COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00217

BETWEEN

JENNIFER BAIN

Plaintiff

-AND-

FAMILY GUARDIAN INSURANCE COMPANY LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Camille Cleare of Harry B. Sands, Lobosky & Co. for the Plaintiff.
Mr. Leif Farquharson and Mr. John Minns of Graham Thompson for the Defendant

Hearing Date: 18 July 2019

Civil Practice and Procedure – Pleadings – Amendment of Statement of Claim after conclusion of evidence, closing submissions and closing reply submissions – Rules of the Supreme Court, Order 20 – Whether Statement of Claim should be allowed to be amended at such late stage of the trial

This matter was given a trial date in early December 2017 but did not get off the ground due to the absence of a Court Reporter. A new trial date was given in July 2018. In the interim, on 7 May 2018, the Plaintiff filed a Summons to amend her Statement of Claim. The amendment does not raise a new claim and the limitation period on the cause of action for which the amendment was sought had not yet expired.

By email correspondence, Counsel for the Plaintiff sought a date from the Court. The Court questioned whether such an amendment could be made at such a late stage; that is, after pleadings had been closed but before the trial had commenced. The Court expressed that it will approve an order if the Defendant consents to the amendment. The Defendant did not. The trial commenced and the extant Summons to amend was not raised by the Plaintiff until after the trial had ended and both Counsel had filed their closing submissions and reply closing submissions.

The Defendant opposes the Summons to amend and submits that it is obscenely late. No prejudice is alleged.

HELD: allowing the Summons to amend even after all witnesses had testified and closing as well as reply closing submissions were in.

1. The Court has the jurisdiction to allow an amendment at any stage of the proceedings as expressly stated in Order 20 Rule 5.

2. Citing with approval the judgment of Crane-Scott JA in **Bahamas Telecommunications Company Limited v Island Bell Limited** SCCivApp No. 188 of 2014 and **Ketteman v Hansel Properties Ltd.** [1987] 2 WLR 312, HL in exercising its discretion, the Court must look at each case on its own particular facts and circumstances to determine where justice lies, which includes the fact that the Plaintiff is a personal litigant as opposed to the Defendant, a large commercial enterprise.

3. There was no inordinate delay in the conduct of the action. Both Counsel worked well and efficiently between themselves with significant additional discovery to prepare for the first Trial fixture. The Plaintiff having consented to an application by the Defendant to amend its Defence after viewing her witness statement and about one month before the scheduled trial date of a fairly complex action involving three discrete causes of action; one of which is civil conspiracy; not common in this jurisdiction.

4. The application to amend was filed after discovery was completed and settlement negotiations were exhausted. Discovery was only completed on the first day of the first scheduled trial by means of Mr. Cardinal McCardy, a witness who was subpoenaed to attend and produce documents. The Defendant agreed to all of the bundles in lieu of this witness testifying.

5. The mistake in not making a second request to list the application at trial was not fraudulent, done in bad faith or intended to overreach and was not done in default of the Court's rules, direction or order. It was done on the misunderstanding or assumption that the application was denied if not consented to.

6. The Court has the power under Order 31A to rectify matters of its own motion where there has been an error of procedure or a failure to comply with a rule, practice direction or order of the Court.

7. The application to amend did not seek to add a new cause of action and the limitation period on the cause of action for which the amendment was sought, conspiracy to injure by unlawful means, had not yet expired.

8. The real disagreement between the parties is not changed by the amendments. The amendments seek to clarify an issue which was already pleaded. It is a necessary element of the tort which must be pleaded and proved.

9. There is no evidence of what actual prejudice has or may have been caused to the Defendant for which it cannot be compensated by an order for costs.

10. Following **MacDonald Construction Company v Rose** [1980] 25 NFLD & P.E.I.R. 118, the amendment is allowed on terms that the pleadings are re-opened with additional discovery and rediscovery of any witness and the right to recall and re-examine any witness on the matters touching or arising out of the substance of the amendment. **Newton-Ryan v. Clarke** 2010/PRO/CPR/20 applied.

11. Costs are reserved until the final outcome of the trial or when the extent of any wasted costs can be ascertained.

RULING

Charles J

Introduction

[1] Pursuant to Order 20 Rule 5 of the Rules of the Supreme Court ("RSC"), the Plaintiff ("Ms. Bain") filed a Summons on 7 May 2018 seeking leave of the Court to amend her Statement of Claim. The Summons sought leave to amend the particulars of fact in the claim of conspiracy to injure by unlawful means, as originally pleaded on 16 February 2016, specifically at paragraphs 18-45 in the manner set forth on the draft appended to the Summons.

[2] The Defendant ("Family Guardian") opposes the application on the ground of delay namely that Ms. Bain's second request to list the Summons for hearing came after the trial, there being no available court time to have it listed before trial, and she having failed to make a further request to have it listed at the commencement of the trial amounts to an abuse of process.

Background facts

[3] The background facts can be gleaned from the affidavit of Samuel Brown filed on 19 June 2019 and the affidavit of Jennifer Bain filed on 28 June 2019 in support of the present application. They are largely undisputed. On 18 February 2016, Ms. Bain instituted the present action against Family Guardian. Broadly speaking, she pleads three causes of action. First, breach of contract in respect of the termination of her services as a Financial Services Sales Representative on or about 29 September 2015. Secondly, libel by reason of a letter written by Family Guardian and copied by email to two officials within the Insurance Commission of The Bahamas, which she alleges was defamatory of her. Thirdly, conspiracy arising by reason of certain

specified actions of Family Guardian and one of its employees, who was also a registered sales intermediary, allegedly taken following the termination of her services.

[4] The conspiracy allegation is at the heart of the present application to amend. It is contained in paragraphs 18 - 29 of Ms. Bain's Writ of Summons. She averred, among other things, that:

> "18. By a series of letters dated from 2nd to 26th October 2015, and at certain other dates which will be revealed upon discovery, Family Guardian informed Ms. Bain's clients that she was no longer working with the Company and that a sales representative would be taking her place."
>
> "19. From as early as 5th October, 2015 and in response to letters received from Family Guardian, certain of Ms. Bain's clients wrote letters requesting that Hope Insurance Agents & Brokers Limited ("Hope Insurance") be noted as broker of record."
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> "20. Notwithstanding these requests, Family Guardian provided private information to other independent contractors who then made contact with certain of Ms. Bain's clients using the private information provided by Family Guardian. …"
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> "23. After Ms. Bain was terminated John Bull submitted a Notice of Change of Agent form requesting Hope Insurance to act as its agent. Customarily there would be no change in premium and no change in commission upon such a notice being effected and, pursuant to policy, the existing agent would have five (5) days to try and get the business back, failing which Family Guardian would be obligated to deal with the client through the new designated agent."
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> "24. On this occasion, **Family Guardian conspired with its sales intermediary, Ms. Major**, to influence John Bull and dissuade it from using Hope Insurance as its agent so as to cause loss of commission to Ms. Bain."
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> "25. **Acting upon the conspiracy, Family Guardian through its sales intermediary, Ms. Major**, met directly with John Bull, without Hope Insurance present. Notwithstanding that the Change of Agent form had previously been completed and sent to Family Guardian, Ms. Major, with the sanction of Family

Guardian, offered new lower rates to John Bull. The new rate was not provided by BahamaHealth but was directly manipulated by Family Guardian and Ms. Major by reducing the 4% commission to 2% which was otherwise payable to Hope Insurance."

"26. John Bull accepted the new rates but they still wanted Hope Insurance as their broker. Consequently, Family Guardian unilaterally cut Hope Insurance's commission provided by BahamaHealth Underwriting from 4% to 2% to accommodate the new lower rate that it directly and unilaterally offered to John Bull, thereby causing Ms. Bain financial loss. Further, consistent with all of the change of broker requests from Ms. Bain's clients; Family Guardian breached its own policy by delaying longer than five (5) working days in honouring the request."

"28. For reasons best known to Fulmar Advisors, it subsequently decided to issue a Notice of Change of Agent form appointing Hope Insurance which customarily would not have required a change in premium or commission. Upon receipt of the change of Agent form, **Family Guardian again conspired with Ms. Major**, acting as a sales intermediary, to directly approach Fulmar Advisors and, for the first time, offer them a lower rate which would cut the existing built in commission of 4% to 2% in an effort to entice Fulmar Advisors to renege on its Change of Agent request. Fulmar Advisors accepted the new lower rates but opted to keep Hope Insurance as its broker of record."

"29. "**By virtue of the actions of Family Guardian and Ms. Major in concert and with intent to injure Ms. Bain**, Ms. Bain has suffered damage and continues to suffer loss and damage. …." [Emphasis added]

[5] On 5 April 2016, Family Guardian filed its Defence.

[6] On 17 November 2016, Directions for Trial were given and the action was set down for trial for two days to commence on 5 December 2017. The trial did not commence on this date due to the unavailability of a court reporter. Significantly, on this day, Mr. Cardinal McCardy appeared on subpoena.

[7] On 26 February 2018, the parties appeared in Court to report on whether or not the matter was still proceeding to trial. No settlement having been achieved, the Court confirmed the trial dates.

[8] On 7 May 2018, Ms. Bain filed a Summons to amend with draft Amended Statement of Claim which was served on learned Counsel for Family Guardian, Mr. Farquharson.

[9] On 17 May 2018, Ms. Cleare appearing as Counsel for Ms. Bain emailed the Court seeking an available date for the hearing of the Summons. In an email of the same date, the Court responded:

> **"Can you amend at the eleventh hour? This matter was scheduled for trial when there was no court reporter."**

[10] Ms. Cleare responded to the Court's email on the same date, pointing out that there had been no further Pre-Trial Review in the action and stating that she would seek to confirm available dates with Mr. Farquharson for the purposes of making the amendment application. In response, the Court advised Counsel as follows:

> **"There was no further PTR because the matter had a confirmed trial date. <u>The trial date was adjourned to facilitate the presence of a court reporter not to re-open the pleadings. That being said, I have no available dates before the trial date. If the other side agrees to your request then I will approve.</u>"**[Emphasis added]

[11] Ms. Cleare then sent an email **"noting"** the Court's response. Immediately following the exchange, Ms. Cleare sent an email to Mr. Farquharson enquiring whether he would be prepared to agree to the proposed amendments by consent, so that the trial could proceed as scheduled on 16 July 2018 for two days.

[12] Mr. Farquharson responded by email the following day, stating that:

> **"…Given the lateness of your application, and for various other reasons, we are not prepared to agree the proposed amendments by consent."**

[13] Ms. Cleare sent an email the same day **"noting"** Mr. Farquharson's position. The various email exchanges between Ms. Cleare and the Court and between both Counsel culminated in Ms. Cleare's email of 18 May 2018 "**noting**" that Mr.

Farquharson was not prepared to agree the proposed amendments by consent, are contained at Exhibits SB-1 and SB-2 in the Affidavit of Samuel Brown.

[14] On 16 July 2018, the trial commenced. Ms. Bain testified and closed her case. The Defence opened their case with Ms. Kerry Higgs testifying.

[15] On 20 July 2018, the trial continued with Ms. Higgs completing her evidence. Ms. Alana Major gave her evidence and was cross-examined very extensively on John Bull issue and breaches to the Agency Agreement with Hope Insurance.

[16] On 22 November 2018, the trial continued. Ms. Major completed her evidence. Directions were given for written submissions by 31 January 2019 and brief oral submissions on 27 February 2019.

[17] On 4 February 2019, Ms. Bain lodged her written submissions and Family Guardian lodged theirs on 25 February 2019. There was a slight delay in the receipt of the transcripts which correlatively led to the delay of all submissions to the Court.

[18] Oral closing submissions were then adjourned to 10 April 2019 with liberty to file written reply submissions by 27 March 2019.

[19] On 28 March 2019, both parties exchanged and lodged written reply submissions. It is also on this date that Counsel for Ms. Bain wrote requesting a re-listing of the Summons to amend.

[20] Oral submissions (specifically on the civil conspiracy issue), previously adjourned to 10 April 2019 was further adjourned to 17 April 2019.

[21] On 17 April 2019, Counsel for Ms. Bain introduced the extant Summons to amend. The Court fixed a hearing of that application for 18 July 2019 when it was heard.

The law

[22] It is accepted that the Court has the jurisdiction to allow an amendment at any stage of the proceedings as expressly provided for in Order 20 Rule 5. While the Court is

vested with wide powers to amend even at a late stage, such discretion must be exercised sagaciously and not whimsically or capriciously. This is especially so where the amendment sought, if granted, will result in an adjournment or delay of the proceedings.

[23] According to the learned editors of **The Supreme Court Practice 1999**, *"After all the evidence on both sides has been taken, leave to amend will, as a rule, be refused"*: see para.20/8/12. And while a slight delay is not in itself sufficient grounds for refusing leave, if an application which could easily have been made is delayed until after evidence given and a point of law argued, leave will often be refused: para.20/8/21 [supra]. In addition, the Court will not generally allow at the trial an amendment, the necessity of which was apparent months ago: para. 20/8/11 [supra].

[24] These principles have been applied in many cases. For instance, an application for leave to amend made at the opening of trial was refused in **Bank of Baroda v. Panessar** [1987] Ch. 335. The case involved an action by a bank against a company's shareholders and their wives under guarantees purportedly executed by each of them. The wives' defence alleged that the guarantees in their names had been signed by their husbands without their authority. At the commencement of the trial, counsel for the wives applied for leave to amend the defence to plead undue influence. If granted, the amendment would have resulted in the adjournment of the trial as further evidence would likely be adduced. Walton J. accordingly held that the application had been made far too late and refused leave to amend. At page 342, he stated:

> **"The bank was in a position to go ahead and, indeed, the application was only made after Mr. Crystal had commenced his opening; therefore, it seemed to me that any such application was made far too late."** [Emphasis added]

[25] Correspondingly, in **Tramp Leasing Ltd v. Sanders** (1995) The Times, 18 April, 1995, the Court of Appeal held that seeking to amend the defence during closing speeches to plead no or part consideration in an action for breach of contract was too late for such a fundamental change. This was so in spite of the defendant's

contention that the plea was purely a point of law and raised no additional factual considerations. In rejecting the application, the Court re-stated the importance of parties' pleaded cases setting out all material facts upon which they intend to rely. Otton LJ at p. 5 had this to say:

> **"Quite apart from that, it seems to me that the technical stance taken by counsel on behalf of the Appellant is not in accord with the spirit of the times. <u>According to the current thinking, as adumbrated by the Lord Chief Justice, Lord Taylor, by way of a practice direction, openess and frankness are at the forefront of legal disputation. The issues must now be clearly set out and before the court so that the parties and not least the judge, are fully aware of the scope of the litigation and the issues which are to be determined at the trial.</u>"** [Emphasis added]

[26] In the same way, in **James v. Smith** [1891] 1 Ch. 384, the plaintiff alleged that the defendant held certain property as his agent, having previously agreed to bid for the purchase of the same on his behalf. By way of defence, the defendant denied the existence of such an agreement and agency. In the alternative, he further relied upon section 4 of the Statute of Frauds. At trial it became apparent that section 4 of the statute may not have availed the defendant; and accordingly, <u>at the close of the plaintiff's case</u> he sought leave to amend to rely upon section 7 thereof. In refusing leave to amend, the trial judge summarised his position thus (at p.389):

> **"<u>But then I have a point of pleading here to which my attention was only called at a very late stage - so late as, in my mind, to make it exceedingly difficult to allow any amendment</u>. By Order XIX., r. 15, the Defendant is bound to plead the *Statute of Frauds* if he intends to rely on it - but the rule does not oblige him to plead the particular section. Here the Defendant has pleaded the 4th section; and it is admitted now that on the 4th section he must fail, and that he must rely on the 7th section. Then I am asked at the last moment to allow an amendment to be made so that his defence may read that he will rely on the 7th section. <u>I have said frequently, and I repeat it, that there is no Judge on the Bench who is more willing to allow amendments even at the last moment than I, provided there is no surprise; but I think I should be going too far if I were to allow it in this action, and it would be introducing a laxity which I ought not to introduce. A party relies on a particular section of the statute, and when he finds the authorities to be against him he says, "I should like to rely on something else." To sanction that would, it seems to me, make pleading even more loose than it is at present, and I think I ought not to allow that amendment.</u> Therefore, although I hold the 7th**

section of the *Statute of Frauds* to be applicable, I think it is not properly pleaded, and is not available to the Defendant." [Emphasis added]

[27] Looking closer to home, our own Court of Appeal has dealt with this very issue in the case of **Bahamas Telecommunication Company Limited v Island Bell Limited** SCCivApp No. 188 of 2014. Crane-Scott JA, in delivering the judgment of the Court stated:

> **"[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:**
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> **"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."**
>
> **[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."**[Emphasis added]

[28] Unquestionably, each case must be looked at on its own peculiar facts and circumstances. From a reading of all of these cases, there are some factors that the Court have to consider but the one that stands out is: no amendment should be granted if doing so will cause injustice to the other party.

Discussion and disposition

[29] The Specially Indorsed Writ of Summons was issued without delay, within four and one-half months of the termination of Ms. Bain. The first case management order was made about six months after pleadings were closed. The Court gave directions and fixed trial to commence on 5 December 2017 with a time estimate of two days.

[30] I can say that both Counsel worked well and efficiently between themselves with significant additional discovery and Ms. Bain consented to an application by Family Guardian to amend its Defence (after viewing Ms. Bain's witness statement) about one month before the scheduled trial date of a fairly complex action involving three discrete causes of action; one of which is civil conspiracy; not common in this jurisdiction.

[31] The documents supporting the claim for unlawful means conspiracy were not agreed until 5 December 2017 (the first day of the trial which did not commence because of the unavailability of a court reporter). Discovery was only completed on that day by means of Mr. McCardy, a witness who was subpoenaed to attend and produce documents. Family Guardian agreed to all of the bundles in lieu of this witness testifying.

[32] The Court fixed new trial dates to commence on Monday, 16 July 2018 and directed that the parties report for mention on 26 February 2018 after they underwent settlement negotiations to confirm whether or not a trial was still necessary.

[33] Approximately, three months after the mention date, on 7 May 2018, Ms. Bain filed a Summons to amend with the draft amendments appended to it. The application was made after discovery was completed and settlement negotiations were exhausted.

[34] That said, on any view, the Summons to amend came late causing the Court to inquire whether such an application to amend could be made at the eleventh hour. It came after evidence was taken from all of the witnesses, after the laying over of closing submissions and reply closing submissions. However, I would say that was "obscenely late", as learned Counsel Mr. Farquharson labelled it.

[35] There were a plethora of emails between Ms. Cleare/Court and Ms. Cleare/Mr. Farquharson which I have to admit could have signaled mixed messages from the Court. At the inception, the Court inquired "*Can you amend at the eleventh hour? The matter was scheduled for trial when there was no court reporter*."

[36] Ms. Cleare pointed out that there had been no Pre-Trial Review leading to the new trial dates and therefore, she would liaise with Mr. Farquharson to find a suitable date for the hearing of the amendment application.

[37] Then the Court responded somewhat ambivalently that "*There was no further PTR because the matter had a confirmed trial date. The trial was adjourned to facilitate the presence of a court reporter not to re-open the pleadings. That being said, I have no available dates before the trial date. If the other side agrees to your request, then I will approve*."

[38] Mr. Farquharson did not agree to the proposed amendments. The trial commenced on 16 July 2018 as scheduled. It continued over the course of 20 July and 22 November 2018. Both sides called all of their witnesses and closed their respective cases. Following this, both sides laid over and exchanged their closing submissions and reply closing submissions.

[39] Learned Counsel Mr. Farquharson submitted that at no point during the course of the trial did Ms. Bain seek to move the Summons to amend and, at this juncture in time, it is an abuse of the court's process. He next argued that the proposed amendments raise a number of entirely new factual and legal issues which will likely require further investigation and discovery, further evidence and further legal submissions. Mr.

Farquharson further argued that it is disingenuous for Ms. Bain to suggest that the Summons to amend was diligently and timeously pursued.

[40] The learned editors of **The Supreme Court Practice, 1999. Volume 1** para. 20/8/11 at p. 383 states as follows:

> **"The court has power to allow the amendment or re-amendment of pleadings after the conclusion of the evidence and even after closing speeches of counsel, where injustice or prejudice would be occasioned to either party and where it is necessary to formulate the real issue between the parties which did not appear from the original pleadings: *Smith v Baron* [1991] The Times 1, CA.** [Emphasis added]

[41] I agree with learned Counsel Ms. Cleare that in considering where justice lies, the Court must have regard to a number of circumstances which includes the fact that Ms. Bain is a personal litigant as opposed to Family Guardian, a large commercial enterprise: See: **The Supreme Court Practice,** [supra] para. 20/8/12 at p. 383:

> **"The grant of an amendment by the trial judge is a matter for his discretion to assess where justice lies, having regard to many factors such as the strain of the litigation particularly on personal litigants the anxieties occasioned by facing new issues, the raising of false hopes, and the disappointment of legitimate expectations since justice cannot always be measured by money (Ketteman v Hansel Properties Ltd. [1987] 2 WLR 312, HL, leave to amend to add a plea of limitation during closing stages of the trial refused)."**[Emphasis added]

[42] Significantly, I observed that the statute of limitation of six years has yet to expire on the cause of action of the tort of conspiracy.

[43] I agree with learned Counsel Ms. Cleare that it cannot be said with sincerity that there was inordinate delay in Ms. Bain's conduct of the action or evidence of bad faith. The Court is also responsible for this sad state of affairs. Had it granted the amendment at the commencement of the trial (since it could have done so of its own motion pursuant to Order 31A), it would have given learned Counsel for Family Guardian, Mr. Farquharson an opportunity to consider it and adduce evidence and/or apply for an adjournment for that purpose. The law is clear that the opponent must always be

allowed an opportunity of meeting the new matter, if he reasonably asks for it: **Winchilsea v Beckly** (1886) 2 T.L.R. 300.

[44] I also agree with Ms. Cleare that Ms. Bain has not been guilty of failing to act in accordance with a rule, direction or order of the Court. The mistake in not making a second request to list the application at trial was not a fraudulent one or intended to overreach and was not done in default of the Court's direction. It was done on the misunderstanding or assumption that the application was denied if not consented to.

[45] Crane-Scott JA in **Island Bell** at paragraph 25 referenced Brett M.R. in the 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**."

[46] Another issue which arises for consideration is whether a fair trial and the determination of the issues would be compromised by the granting of leave to amend. In her affidavit, Ms. Bain averred that the intended amendments reveal no new cause of action or issues of law.

[47] Learned Counsel Ms. Cleare contended that the proposed amendments are simply a modified approach to the same facts based on the same cause of action, the effect of which is to expressly plead what was impliedly pleaded; an amplification of the material facts in support of the existing claim for conspiracy to injure by unlawful means that is plainly already pleaded and for which the prayer already seeks damages for unlawful means conspiracy. She further contended that the proposed amendments provide more detail in the pleadings so as to correspond with the evidence in the agreed bundles, in the witness statements and the evidence provided by Mr. McCardy on 5 December 2017 and thereafter cross examined upon at the trial in July 2018. According to her, these particulars of fact are necessary to ground the intentional tort of conspiracy and they cannot realistically be said to have taken Family Guardian off guard. The application was made in good faith and Family Guardian was in possession of the draft from 7 May 2018, some two months before trial.

[48] I agree with Ms. Cleare that the real disagreement between the parties will not be altered by these amendments: it has always been whether Family Guardian acted deliberately and unlawfully and in concert to induce John Bull to deal directly with it in order to cause financial loss to Ms. Bain.

[49] Scrutinizing the amendments which are being sought, I am also of the opinion that they seek to clarify the issue which was already pleaded. The clarification is that by unilaterally cutting Hope Insurance's commission to cause Ms. Bain financial loss, Family Guardian *breached* Hope's agreement; something that was actionable by Hope, whether Hope acted on the breach or not.

[50] Indeed, this is a necessary element of the tort which must be pleaded and proved.

[51] The documents which support these amendments were not within the power custody or control of Ms. Bain. Rather they came from Mr. McCardy of Hope Insurance on 5 December 2017 after the pleadings were settled and the first trial date was vacated.

[52] Learned Counsel, Ms. Cleare invites the Court to follow the approach in **Diamond Willow Ranch Ltd. v. Oliver (Village),** [1988] B.C.J. No. 880 (B.C. S.C) and grant the amendment on terms similar to the approach in **MacDonald Construction Company v. Rose** [1980] 25 NFLD & P.E.I.R. 118 which was also the approach taken by Sir Michael Barnett, the Chief Justice (as he then was) in **Newton-Ryan v Clarke** 2010**/**PRO/CPR 20. Sir Michael said: (paragraph and page unnumbered)

> **"In Diamond Willow Ranch Ltd. v. Oliver (Village), [1988] B.C.J. No. 880 (B.C. S.C. [In Chambers]) the court considered an application to amend made at the conclusion of the evidence of the trial and before argument. In paragraphs 5 and 6 it adopted the following principles as "a good guide in considering applications to amend brought at the conclusion or late in a trial."**
>
> **A proposed amendment must:–**
>
> > **(a) not be inconsistent with the pleadings already filed on behalf of the party seeking the amendment,**
> > **(b) not be inconsistent with the evidence tendered by that party at trial and on discovery;**

(c) not have changed the whole course of the trial, had it been requested at the outset of the trial;
(d) not be unfair to the opposite party; and
(e) be necessary for the purpose of determining the real issues raised or depending upon the proceedings.

This was followed as recently as 2007 in Canadian National Railway v. Imperial Oil Ltd, [2007] BCSC 1193, [2007] B.C.J. No. 1743 (B.C. S.C.).

In MacDonald Construction Company v. Rose [1980] 25 NFLD & P.E.I.R. 118 the Supreme Court of Prince Edward Island, Canada permitted an amendment to a defence after evidence had been completed but before closing arguments. The court said:–

> **"However, as Fletcher Moulton L.J. pointed out in Re Robinson's Settlement, supra, the function of rules is to present the respective position of the litigants in such a manner as will enable the Court to administer justice between them, and where they appear to militate against this end, they should either be interpreted flexibly, or where this is not possible, amendment on terms should be permitted in the discretion of the Court.**
>
> **It is possible that had the defendant's suggested defence been properly pleaded, rather than approached obliquely, it might conceivably constitute a good defence to the action, and he should not be denied his defence by a rigid application of the rule. On the other hand, had the defendant so pleaded, it is equally conceivable that the plaintiff might well have countered it either by way of a pleading in reply, or by evidence led.**
>
> **I would be of the opinion that the proposed amendment should be allowed in order to bring all proper issues before the Court, for that is the purpose of the trial process. To allow the amendment may change substantially the entire thrust of the proceeding, and this should not be done to the prejudice of the plaintiff. In allowing the amendment the court in that case imposed terms as follows:–**
>
> **The amendment will be allowed on the following terms. The pleadings will be deemed to be re-opened with the plaintiff being allowed to reply, if he considers it appropriate to do so; the plaintiff may discover, or rediscover any witness; when trial resumes either party should have the right to recall and re-examine any witness on matters touching or arising out of the substance of the amendment.**[Emphasis added]
>
> **In addition, the plaintiff shall have its costs as taxed in any event from the time of the close of the initial pleadings to the date of resumption of trial. In addition, if it should be that the end result of the trial shall be in favor of the plaintiff, the plaintiff will be entitled to interest, at present bank rates, from the date on which**

> **the application to amend was made to the date on which the taking of any further evidence which either counsel may elect to adduce, as a result of such amendment, shall be concluded.""**

[53] Notwithstanding that the amendment sought was to add a new cause of action in **Newton-Ryan v Clarke**, Barnett C.J. went on to allow it on terms similar to that imposed by the Court in **MacDonald Construction Company v Rose** [supra]. He then continued:

> **"…The pleadings will be deemed to be re-opened with the defendant being allowed to amend its defence if she considers it appropriate to do so. The defendant may discover, or rediscover any witness and (sic) when the trial resumes and the defendant should have the right to recall and re-examine any witness on matters touching or arising out of the substance of the amendment.**
>
> **I will not make any order as to cost at this time. I will reserve the issue of costs to be determined at the end of the trial having regard to the final decision of the court on all the matters raised in the action."**

[54] Likewise, I will allow Ms. Bain to amend her pleadings in the manner shown in red on the draft Statement of Claim specially indorsed on the Writ of Summons. The pleadings will be deemed re-opened. Family Guardian will re-amend its Defence by 31 August 2019 if it considers it appropriate to do so. Family Guardian may discover or re-discover any evidence when the trial resumes. Family Guardian will have the right to call, recall and re-examine any witness on matters touching or arising from the amendments.

[55] The final issue is whether costs would compensate for the amendments. The issue of costs is always a vexed one. I am cognizant that the proposed amendments were anticipated well before the trial. In addition, there is no evidence of what *actual* prejudice has or may have been caused to Family Guardian for which it cannot be compensated in costs. It is also undetermined what further evidence will be required that has not yet surfaced. But, in my opinion, Family Guardian may be required to conduct further investigation, discovery, evidence and/or legal submission as foreshadowed in the affidavit of Mr. Brown.

[56] For the time being, I will reserve the issue of costs until the final outcome of the trial or until Family Guardian can satisfy the Court of wasted costs (if any) it had incurred by having to garner further evidence and /or legal submission.

Conclusion

[57] For all of the reasons stated above, I will grant the amendments shown in red on the draft Statement of Claim specially indorsed on the Writ of Summons filed on 7 May 2018. Costs are reserved until the final outcome of the trial or when the Defendant could ascertain the extent of the wasted costs (if any). This part-heard trial will resume on Thursday, 7 November 2019 at 2:30 p.m. for two hours.

Dated this 15th day of August, A.D, 2019

Indra H. Charles
Justice