

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No. DOMHCV2015/0255

BETWEEN:

LAUREEN BENJAMIN-WALCOTT	1 st Claimant
CYRIL BENJAMIN	2 nd Claimant
HELEN AGNITA BANNIS	3 rd Claimant

- and -

JUSTINN KASE FORMERLY KNOWN AS LAWRENCE BENJAMIN	
As Personal Representative of the Estate of Esther Benjamin	1 st Defendant

RAYMOND BENJAMIN as Personal Representative of the Estate of Esther Benjamin	2 nd Defendant
STAPHINE P. EMANUEL	3 rd Defendant

APPEARANCES:

Mr Delano Edwards, Counsel for the Claimants and Added party

Mrs Noelize Knight-Didier, Counsel for the Defendants

2024: October 11
October 22 (written submissions)
December 13

RULING

BACKGROUND

[1] **JAWARA-ALAMI, J.:** By a Notice of Application dated and filed on 10th November 2021 the Applicants/Claimants apply to this Honourable Court pursuant to Part 20 of the

CPR for an order that the applicants/claimants be granted leave to amend the claim form filed on 15th October 2015 and the amended claim form filed on 16th March 2016 to include the following reliefs:

1. That the Court shall revoke the Letters of Administration granted to the Defendants for the estate of Esther Benjamin on the 13 day of April 2011;
2. That the Court shall grant the Claimants Letters of Administration of the Estate of Esther Benjamin;
3. That the 1st and 2nd Defendants shall submit an account for the estate from the date when Letters of Administration was granted to the present including valuations of all properties sold;
4. That the 1st Defendant and 2nd Defendant shall deliver up all Certificates of Titles in the name of Esther Benjamin;
5. That the 1st Defendant and 2nd Defendant lodge the Letters of Administration for the Estate of Esther Benjamin at the Registry within 14 days;
6. Costs.

[2] The application is supported by an affidavit in support filed on 10th November 2021 and a supplementary affidavit filed on 9th October 2024 in which the deponent Laureen Benjamin-Walcott averred to reasons why the claimant wishes to amend their claim.

[3] In the 1st and 2nd Defendants' counterclaim they alleged that the 1st and 3rd Claimants since the deceased's death took possession of monetary instruments from the deceased's safe as well as jewellery belonging to the deceased; rents received from the estate's properties were being put into an account of the deceased which was in the joint names of the deceased and the 3rd Claimant and after the deceased's death the 3rd Claimant cleared this account of over \$20,000.00 which she has never accounted for or returned; the deceased also had a joint bank account with the 1st Claimant which the 1st Claimant withdrew all of the funds therefrom following the deceased's death.

[4] The 1st and 2nd Defendants therefore counterclaim for:

1. An account and/or the return of the deceased's monetary instruments and jewellery taken by the 1st and 3rd Claimants;

2. An account and return of funds belonging to the Estate and taken by the 3rd Claimant from the National Bank of Dominica account #115000410 held in the joint names of the deceased and the 3rd Claimant;
3. An account and return of funds belonging to the deceased at the Estate, taken by the 1st Claimant from the Royal Bank of Canada account #706-526-1 held in the joint names of the deceased and the 1st Claimant.

[5] The Claimants filed a reply to the Defence on 19th May 2016. A copy of the Letters of Administration obtained in the Estate of Esther Benjamin was lodged at the High Court by the 1st and 2nd Defendants on 1st June 2016.

[6] The matter came on for hearing on 13th July 2016 and a mediation referral order made. The mediation referral order was extended three times but the parties did not settle. The matter was therefore listed for first hearing wherein directions were given and trial date fixed for 29th, and 30th March 2021. The parties filed witness statements/summaries and the trial bundles filed on 1st February 2021 ahead of the trial.

[7] On 17th March 2021, the 1st and 2nd Defendants filed a Notice of Application Pursuant to CPR Part 68.9 For the Dismissal of the Claimants' Claim and for the Court's Approval of the Administrators' Administration Plan, with affidavits in support, exhibits and a certificate of urgency. It does not appear that this application was heard. The Claimants filed a Notice of Application on 10th November 2021 for leave to be granted to amend the Claim Form filed on 15th October 2015 and Amended Claim Form on 16th March 2016 and that the Defendants application filed on 17th March 2021 be dismissed with costs.

[8] A Judicial Settlement Conference order was made on 30th October 2023. However, owing to some delay with the Claimants retaining Counsel and the Court Office scheduling Judicial Settlement Conference dates, the parties reported to the Court on 15th July 2024 that they attended the conference but did not settle. On that date, Counsel for the Defendants informed the Court that there were two pending applications; one by the Defendants essentially for judgment and the other by the Claimants to amend the claim. Counsel therefore requested a date for hearing of the Defendants' application which was filed first in time. Counsel for the Claimants and Added Party urged the

Court to consider the Application to Amend first because otherwise the Claimants' application would be moot. The matter was adjourned to 11th October 2024 for hearing. On 11th October 2024, this Court ordered the parties to file written submissions on the application filed on 10th November 2021 and adjourned the matter to 13th December 2024 for ruling.

Submissions

- [9] The Claimant contends that this application is necessary because the Court order of Justice ME Birmie Stephenson dated 18th November 2021 ordered that there be no further applications filed in this matter after 22nd January 2021, however the order included the clause "Liberty to Apply".
- [10] The Claimant also contends that the Court is empowered to grant the application to amend by virtue of section 20.1(2) of the CPR which states that "the court may give permission to amend a statement of case at a case management conference or at any time on an application to the court".
- [11] The Applicants/Claimants further contend that the relief sought by the Applicants/Claimants in an amended statement of case became necessary because of the matters disclosed in statements of account filed by the Defendants that were only made available to the Applicants/Claimants after they brought the claim. That the amendments applied for are necessary so as to include claims for pertinent relief that was not known to them at the time of filing the said Claim and Amended Statement of Claim and that without including the said relief the Claimants' claim would be severely prejudiced. The delay in bringing the application is also due to the Claimants seeking and instructing new counsel.
- [12] The Defendants/Respondents, by an affidavit in opposition dated 13th November 2024, opposed the Claimants' application. The Defendants submitted that based on their original claim, the Claimants did not allege that the administrators of the estate fraudulently or dishonestly stole from the Estate which they now allege in the proposed amendments. The Defendants also submitted that these are serious allegations, which they deny.

[13] At this juncture, I wish to state that this application is brought in the face of a striking out application and I had earlier ruled that I will consider the application to amend first and deal with the application to strike out subsequently because the application to strike out was not a challenge to the jurisdiction of the court under CPR 9.7 and I held that the application seeking to save the claim will be given priority, in line with the thinking of the Court of Appeal.

The Issues

[14] **Whether the Claimants’ application to amend its claim should be granted at this late stage of the proceedings?**

The Law

[15] **Rule 20 of the Civil Procedure Rules (Revised Edition) 2023¹** is instructive on amendments and is reproduced below for the sake of clarity as follows:

Rule 20.1(1) provides that “*a statement of case may be amended once, without the court’s permission, at any time prior to the date fixed by the court for the first case management conference*”.

Rule 20.1(2) provides that “*the court may give permission to amend a statement of case at a case management conference or at any time on an application to the court*”.

Rule 20.1(3) provides that “*when considering an application to amend a statement of case pursuant to rule 20.1(2), the factors which the court must have regard shall include –*

- (a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;*
- (b) the prejudice to the applicant if the application were refused;*
- (c) the prejudice to the other parties if the change were permitted;*
- (d) whether any prejudice to any other party can be compensated by the payment of costs and interest;*

¹ Hereinafter referred to as CPR 2023

- (e) *whether the trial date or any likely trial date can still be met if the application is granted; and*
- (f) *the administration of justice.”*

[16] These principles were further canvased in the cases of **George Allert et al v Joshua Matheson et al**² and were restated in the later decision of **Comodo Holdings Limited v Renaissance Ventures Limited and Joseph Katz**³ where Blenman JA stated:

“CPR 20.1 enables a party to amend its statement of case once before the date that is fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining the permission of the court. In George Allert et al v Joshua Matheson et al this Court held that “it is of no moment that the case management conference was adjourned and in fact no directions were given; what triggers the need or otherwise to obtain the permission of the court is the arrival of the date of the first case management conference...””.

Discussion

[17] Accordingly, this application is properly before the Court seeking for leave to amend the Claimant’s pleading subsequent to a case management conference that was held and directions given.

[18] In considering the application instant, the case of **George Allert v Joshua Matheson**, which is of some guidance, laid out the principles that are relevant to applications to amend pleadings and they are as follows:

*“... the main factor that the Court will take into account in determining whether or not to grant leave **is the interest of justice**. When faced with late amendment applications, the Court will therefore take a number of factors into account including: **the exact stage reached in the proceedings, how great a change is made in the issues by the proposed amendments and whether the other side would be prejudiced in a manner for which they cannot be properly compensated...** [78] **...It is the law that a court which is asked to grant permission to amend will base its decision on the overriding objective**. Generally, disposing of a case justly will mean the amendments should be allowed to enable the real issues to be determined. There is a public interest in allowing a party to deploy its real case, **provided it is relevant and has a real prospect of success**. The court is competent to refuse to grant leave to amend the pleadings **if the proposed amendments will serve no useful purpose or are fanciful**.” (Emphasis mine)*

² GDHCVAP2014/0007 (delivered 24th November 2014, unreported)

³ BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported)

[19] Guided by the foregoing authority I will now consider this application taking in turn these factors as well as the factors prescribed in Rule 20.1(3) of CPR 2023.

[20] **The first factor being how promptly the applicant has applied to the Court after becoming aware that the change was one which he or she wished to make.**

Now, the Claimants herein have failed to address the Court on this point in their written submissions but have advanced reasons for the delay in their affidavits in support, that the alleged acts of the defendants became apparent after the filing of the Claimants' existing statements of case and after the Defendants produced estate accounts for the years 2010-2015 in compliance with the order of the Court. The Claimants also submit that several supporting documents provided with the accounts were given in a flash drive containing password encrypted files which the Defendants did not provide until sometime after January 26th 2021.

[21] Having said this, the question that behooves on the Court at this time is simply whether the Claimants have brought the application in a timely manner? The Defendants state that these accounts, as well as all supporting documents, were supplied to the Claimants including the flash drive since 2017 and that the Claimants failed to make a request for the password until January 2021. I note from the records that this claim was filed on 25th February 2016 and by November 2016 the Defendants had submitted the estate accounts for the period 2011 to 2015 and also a flash drive containing all the receipts, bank statements and other documents relating to the accounts. It is true that the case fell into abeyance, for four years but on the 16th of July, 2020 case management directions were given, after which there was disclosure and exchange of witness statements. Pre-trial review was conducted on 20th of November, 2020, at which hearing the matter was fixed for trial for the 29th and 30th of March, 2021. A Judicial Settlement Conference referral order was made in August 2023 after which the Claimants lost representation of counsel but secured counsel in November 2023.

[22] I also note from the submissions that the Defendants sought in January 2021, to try to settle the matter by addressing the Claimants' requests about the accounts which they had sent years back. The Claimants did not respond to the contents of the letter, and made no move to amend their case then. The Defendants applied to the Court for a dismissal of

the case pursuant to CPR Part 68.9, on 17th March, 2021 and the Claimants on 10th November 2021, made the instant application to amend their claim.

[23] In light of the foregoing facts, I am minded to agree with the Defendants that the proposed amendments were filed after particular information have come to the fore supplied by the Defendants in the interest of compliance with the order of the Court.

[24] In borrowing the authority provided by the Defendants in the case of **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and Others**⁴,

"The lateness by which an amendment is produced is a relative concept (Hague Plant). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment".

Hence the answer to the question earlier posed, could the Claimants have brought the application earlier than it did? To this I say yes. Even though the Claimants had issues with retaining legal counsel in 2023, it took 10 months to file its application after retaining counsel and 2 years after becoming aware that that they needed to amend their claim to include the current amendments. Although the trial dates had been vacated in 2021, disclosure was complete. If this amendment is allowed, would it not run afoul of the overriding objective having regard to time and cost? The resultant effect will be that the Court will have to conduct a pre-trial review again wherein new witness statements will be filed and disclosure conducted for the second time and updated trial bundles filed.

[25] It is therefore safe to say that the exact stage of the proceedings when taken into account would make it apparent that the Claimants have failed to bring this application before this court in a timely manner.

[26] **The prejudice to the other parties if the change were permitted; whether any prejudice to any other party can be compensated by the payment of costs.**

⁴ [2015] EWHC 1345 (TCC)

This leads me to the consideration of the second factor, whether the Defendants would be prejudiced if the amendments were allowed and authorities have held that to determine this question one must look at the contents of the pleadings. Authoritative on this point is the case of **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea**⁵ wherein the learned Justice held that:

“The question arose whether the contents of certain documents and witness statements (and an expert’s report in particular) were particulars of allegations contained in the pleadings or whether they were new allegations, amounting to a change in the statement of case...if the material is really particulars and not new allegations or a change of case, that there would be no unfairness in permitting this evidence to be admitted. Such evidence would be relevant to the misconduct alleged in the defence and counterclaim. It is therefore necessary to examine the excluded material to see if it truly consists of particulars of allegations already made or is in reality new allegations...Before considering whether the challenged material were particulars of existing”.

[27] In this case the learned justice was clear that he intended to allow any change of case to be made and proceeded to emphasize the distinction between “changing a statement of case and supplying particulars to say I expect the courts will be keen to ensure that the one does not masquerade as the other”.

[28] This begs the question whether the amendment sought consist of particulars of allegations already made or are they new allegations? In their original statement of claim, the Claimants alleged that the Defendants: (i) received rental income from the estate properties for which they gave no account; (ii) sold land belonging to the estate for which they gave no account; (iii) neglected their fiduciary responsibility; and (iv) in breach of their fiduciary obligation, were not diligent in defraying the expenses of the estate, namely, income taxes, land taxes and property insurance.

[29] In their draft re-amended statement of claim the Claimants pleaded further that; the Defendants have mismanaged the estate and continue to act in breach of trust and their fiduciary obligation to them, in that the Defendants, *inter alia*: (i) have unduly profited from the estate; (ii) have used or permitted their progeny to be use to carrying on the private businesses; (iii) prior to and after obtaining the grant, remunerated themselves with from funds from estate for services renders as a personal representative; (iv)

⁵ (St Vincent and The Grenadines Civil Appeal No. 12 of 2006) (Delivered 16 July 2007)

neglected estate property with the result that they fell into disrepair and thus fell in value; (v) made false representations to the Court to obtain the grant; (vi) misappropriated and/or used estate funds to defray their personal expense; and (vii) commingled estate funds with their personal monies.

[30] Furthermore, Exhibits L.B.W.1 and 4 are based on activity which allegedly took place on July 3rd 2019 and 19th December 2019, which are clearly 4 years after the initial claim was filed. These are in my view new allegations that would require the Defendants to respond to and defend the allegations of fraud raised.

[31] It is settled that the Courts will give due effect to the overriding objective of the CPR expressed in CPR 1.1(1), and 1.3 which enjoins the Court to deal with cases justly, meaning that the Court must always ensure that the parties are on equal footing and ensuring that a case is dealt with expeditiously and fairly.

[32] Clearly the Defendants would be prejudiced if the amendments are allowed and in the **Maria Agard v Mia Mottley and Anor**⁶ it was held that:

“promoting the principle of the overriding objective that, significant costs and judicial time are wasted if a litigant who sits back and waits for his pleadings to be attacked before amending, could defeat an application to strike by amending his pleadings on the eve of the hearing and that such an approach would indeed be tantamount to the party attacking the pleadings ‘[shooting] at a moving target’”.

[33] This brings me to the conclusion that in allowing this application, the Defendants will be prejudiced and I hold the view that costs will be insufficient as compensation since this matter has been ongoing from 2015 to date and begs the question, how would cost be assessed?

[34] **The prejudice to the applicant if the application were refused;**

In perusing the Claimants’ claim before the Court which was the revocation of the grant of letters of administration and delivery of certificates of titles, I will say that in the determination of this claim, it would be remiss of the Court if it does not require auditing and accounting of the estate in question before anything else. In doing so, the

⁶ Barbados High Court Claim No 1753 of 2015

real picture of the administration of the estate thus far will emerge and it will reveal whether the Defendants owe any monies to the estate.

[35] In light of the foregoing therefore, I am of the firm view that the amendments instant will cause injustice between the parties as it will have the effect of changing the case fundamentally at this very late stage in the proceedings. The application to amend therefore fails and is dismissed with cost to be assessed by the Master.

Zainab Jawara-Alami
High Court Judge

BY THE COURT

REGISTRAR