having regard not only to the individual words in isolation, but the Rule and the law in its entirety, that this Honorable Court has no jurisdiction under Order 18 rule 12 of the Rules of the Supreme Court to hear the Defendant's application or to order the Plaintiffs to provide further and better particulars of their Statement of Claim to the Defendant at this stage of the proceedings.
 3. **Rules 6 and 12 of Order 18 are designed to ensure the trial is conducted fairly** by requiring a party to give such particulars as are necessary to enable the other party to be informed of the case he has to meet, but in the circumstances stated above, at all times, UBS was able to understand the claims alleged against it and to plead its Defence, thereby no order is necessary or desirable to enable UBS to plead.
 4. This Honorable Court should refuse to intervene or to order that the particulars be delivered by the Plaintiffs.

Statutory Provisions

“Facts, not evidence, to be pleaded (O. 18, r. 6).

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.

“Particulars of pleading (O. 18, r. 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.”

5. The Plaintiffs contend that the Statement of Claim states only the material facts relied on permissible in terms of pleading under the Rules of the Supreme Court (“RSC”) such as statements in summary forms of the material facts, but not the evidence within the meaning of RSC Order 18 Rules 6(1) to (4); and the necessary particulars of any claim within the meaning of RSC Order 18 Rules 12(1) and (2).

The Principles of Pleadings

6. Support for the Plaintiffs' contention may be found in ***Edgecombe v. Adams-Newbold*** - [2003] BHS J. No. 120 (quoted brevity causa) Isaacs J. (Acting) in his Judgment dated 23rd July 2003 held, among other things:

“8 Bearing in mind that a dual cause of action is pleaded, an examination of R.S.C. O. 18 must be conducted as it relates to both causes. From the English rules at rubric 18/7/2 we see that this rule lays down the requirements of the system of pleadings namely that pleadings should be statements in a summary form and should state, and state only the material facts relied on, and not the evidence by which they are to be proved, and the statement must be as brief as the nature of the case admits.

9 As stated by May L.J. in Lipkin Garman Karpnale Ltd (1989) 1 W.L.R. 13 - 10 at 135 these requirements should be strictly observed.

10 The relevant matters must be stated briefly, succinctly, and in strict chronological order. Pleadings should be as brief as the nature of the case will admit. The Court has inherent jurisdiction to deal with prolix documents as seen in Hill v. Hart Davies (1884) 26 Ch. D. 470.

11 Farwell L.J. stated in N.W. Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd. (1918) 3 R.B. 422 at 425 that every pleading must contain a statement of the material facts on which the party pleading relies, and not on the evidence by which they are to be proved.

12 Again, Lord Denman C.J. in Williams v. Wilcox (1838) 8 A and E 314 at 331 stated that all facts which tend to prove the fact in issue will be relevant at the trial, but they are not material facts for pleading purposes. It is an elementary rule of pleading that, when a statement of fact is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation.

13 The words "contain only" emphasise that only facts which are material should be stated in a pleadings. Accordingly, statements of immaterial and unnecessary facts may be struck out as in Davy v. Garrett (1878) 7 Ch. D. 473.

14 In Philipps v. Philipps (1878) 4 O.B.D. 127 Cotton L.J. stated that it is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet.

15 Again Scott L.J. in Odhams Press Ltd (1936) 1 A.E.R. 287 at p. 294 stated that "material" means necessary for the purpose of formulating a complete cause of action: and if any one material statement is omitted, the Statement of Claim is bad.

16 Paragraph 1 of the Practice Direction (Civil Litigation: Case Management) (1995) W.L.R. 262 formulates generally the approach to be taken by Courts of first instance and it states that:

"The paramount importance of reducing costs and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than has hitherto been customary. Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders". "

6. In ***Island Bell Limited v. The Bahamas Telecommunications Company Limited*** - [2011] 3 BHS J. No. 82 (quoted brevity causa) The Hon. Mrs. Justice Rhonda P. Bain in her Judgment dated 4th November 2011 held, among other things:

"35 In considering the request for further and better particulars the court must consider what is the purpose of pleadings. Fitzgerald J in Malon v Celbridge Spinning Company 1967 IR1 defined the purpose of pleadings in the following terms -

"The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of

the trial to the matter relevant to those issue, and to ensure that the trial may proved to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline the case he will have to meet at the trial."

36 *The function of pleadings have been stated in the White Books 1988 at paragraph 18/2/2 as follows -*

- (1) to inform the other side of the nature of the case 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 what evidence they ought to be prepared with and to prepare for trial.*
- (4) to limit the generality of the pleadings.*
- (5) to limit and define the issues to be tried and as to which discovery is required.*
- (6) To tie the hand of the party so that he cannot without leave go into matters not included."*

42 *The Defendant also submitted that the court should refuse the application for Further and Better Particulars because there was inexcusable delay in making the application. The defence was filed in 2005 and the application is being made in 2011 six years later*

*and months before the matter is set for trial. According to Lord Denning in **Astrovlanis Compania Naviera S.A. v Linard 1972 2 QB 611** -*

"In my judgment, this application comes far too late without going into the rights and wrongs of the matter, this application should have been made as soon as the defence was delivered."

43 The request for further and better particulars should have been made before the Plaintiff filed its Reply on 15 June 2005.

44 The Court holds that any request for Further and Better Particulars of the Defence should have been made after the Defence was filed in 2005. The application by the Plaintiff for Further and Better Particulars of the Defence at this late date is inexcusable and is refused.

45 The summons filed 18 August 2011 is dismissed with costs to the Defendant to be taxed if not agreed."

7. When the Statement of Claim was served in November 2017, the only thing UBS wanted to be able to plead was an extension of time.

8. Since then for 1 year and 3 months, UBS had no reason for an application for further particulars or information.

9. The procedural consequences of the UBS' application being granted such as, for example, loss of the trial date, outweighs the significance of the further and better particulars issue.

11. Additionally, the Plaintiffs recently discovered that, on the 10th September 2019, the Court of Appeal appointed date of hearing of the Appeal against possession order in action CLE/gen/No. 01260 of 2014, subject-matter of Claims 9, 10, 11 and 12 of the Statement of Claim.

Second Objection

10. The Plaintiffs respectfully submit that giving UBS an opportunity to be heard on its application after 1 year and 3 months the Statement of Claim had been delivered and so close to the date ordered for the trial would mean that that date would have to be vacated with the result that the Plaintiffs would have been put to inconvenience and expense, and therefore would be prejudiced, by reason of the delay involved.

In brief about the injustice by reason of delay

11. The delay of 1 year and 5 months in making an application for further and better particulars is inordinate and inexcusable delay.

12. The said delay, if UBS was permitted to be heard or granted on its application, would create a situation where a fair trial could be seriously prejudiced or that the Plaintiffs' ability to have a fair trial would be prejudiced.

13. The Plaintiffs have already been caused serious prejudice by reason of that delay

14. It cannot be said that this delay was unintentional.

15. Support for this position may be found in ***Central Bank of Ecuador v. Conticorp Bahamas Trust (Trustee of)*** - [2004] BHS J. No. 388 Lyons J. in His Lordship's Judgment of May 18, 2004 held in respect of an application for further and better particulars:

“66. ... This application should be made in a timely fashion. Where the application is made after a 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] 2 QB 611).”

16. In *Astrovlanis Compania Naviera SA v. Linard* [1972] 2 QB 611 the English Court of Appeal held per Lord Denning MR:

"The appeal would be dismissed because the Plaintiffs had been guilty of inexcusable delay [about 1 year and 1 month] in leaving their applications for particulars until only shortly before the date fixed for the trial; they should applied for them as soon as the defence had been delivered; to order particulars so close to the date ordered for a trial would probably meant that that date would have had to be vacated with the result that the defendant would have been put to indefensible inconvenience and expense." Square brackets added

17. Also, in *Astrovlanis* case Lord Denning MR gives the proposition of law regarding pleadings of conspiracy and says at page 652:

*"The courts have always recognised that a party who alleges conspiracy cannot be expected to give particulars of it. All that the court requires of him is that he should give particulars of the overt acts, that is of the acts done in pursuance of the conspiracy. ... All the rest is evidence. This distinction is well illustrated by the rule which used to obtain that, when a party pleaded a fraudulent intention or other state of mind, it was sufficient to state it as a fact without setting out the circumstances from which it could be inferred-because those circumstances would only be the evidence of it: see *Burgess v Beethoven Electric Equipment Ltd.* So also in a conspiracy case or a scuttling case, it is sufficient to state the conspiracy, or the procuring and conniving as a fact. The rest is evidence."*

18. Paraphrased by the Plaintiffs for the purposes of this Submissions the rule provides that direct evidence cannot expected in such matters, a conclusion has to be drawn from all the circumstances of facts of the case, which may lead to a necessary inference of UBS agent's complicity, either by pointing directly to that conclusion or by such an entire exclusion of every other cause as to leave no other conclusion possible. Plaintiffs cannot possibly know what happened so as to be able to give particulars they are not bound to give them. Plaintiffs hoped to

obtain such information from discovery of documents and records and now by cross-examination of witnesses called by UBS. (see *Astrovlanis Compania Naviera SA v Linard* at page 652).

19. Thereby, most of the UBS requests in respect of the following paragraphs of the Statement of Claim alleging conspiracy in Claim 5 (paragraphs 281 to 322), Claim 8 (paragraphs 364 to 492) and Claim 11 (paragraphs 589 to 627) are improper being the requests for evidence barred by both RSC Order 18 Rule 6 and the long established pleading practice in conspiracy cases.

Third Objection

20. The Plaintiffs respectfully submit that UBS is judicially estopped from contending that it was unable to plead its Defence and therefore prevented from taking a “new” contrary position which would give it an unfair advantage over the Plaintiffs simply because its interests have changed.

21. This Honorable Court, for the purpose to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment, should prevent UBS, who plays fast and loose with this Court, from gaining an unfair advantage.

Briefly about the UBS' “old” and “new” positions

22. On 10th December 2018, The Hon. Mr. Justice Ian R. Winder granted UBS leave to amend its Defence filed 28th November 2017.

23. In the opinion of the Court, no order was necessary or desirable to enable UBS to plead.

24. Both in 2015 and in 2018, UBS assumed and succeeded in maintaining a position regarding its Defence and the Statement of Claim (“old” position), as formulated in Fourth Affidavit of Renate Raeber filed on 18th February 2019 (“4th Affidavit of Raeber”):

“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

that UBS has a strong Defence to the Plaintiffs' claim and therefore the Plaintiffs' application to strike out the Amended Defence is without merit."

25. This "old" position implies that (1) the Statement of Claim contains the necessary particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the Statement of Claim relies (See, e.g. Supreme Court Rules Order 18 Rule 12(1)); and (2) there is no need for the Court to order the Plaintiffs to serve on UBS *particulars of any claim* (See, e.g. Supreme Court Rules Order 18 Rule 12(3)).

26. The Plaintiffs acquiesced in the "old" position taken by UBS.

27. By applying to the Court for further and better particulars in respect of 183 paragraphs of the Statement of Claim, UBS assumed a new position regarding its Defence and the Statement of Claim ("new" position), which is clearly inconsistent with "old" position previously accepted by this Court.

31st July 2019

Respectfully submitted,

Yuri Starostenko, *pro se*
Second Plaintiff

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