

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. 1314 of 2012

BETWEEN:

SALON PROFESSIONALS LTD.

CLAIMANT

AND

STEVE EDWARD BROWNE

DEFENDANT

AND

**DEREK ELTON BROWNE Representatives
of the estate of STEVE ELTON BROWNE**

Before Master Deborah Holder, BSS, Master of the High Court

2016: October 17

2017: March 6

Appearances:

Ms. Duana Peterson, attorney-at-law for the Claimant

**Mr. Vernon Smith, Q.C. in association with Mr. Michael Springer, Q.C.
attorneys-at-law for the Defendant**

Introduction

[1] On 19th January 2016 the Claimant was granted leave to amend its Claim form and Statement of Claim. As a result the Defendant made an application for costs from the date of filing the original Statement of Claim until the date of amendment.

[2] The Defendant relied on *Beoco Ltd. v Alfa Laval Co. Ltd. [1995] QB*

[3] In that case the Claimant obtained leave to amend the statement of Claim on the first date of the trial. It was held that there was no reason to depart from the general rule that where the Plaintiff made a late amendment which substantially altered the case the Defendant had to meet and without which the action would have failed, the Defendant was entitled to the costs of the action down to the date of amendment.

Defendant's Arguments

[4] Mr. Smith, QC argued that the Defendant was entitled to costs from the date of filing the Statement of Claim until the date of amendment on the basis of *Beoco Ltd. v Alfa Laval Co. Ltd. (supra)* because the Defendant was put to serious loss and it was unacceptable to expect that the Defendant should cover the costs. He insisted that the Claimant should be ordered to pay. He asserted that the case was a completely new one, but did not give specifics. He foresaw difficulty in preparing an Amended Defence because Steve Browne was deceased.

[5] Mr. Springer submitted that the amended Statement of Claim was based on work done prior to the amendment and that the Defendant was put to the expense of having to peruse the Statement of Claim. He

also claimed that the Claimant had amended two exhibits and this was not allowed.

Claimant's Arguments

[6] Ms. Peterson argued that **Beoco Ltd. (supra)** should be distinguished from the present case because:

(1) That amendment was made at trial stage whereas the present case was still at the case management stage and therefore the amendment was not made late in the proceedings.

(2) The Defendant had to meet a completely new case whereas in the present matter the case the Defendant had to meet was essentially the same after the amendment as before.

[7] She maintained that her pleaded claims of misappropriation, conversion and breach of statutory duty were “merely different labels applied to the same underlying facts.” But in **Beoco Ltd.** the original and amended pleas were entirely separate.

[8] She relied on **Begum v Birmingham City Council [2015] EWCA Civ 386** where the claim originally raised causes of action in negligence and misrepresentation. The claim was amended twelve months before the trial to allege statutory duty. The trial judge awarded costs prior to amendment to the Defendants.

- [9] This part of the judge's order was reversed on appeal and it was held that the pleaded claims for negligence, misrepresentation and breach of statutory duty were merely different labels applied to the same underlying facts. The case the Defendant had to meet was essentially the same after the Claimant's amendment as before.
- [10] The costs prior to amendment were awarded to the Claimant limited to 85% to take account of the fact that pursuing the original, unsuccessful claim had increased her costs overall. The court felt that the proper way to reflect the Claimant's lack of success on negligence would be to make a discount of 15% from the Claimant's costs.
- [11] Ms. Peterson suggested that the principle espoused in *Begum v Birmingham City Council (supra)* should be applied to this case because the Claimant's amendment did not substantially alter the case which the Defendant had to meet.
- [12] Ms. Peterson also submitted that *Beoco Ltd.* should not be followed where the judge was satisfied that, even if the amendment had been made earlier the action would have been vigorously resisted by the Defendant. She relied on *Kaines (UK) Ltd. v Osterrcichische Warrenhandelsgesellshaf* formerly *CGL Handelsgesellschaft mbH* *[1993] 2 Lloyd's Report 19.*

[13] She further submitted that the decision whether to make such an order for costs was sometimes best left for consideration by the court post trial because of the difficulty in determining the viability of the unamended case at the amendment stage.

[14] Her authority was *Chadwick v Hollingsworth (No. 2) [2010] 2 EWHC 2718, [2011] 6 Costs LR 931*, where the court noted that if the trial was imminent, the trial judge would be in a better position to determine the matter post trial than the case management judge.

[15] Counsel for the Claimant reiterated that a fundamental rule of civil proceedings is that costs follow the cause. She also pointed out that the Claimant was the successful party on 19th January, 2016 and that a substantial costs order should not be made because it could derail the Claimant's ability to get this matter to trial.

Reply

[16] Counsel for the Defendant did not respond to any of the legal authorities cited by Ms. Peterson.

Law

[17] **Supreme Court of Judicature Act Cap 117A** provides:

Section 85(1). Subject to the rules of court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, are in the discretion of the court and each court has power to determine by whom and to what extent the costs are to be paid.

[18] **The Supreme Court (Civil Procedure) Rules 2008.**

Part 64.3 The court's power to make orders about costs include power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings.

[19] **Part 64.6.**

- (1) In exercising its discretion under **section 85** of the Act, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party.
- (2) The court may, however, while acting judicially, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.
- (3) Without limiting the court's discretion or the range of orders open to it, the court may order a person to pay
 - (a) only a specified proportion of another person's costs;
 - (b) costs from or up to a certain date only; or
 - (c) costs relating only to a certain distinct part of the proceedings.
- (4) In deciding who, or if any person should be liable to pay costs, the court must have regard to all the circumstances.

Discussion

[20] The court’s discretion notwithstanding, “the normal rule is that the applicant should pay the costs of the application to amend (**Lidl UK GmbH v Davies [2008] EWCA Civ 976, LTL 10/7/2008**).” See **Blackstone’s Civil Procedure 2011. Chapter 31.5.**

[21] However this is not the matter to be determined. The issue is whether the Defendant is entitled to costs from the date of filing the Claim form and Statement of Claim to the date of the amendment.

[22] The **Beoco Ltd.** case (supra) has been described as a case which demonstrates the consequences in costs of a late application to amend a statement of claim.

[23] The following commentary on the case is instructive therefore I consider it appropriate to include it here.

“...[I]f permission is sought at a very late stage to make amendments having a fundamental effect on the way the case is set out, particularly where the other side is prejudiced, such as by being unable to make an effective Part 36 offer to settle, the court may impose very stringent costs terms when granting permission to amend. Thus in **Beoco Ltd. v Alfa Laval Co. Ltd. [1998] QB 137** permission to amend was granted on terms that the claimant paid the defendant’s costs up to the date of amendment, and 85% of the Defendant’s costs thereafter.

Such a penal approach is not always correct.” Blackstone’s Civil Practice 2011. Chapter 66.31.

“**Material change in successful party’s case.** When the basis of a party’s case is changed, that party usually has to amend their statement of case, which usually results in an order that they pay the costs of and occasioned by the amendment. Sometimes the court goes further and makes an order for costs covering all or part of the proceedings (**Beoco Ltd. v Alfa Laval Co. Ltd. [1995] QB 137**). It is a frequent occurrence that the case that emerges at trial is not exactly the same as that set out in the statement of case. It is a question of degree whether this will require the statement of case to be amended, and in practice it is only substantial changes which justify such a course. Likewise it is a question of degree whether any difference between the pleaded case and the facts as they emerge at trial justify departing from the general rule that costs follow the event. It is wrong to depart from the general rule where any differences are small. (**Alli Luton and Dunstable NHS Trust [2005] EWCA Civ 551, LTL 27/4/2005**). Where the differences are material and particularly where the losing party may have been misled, it would be appropriate to deprive the successful party of some or all of their costs.” Blackstone’s Civil Procedure 2011. Chapter 66.7.

[24] In the commentary on the costs order which was made in **Beoco Ltd.**

case, words such as “penal”, “stringent”, “onerous” and “adverse” are used. (See also Blackstone’s Civil Procedure 2011. Chapter 46.18.

[25] The case of **Chadwick v Hollingsworth, ([2011] 6 Costs LR931 at**

939 – 940), which was cited by Ms. Peterson, offers significant guidance in addressing the pertinent questions that must be answered in the present case.

[26] **Rix LJ** in his judgment said:

“24. The questions therefore are (i) whether the appellant’s amendment “substantially alters the case the defendant has to meet” and (ii) whether without the amendment “the action will fail”. I would observe that this case presented nothing like the situation in *Beoco*, where the amendment was put on a totally different ground. In the present case, the breaches of duty were much expanded, but the original case was preserved. However, would the appellant’s action have failed without the amendment? Such a question is easily answered in a situation like *Beoco* where the original and amended pleas are entirely separate, the amendment is made at trial and the relevant costs order is made at the conclusion of trial; or in any case where, even if the amendment is made at a late stage before trial, the relevant costs order is made at the conclusion of trial. It can also be easily answered where the amending party accepts that he cannot succeed without his amendment, or where the court is capable of providing a summary answer before trial as to the viability of the unamended case.

25. However, where a judge is asked to make such a summary decision, he must be careful that he does so with due circumspection. Moreover, if trial is in any event imminent, he needs to bear in mind that the trial judge will be in a much better position to determine the question post trial than a case management judge can do pre-trial. It may nevertheless be the case that the case management judge can both safely determine the summary issue, if asked to do so, and feel it is necessary to do so, in the interests of justice, fairness to the parties, and the efficient allocation of resources.”

[27] Taking the foregoing into account it appears that for the decision in

Beoco Ltd. case to be applicable to the present case there must be:

A late amendment which substantially alters the case the Defendant has to meet; without the amendment the action will fail and the Defendant suffers prejudice.

(a) ***Late Amendment***

The amendment in the present case was made at case management and before full case management orders were given.

(b) ***The amendment substantially alters the case the Defendant has to meet and***

(c) ***Without which the action will fail***

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.” **Letang v Cooper [1965] 1 QB 232 at 242 – 3.** Per Diplock LJ.

In addition, whether a new cause of action arises out of the same facts as those already pleaded is essentially a matter of impression **(Welch Development Agent v Redgate Dorman Long Ltd. [1994] 1 WLR 1409.**

However the impression must be derived from a reasoned assessment of relevant factors. **(Lidl UK GMBH ANR v Davies & Ors (supra).**

The Amended Statement of Claim, though expanded, preserved the original facts and Ms. Peterson did not agree that her amendment substantially altered the case. She submitted that her claims for conversion, misappropriation and breach of statutory duty were different labels applied to the same underlying facts. She relied on *Begum v Birmingham City Council (supra)* where **Jackson LJ** held that

“The claimant’s pleaded claims for negligence, misrepresentation and breach of statutory duty were different labels which the pleader applied to the same underlying facts.”

He continued:

“31. This case is very different from *Beoco Ltd. v Alfa Laval Co. Ltd. [1995] QB 137*, on which the council relies. In *Beoco* the claimant’s late re-amendment substantially altered the case which the defendant had to meet. Also, the defendant was prejudiced by lack of opportunity to make a payment into court. In the present litigation the case which the defendant had to meet was essentially the same before and after the claimant’s re-amendment. The claimant continued to assert, and the defendant continued to deny, the same basic facts and the same disputed propositions of expert evidence. There is no suggestion that the defendant lost an opportunity to settle. The defendant at all

times disputed the factual basis of the claimant's claim.”

Bean LJ, agreeing with **Jackson LJ** said:

“36. *Beoco* is frequently cited, but is not authority for the proposition that in all cases where an amendment to a claim makes the difference between failure and success, the claimant must pay the defendant's costs up to the moment of the amendment. It all depends on the case. Here the amendment was made at a hearing which proved ineffective for a number of reasons. The defendant then had the opportunity to make a **Part 36** offer before the effective trial date but did not take it. The factual dispute at trial was the same as it would have been anyway: only the legal label attached to the factual allegations had changed. In those circumstances I too would award the Claimant 85% of her costs....”

It should be noted that there was no admission by Ms. Peterson that her claim would have failed without the amendment and counsel for the Defendant made no submission on this requirement.

(d) ***Prejudice***

Prejudice resulting from an amendment of Statement of Claim is usually discussed within the context of injustice, and there is no injustice if the other side can be compensated in costs. In this regard relevant express prejudice is required. (See *Blackstone's Civil Practice 2011. Chapter 31.4*).

As previously stated the counsel for the Defendant referred to expense incurred and the death of

Steve Elton Browne, but did not elaborate. No arguments were advanced to demonstrate the prejudice allegedly suffered.

Conclusion

- [28] The court wishes to thank Ms. Peterson for her useful authorities. However apart from citing the case **Beoco Ltd. v Alfa Laval Co. Ltd.** on which they relied and claiming an entitlement to costs on the same basis the attorneys for the Defendant offered no analysis whatsoever nor did they attempt to justify their assertion.
- [29] It is my view that the amendment in this case cannot be considered a late amendment. Moreover the Defendant has not demonstrated that the amendment substantially altered the case he has to meet, that the action would have failed without the amendment and that he suffered prejudice.
- [30] I am not persuaded that the adverse and onerous costs order made in **Beoco** is applicable to the present case. **Beoco** was a case at trial stage and I agree with counsel for the Claimant that it should be distinguished.

[31] I also agree that *Begum v Bermingham City Council (supra)* is more applicable to the present case. The original case has been preserved and the claims expanded.

[32] In making an assessment of the viability of the unamended claim, the court is required to exercise great care.

[33] I find merit in the suggestion that a determination of the question whether the claim would have failed without the amendment is best left post trial.

[34] The Defendant's application is dismissed.

**Ms. Deborah Holder, BSS
Master of the High Court**