

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2009/0152

BETWEEN:

[1] MCHAEEL RICHARDS
(Next Friend of Jemark Jackson) Claimant

AND

[1]	THE ATTORNEY GENERAL	First Defendant
[2]	OFFICER HADLEY BALLANTYNE	Second Defendant
[3]	OFFICER OSRICK JAMES	Third Defendant
[4]	OFFICER CASANKI QUOW	Fourth Defendant
[5]	ELMORE ALEXANDER AKA 'SIX'	Fifth Defendant

Before: Her Ladyship the Hon. Justice Gertel Thom (Ag.)

Appearances:

Mr. Jomo Thomas of Counsel for the Claimant

Ms. Gabrielle Myers of Counsel for the Defendants

2024: July 23, 19
September 20

JUDGEMENT

[1] **THOM J (Ag):** On the 17th day of November 2009 Michael Richards instituted these proceedings as next friend of Jemark Jackson who was then a minor having been born on the

30th day of July 1993 instituted these proceedings against the Attorney-General, the Commissioner of Police and the 2nd to 5th defendants who are all members of the Royal St. Vincent and the Grenadines Police Force, for general damages, assault, battery, false imprisonment, wrongful arrest, unlawful detention, aggravated damages, interest and costs. The Commissioner of Police was subsequently removed by order of the court.

- [2] Jemark Jackson became an adult on 30th July 2011. However, he did not give the notice required pursuant to CPR 23.11 (4), nor did he next friend Mr. Michael Richards give the notice required pursuant to CPR 23.11 (6). These provisions read as follows:

"(4) The minor or patient in respect of whom the appointment to act has ceased must serve notice on the other parties-

(a) giving an address for service;

(b) stating that the appointment of the next friend has ceased; and

(c) stating whether or not he or she chooses to carry on the proceedings.

(6) The liability of a next friend for costs continues until-

(a) the minor or patient serves the notice referred to in paragraph (4); or

(b) the next friend serves notice on the other parties that the appointment has ceased."

- [3] Jemark Jackson died on the 4th of June, 2021 at the age of 27 years. Up to the time of his death the notice was not served. Mr. Michael Richards died on the 14th April, 2023 also without serving the notice pursuant to Rule 23.11 (6).

- [4] On the 8th March, 2024, Romano Richards, the brother of Jemark Jackson made an application pursuant to CPR 21.8 to continue the proceedings and pursuant to CPR 19.3 to be substituted as claimant.

- [5] He seeks the following orders of the Court:

"(1) Mr. Romano Antonio Richards be appointed as personal representative in the estate of Jemark Jackson otherwise known as Jemark Richards (deceased).

(2) Mr. Romano Antonio Richards personal representative of the Estate of Jemark Jackson otherwise known as Jemark Richards, be substituted as claimant in claim SVGHCV 2009/0152 wherein Jemark Jackson otherwise known as Jemark Jackson Richards (deceased) is the claimant.

(3) No order as to costs."

- [6] In the affidavit of Romano Richards in support of his application, he stated at paragraph 2 (d):

"I have been advised by counsel Shirlan Barnwell that Jemark's claim against the defendants can only continue if someone who is his personal representative becomes the substitute claimant. And it is upon this basis that I make this application on behalf of my deceased brother."

- [7] Notably Mr. Richards does not state when he was so advised by learned Counsel Ms. Shirlan Barnwell.
- [8] The Defendants in response to the application filed an application to strike out the claim pursuant to CPR 23:11(5). They contended that Jemark Jackson prior to his death failed to comply with CPR 23. 11 (4) and Michael Richards failed to comply with CPR 23.11 (6).
- [9] The application came on for hearing on the 8th April, 2024.

Submissions

- [10] Mr. Thomas submitted that the applicant has met the requirements of CPR 21.8 and 19.3. He contended that CPR 21.8 empowers the Court to give directions and or make orders for proceedings to continue after the death of a party. The Court may do so whether an application has been made. He referred to the case of **Berti v Steele Raymond** [2001] EWCA Civ 2079 where the English Court of Appeal considered UK Rule 19.8 (1) which reads:
- “(1) Where a person who had an interest in a claim has died and that person has no personal representative the court may order-
- (a) The claim to proceed in the absence of a person representing the estate of the deceased; or
 - (b) Appoint a person to represent the estate of the deceased.
- [11] In considering the provision Robert Walker LJ stated:
- “It is apparent from the rule, that it gives the Court quite wide powers to dispense with the need for a formal grant of probate or letters of administration after the death of a party. It seems to recognize that, especially with relatively small claims, the need for a formal grant may be disproportional and cause unnecessary delay and expense.”
- [12] Mr. Thomas acknowledged that pursuant to Rule 21.9 the Court may strike out a claim after the death of a claimant. Rule 21.9 reads.
- “(1) If a claimant dies and the claimant’s personal representative does not apply for an order rule 19.3 to be substituted as claimant, the defendant may apply for the claim to be struck out.
- (2)...
- (3) The general rule is that if the Court makes an order on an application under this rule, it will be that unless the personal representative or some other person on behalf of the state apply to be substituted under Rule 19.3 or for directions under Rule 21.8 by a specified date, the claim is to be struck out.
- (4) The court may give directions under 21.8 at the hearing of an application under this rule.
- [13] Mr. Thomas submitted that the defendants did not make an application pursuant to sub-rule 21.9 (3). In the absence of such an application by the defendants, the applicant has made, an application pursuant to Rule 19.3 to be substituted for the claimant who has died.

[14] Mr. Thomas concluded that the applicant having complied with both CPR. 21. 9 (1) and 19.3, and the defendants not having made an application pursuant to Rule 21.9 (3) to strike out the claim, the Court should therefore grant the application.

[15] Ms. Myers in response submitted that Jemark Jackson was required pursuant to CPR 23.11 (4) to file his notice of intention to continue within 28 days of becoming an adult. He failed to do so. This failure, counsel contends is fatal.

[16] Learned Counsel relied on the following commentary of Theo Huckle KC in **Butterworth Personal Injury Litigation Service, Lexis Nexis 2024 Issue 210**:

“What happens if the child reaches 18 years old during proceedings?”

By CPR 21.9, assuming the child is not additionally a protected party by reason of mental incapacity (see paragraphs 5.1 and 5.2 of the CPR Pt. 21 Practice Directions), the appointment ceases.” This suggests that the cessation of the appointment operates automatically, without the need for order on the child’s 18th Birthday.

The now adult claimant cannot assume that the other parties will have kept track of his or her date of birth. He or she is obliged to serve notice on the other parties:

“(a) stating the appointment of his litigation friend to act has ceased; (b) giving his address for service; and (c) stating whether or not he intends to carry on the proceedings.”

Perhaps harshly, the rules provide that if the claimant fails to provide that notice within 28 days of reaching 18 the court “may on application, strike out any claim by or defence raised by the child.”

The Court always retains a power to strike out a statement of case in the event of failure to comply with a rule or practice direction (see CPR 3.4 (2) (c)). It is unclear to the authors of this chapter why this specific provision was included, which might read as tending to suggest a successful outcome for an application to strike out. In practice, the invariable response to such an application would be for the claimant to give the requisite notice and, in these circumstances, it would surely be extremely rare for the claim to be subsequently struck out. A litigation friend is well advised to ensure that the notice is given by the claimant. The reason for this is that his or her liability for costs continues until notice is given. Fortunately, a litigation friend may serve notice on him or herself that his or her appointment to act has come to an end.

In the circumstances where the child has reached majority and intends to continue the proceedings in his or her own right, he or she must subsequently be described as A.B. (formerly a child but now of full age).”

[17] Ms. Myers submitted that the purpose of CPR 23.11 (4) is to ensure that the Court and the parties are aware that the appointment of a next friend has ceased. The filing of the witness statement does not illustrate that the minor intended or chose for the proceedings to continue. The rule does not make provision for compliance by conduct. It states a specific methodology. Jemark Jackson made no appearance at any of the hearings after becoming an adult. No attempt was made to remedy the situation after 28 days had expired and no application for

extension of time and for the relief from sanction was made. Further even if such an application was made, it would have been unsuccessful.

- [18] Learned Counsel further submitted that the affidavit of Ms. Williams in support of Mr. Richards' application merely states that the failure of Jemark Jackson to file the notice was due to Counsel's inadvertence. This would not have been a sufficient basis for the Court to grant relief from sanction. Learned Counsel referred to the decision of the Court of Appeal in **Adam Bilzerian v Gerald Lou Weiner and Kathleen Ann Weiner SKB** HCV 2015/0015.
- [19] Mr. Thomas in reply submitted that a court should only deploy its' nuclear option of striking out a claim in rare cases. He contended since the application to strike out the claim was filed approximately twelve (12) years after Jemark Jackson failed to file the notice pursuant to CPR 23.11 (4), the application should be dismissed. Further the claim is ready for trial, Jemark Jackson's witness statement was filed in 2015, and the trial bundle was filed in 2017. Moreover, the Defendants made no application to strike out the claim pursuant to CPR 21.9 after the death of Jemark Jackson.
- [20] Learned Counsel further submitted that the purpose of the CPR 23.11 (4) is to notify the defendants that the next of friend who decided on behalf and for the injured person to pursue the claim is no longer responsible but rather the claimant intends to pursue the claim. Also, to notify the defendants of any change of Counsel or address for service. Learned Counsel contends that the witness statement provided this information. It showed he intended to proceed, and it gave the name and address of his Counsel. Therefore, the defendants would suffer no prejudice if the application is granted.

Discussion

- [21] CPR 21.8 reads:
- “(1) If a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.
- (2) An order under this rule may be made on or without an application.”
- [22] Under this rule the Court on its own volition or an application may direction how proceedings would continue when a party dies.
- [23] The applicant seeks directions from the court for him to be substituted as a claimant representing the estate of Jemark Jackson pursuant to CPR 19.3 The relevant parts are sub paragraph (1), (2) and (4). They read as follows:
- “19.3 (1) The Court may add, substitute or remove a party on or without an application.
- (2)An application for permission to add, substitute or remove a party may be made by-
- (a) an existing party; or
- (b) a person who wishes to become a party.

- (4) A person may not be added or substituted as a claimant unless that person's written consent is filed with the court office.

[24] This is a general rule. CPR also makes specific provisions for proceedings involving minors. These provisions are contained in CPR 23. It is not disputed that when the claim was instituted Jemark Jackson was a minor and he was represented by his next friend Michael Richards and that he became an adult on 30th July 2011. The relevant provisions are CPR 23.11. It reads as follows:

"23.11 (1) The appointment of a minor's next friend ceases when a minor who is not a patient reaches the age of majority.

(2) ...

(3) ...

(4) The minor or patient in respect of whom the appointment to act has ceased must serve notice on the other parties-

(a) giving an address for service

(b) stating that the appointment of the next friend has ceased; and

(c) stating whether he or she chooses to carry on the proceedings.

(5) If the notice is not served within 28 days after the appointment of the next friend ceases, the Court may on application, strike out any claim or defence brought or filed by the minor or patient.

(6) The liability of a next friend for costs continues until-

(a) the minor or patient serves the notice referred to in paragraph (4); or

(b) the next friend serves notice on the other parties that the appointment has ceased.

[25] No application was made by the defendants pursuant to sub-paragraph (5) to strike out the claim until in response to the application by Romano Richards, nor did the Court do so in exercise of its case management powers pursuant to CPR 26.

[26] The issues for determination are:

1. Did Jemark Jackson comply with the provisions of CPR 23.11 (4)
2. If he failed to do so is the failure fatal or is it a procedural irregularity which can be remedied
3. If the failure is a procedure irregularity which can be remedied, should it be remedied?

Issue 1

[27] **Whether Jemark Jackson complied with CPR 23.11 (4)**

[28] For ease of reference, the sub-rule reads as follows:

“(4) The minor or patient in respect of whom the appointment to act has ceased must serve notice on the other parties-

- (a) Giving an address for service
- (b) Stating that the appointment of the next friend has ceased; and
- (c) Stating whether or not he or she chooses to carry on the proceedings.”

[29] It is not disputed that no notice was served on the defendants by Jemark Jackson.

[30] Mr. Thomas submitted that the filing of the witness statement of Jemark Jackson in 2015 and the filing of the trial bundle in 2017, which were served on the defendants amounted to notice pursuant to sub-rule (4).

[31] While the witness statement of Jemark Jackson and the trial bundle were filed after he attained the age of majority the affidavit evidence clearly shows that neither the claimant nor the defendants were aware that Jemark Jackson had attained the age of majority, nor did they address their mind to CPR 23.11.

[32] Even if it could be said that the filing of the witness statement and the trial bundle showed Jemark Jackson’s intention to continue the proceedings and his counsel’s address for service being stated at the back of the witness statement, the defendants had knowledge of his address for service; it cannot be said to give notice to the defendants that the appointment has ceased. The filing of a witness statement and the trial bundle are normal processes that would have taken place even if Jemark Jackson had not reached the age of majority.

[33] Sub-rule (4) specifically requires among other things that the notice must state that the appointment has ceased.

[34] Indeed on 15th October 2020, mere months before Jemark Jackson passed away in 2021 and 9 years after he attained the age of majority, an application was made pursuant to Part 19.2 (5) and Part 26. 1 (2) for a change of name of the 4th Defendant for Officer Oldrick Charles to be substituted for Officer Osrick James reads as follows:

“The Claimant Jemark Jackson (by his friend Michael Richards) makes an application to the Honourable Court for an order that

- (1) The name of Officer Oldrick Charles be changed and or substituted for Officer Osrick James as the 4th Defendant.
- (2) No order as to costs.”

[35] This clearly shows that the instructions were still being given by the next friend Michael Richards at a time when the appointment had ceased.

[36] The proceedings continued after Jemark Jackson died, as if he was still a minor. It was only at a hearing held on 6th December 2021 that mention was made that Jemark Jackson had died. The Order stated that Michael Richards was absent. The Order reads:

“The Claimant having requested an adjournment to make an application for the estate to be represented, and there being no objection by the Defendants.”

ORDER

1. Adjourned to a date to be fixed by the Registrar with consultation with counsel for the parties.
2. The Court Office shall issue notice of hearing at least 14 days in advance with proof of service.
3. Claimant legal practitioner has carriage of this order which must be filed on or before 16th December 2021."

[37] The evidence shows that the proceedings continued with neither counsel being cognisant that Jemark Jackson had reached the age of majority. There is no evidence which shows that Jemark Jackson was aware of the provisions of CPR23.11(4) and the requirement to file the notice. In view of the circumstances of this case, the fact that the witness statement and trial bundle were filed does not amount to notice pursuant to CPR23.11(4). I find that Jemark Jackson did not comply with the provisions of CPR 23.11 (4).

Issue 2

[38] **Whether the Failure to File the Notice was fatal or it was a procedural irregularity.**

[39] CPR 23.11 (5) reads:

"(5) If notice is not served within 28 days after the appointment of the next friend ceases the court may, on application, strike out any claim or defence brought or filed by the minor or patient."

[40] Failure to comply with sub-rule (4) within 28 days does not automatically result in the claim being struck out, nor does it make it mandatory for the Court to strike it out. Rather sub-rule (5) gives the Court a discretion to determine whether to strike it out on application by the other party. The court may grant an extension of time for compliance with the sub-rule. The failure to file the notice within the 28 days is a procedural irregularity.

[41] Jemark Jackson having attained the age of majority did not seek an extension of time to comply with sub-rule (4). This leads to the third issue whether the court should strike out the claim.

Issue 3

[42] **Whether the court should exercise its discretion and strike out the claim for noncompliance with CPR 23.11(4).**

[43] The onus was on Jemark Jackson to give the notice pursuant to CPR 23.11 (4). The 28 days pursuant to sub-rule 4 expired on the 30th day of August 2011. No application was made by the defendants to strike out the claim until the 8th of April 2024 a period in excess of 12 years.

[44] The principles on which a court will strike out a statement of claim are well settled. Mr. Thomas referred the court to the decision of the Court of Appeal in **Baldwin Spencer v The Attorney-General** CivApp. No 20A Of 1997, where the Court emphasized that where there is a viable issue for trial the court should not strike out the claim but where there is no cause of action the court should be vigilant and strike out the claim. Learned Counsel submitted that the claimant has a cause of action, case management has completed and trial directions have been given. The only matter outstanding is a date for trial. The issue in this case, however, concerns a

breach of a procedural rule by the claimant and where the Court has a discretion to strike out for breach of the rule.

[45] After August 2011 when the 28 days expired, there were several hearings. The matter progressed to filing of the witness statement of Jemark Jackson on 8th September 2015 and the trial bundle on May 22, 2017. On October 7, 2020 extensive directions for trial were given by the learned judge. The defendants were represented by counsel at all hearings. Indeed at the hearing on 6th December 2021, when mention was first made to the Court by Mr. Thomas that Jemark Jackson had died, and learned counsel sought an adjournment to take steps to have his estate be substituted. Counsel for the defendants made no objection. Further when the matter came on for hearing more than 2 years later on 19th February 2024, although no steps were taken for substitution of the estate of Jemark Jackson no application to strike was made by the Defendants. Paragraph 1 of the order made by the learned judge reads as follows:

“(1) Adjourned to April 8, 2024 to consider any applications filed by the parties in the absence of which the claimant maybe called upon to indicate the actions the court should take in light of the delay in prosecuting the claim.”

[46] It was on April 8, 2024, almost 13 years after Jemark Jackson failed to serve the notice that the defendants made their application to strike out the claim. Indeed although the defendants after 2 years had not made any application to substitute the estate of Jemark Jackson the Court granted them a further adjournment to do so and adjourned the matter to April 8, 2024. The application was then made on 8th March, 2024 and the application to strike one month later on 8th April, 2024.

[47] In view of all the circumstances of this case, and the need for the court to give effect to the overriding objective of the rules when it exercises any discretion given to it by the rules, it would not be just to strike out the claim at this time. The delay by both sides was inordinate, but the learned judge did grant the claimant another opportunity to make the application for substitution and the applicant did so prior to the adjourned date.

[48] Also, no evidence was adduced by the defendants of any prejudice the defendants would suffer if the application by Romano Richards is granted. The defendants have not filed any witness statements, since their application for an extension of time to do so was dismissed by the learned judge. I will therefore grant the application for Romano Richards to represent the estate of Jemark Jackson for the purpose of these proceedings and grant leave to Romano Richards to make the necessary applications to comply with sub-rule 4. Having regard to the delay by both sides I will make no award of costs.

Order

[49] It Is Ordered

1. The application to strike out the statement of claim is dismissed.
2. Mr. Romano Antonio Richards is appointed the personal representative of the Estate of Jemark Jackson for the purpose of these proceedings.
3. Mr. Romano Antonio Richards as personal representative of the Estate of Jemark Jackson for the purpose of these proceedings be substituted as claimant in claim SVGHCV2009/0152.

4. Leave is granted to Romano Richards as personal representative of the Estate of Jemark Jackson for the purpose of these proceedings to take the necessary action to comply with CPR 23.11 (4) on or before the 1st day of October, 2024.
5. Each party shall bear their own costs.

Gertel Thom

High Court Judge (Ag.)

By the Court

Registrar