

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCV2017/0190

Between

ROMMEL SILAO

Claimant

and

ALISTON WHEATLEY

1st Defendant/Applicant

and

KEVIN MOOREHEAD

2nd Defendant/Respondent

APPEARANCES:

Ms. Nelson Samuel of counsel for the claimant

Ms. Karen Reid appearing with Mandy Harreinesingh of counsel for the 1st defendant

Ms. Valerie Gordon of counsel for the 2nd defendant

2020: September, 23rd
2020: December, 3rd

JUDGMENT

Introduction

[1] **SANDCROFT, M. [Ag.]**: This is an application by the 1st defendant seeking permission to amend its Defence considering a judgment in default against the 2nd defendant. The 2nd defendant/respondent vehemently and voraciously objected to the application of the 1st defendant/applicant.

Background/Chronology

- [2] On the morning of 2nd November, 2011, there was an accident between motor vehicle registration number PV-23281 driven by the 1st defendant and motor vehicle registration number PD-121 driven by the 2nd defendant. The claimant was a passenger in the 1st defendant's vehicle. The accident occurred in the vicinity of the roundabout at Prospect Reef, Sea Cows Bay, Tortola.
- [3] The claimant sustained injuries as a result of the accident and has brought proceedings against both defendants on 31st July, 2017 alleging his injuries were sustained as a result of the negligence of either or both defendants.
- [4] The 1st defendant filed his defence on 8th May, 2018.
- [5] The 1st defendant specifically pleaded that he had filed a claim against the 2nd defendant in respect of the accident which is the subject matter of the present claim.
- [6] That in the 1st defendant's witness statement filed on 12th July, 2019 the 1st defendant specifically stated in his evidence that on that claim against the 2nd defendant, an assessment of damages was pending consequent upon a default judgment being requested against the 2nd defendant.
- [7] That on the 13th day of March, 2020, the 1st defendant was issued with the perfected judgment on the assessment of damages in which the 2nd defendant was ordered to pay damages to the 1st defendant arising out of the accident.
- [8] The Amended Defence does not seek to raise any new issues not previously identified to the parties in these proceedings as it was always the 1st defendant's case that he had brought proceedings against the 2nd defendant in respect of the accident. The purpose of the amendment is to further particularise that pleading consequent upon the issuing of the judgment by the Court, which judgment this Honourable Court is entitled to take notice of even without the amendment being made.
- [9] That this application, filed on 20th March, 2020, was made promptly and is unlikely to affect the trial of the matter, which was fixed in October, 2020.

Submissions of the claimant/applicant

- [10] Part 20 of the CPR provides as follows:

“20.1(1) 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.

(2) 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] Counsel for the 1st defendant submitted inter alia that part 20 clothes the court with the discretion to allow an amendment at any time. **Practice direction 20, No. 5 of 2011**, sets out the factors to which the Court must have regard in considering an application to amend. Those factors are:

- (1) How promptly the applicant has applied to the court after becoming aware that the change was one which he wished to make;**
- (2) The prejudice to the applicant if the application were refused;**
- (3) The prejudice to the other parties if the change were permitted;**
- (4) Whether any prejudice to any other party can be compensated by the payment of costs and or interest;**
- (5) Whether the trial date or any likely trial date can still be met if the application is granted;**
- (6) The administration of justice.**

[12] Counsel for the claimant/applicant submitted inter alia that the Court of Appeal in **Brantley v Cozier** SKBHCVAP2014/0027 held that all the matters listed in the practice direction must be considered in determining whether to permit an amendment. The Court of Appeal found that the application in that case was not prompt being that the amendment was sought 3 years after the judgment which prompted the change was issued (para. 47). However, the Court of Appeal found that the court must consider the prejudice to the applicant of not having his defence amended (para. 49) and the fact that any prejudice occasioned could be compensated in costs (para. 50). Finally, the court found that findings of fact were made in the earlier case which was pertinent to the applicant's defence (para. 53). The learned Court of Appeal also approved of the learning in the English case of **Clarapede & Co. v Commercial Union Association** that no matter how negligent or late an amendment it should be allowed if it will not do any injustice between the parties, so that the real issues will be before the court and there will be no injustice if a party can be compensated in costs (paras. 55 and 56).

[13] Counsel for the 1st defendant further submitted that in the aforesaid case, there are no such difficulties. The trial date is fixed in October, The Amended Defence can be filed within three (3) days and any consequential directions can be carried out before the trial. The application was filed

soon after the judgment which prompted it was published by the court and crystallises the 1st defendant's plea of estoppel against the 2nd defendant. The 1st defendant always raised the other proceedings in his defence as well as in his witness statement, so the proposed amendment is incapable of taking the parties by surprise. The point is not new. It is merely to place the new judgment before the court, which the court is entitled to have judicial notice of even if the pleading is not amended. Further, it will not be in the interest of the administration of justice to deny the pleading of estoppel as it will open the door to having two different judgments on the same set of facts, where the court has already found the Second Defendant liable in respect of the accident which is the subject matter of these proceedings.

[14] Counsel also submitted that the powers of the court under Part 20 of the CPR to permit amendments to Statements of Case are so wide that it would even be entitled to permit an amendment to the pleadings even after the evidence has been led at trial, as was done in **Kelly v Chief Constable of South Yorkshire Police** (2001) EWCA Civ. 1632. Lord Justice Sedley, at paragraph 21 of the judgment stated as follows:

"It is not uncommon for a version of the facts to emerge as a possible deduction from the evidence which has so far been neither side's pleaded case but which one side wants now to plead as an alternative basis, either of liability or of defence. In my experience it is normal and proper practice in the County Courts, and in the High Court too, to allow an amendment to such effect at the conclusion of the evidence if, on any terms which are appropriate as to costs or recall of witnesses, this can be done without injustice to the other party or parties."

[15] Counsel further submitted that the Court has even allowed an amendment after the close of evidence to include a new claim that was by then statute barred once the same arose on the same facts. In **P&O Nedlloyd BV v Arab Metals Co. et al** (2006) EWCA Civ. 1300, the court at paragraphs 23 and 24 stated the following:

"I approach the exercise of the discretion on this factual basis; this was not a case where there was any real prejudice put forward. It is not therefore a case where the court has to balance the prejudice to the defendant against the reasons why the claimant had not advanced the alternative cases earlier. As it is not such a case, to refuse to exercise the discretion in favour of the claimants would be to penalise the claimants for not putting their case at the outset on every alternative basis that might have been available on those facts. However obvious it might appear now

that it could have been put on those alternative bases, it is well known in the experience of many that, even if late in the day it may be seen how obvious things were, it is not always obvious to the person at the time; it would not be right to adopt an approach to this case which would in effect penalise the pleader.

I do not consider therefore that the approach is correct in principle, as it both penalises the claimant and allows the defendant to escape from a claim which arises on exactly the same facts, where all the claimant has failed to do is to characterise every alternative basis upon which the claim might be put. I therefore consider afresh the exercise of the discretion and approach it on the basis I have set out above. On that basis, it seems to me clear and inevitable that a court should exercise the discretion to allow the amendment.”

[16] Counsel posited that since the new alternative claim arose out of the same facts, the Court held that the proper exercise of discretion required the amendment be granted to advance the alternative claim. That the same should be applied in the instant case.

[17] Counsel further posited that this was not an application occasioned by some default or omission by the 1st defendant, who could only await a decision in the earlier proceedings before raising his plea of estoppel. In the circumstances, the 1st defendant should not now be penalized for having to file this present application seeking leave to amend.

[18] Counsel also posited that Part 1 of the CPR sets out the overriding objective of the rules of court, which is to deal with cases justly. The same Part enjoins the court to have regard to this objective when exercising any discretion given to it by the rules and when interpreting any of the rules of Court. This Part has been the subject of much judicial comment. For instance, in **SDP Gestion SAS et al v Franciane's Bakery Ltd et al** ANUHCV 2010/0340, the Court at para. 47 of the judgment, after stating that the rules must be interpreted in a manner consistent with the overriding objective, quoted the oft-cited passage from Blackstone's Civil Practice, 11th edn. at p. 47, para. 1.27 t:

"Shutting a litigant out through a technical breach of the rules will not often be consistent with doing justice, because the primary purpose of the civil courts is to decide cases on their merits, not to reject them for procedural default."

[19] Counsel also submitted that in the instant case it would be consistent with the overriding objective to permit the amendment as it would allow the Court to have before it all the issues between the

parties in the matter properly pleaded so that a just determination of all those issues on their respective merits could be made.

[20] Counsel further posited that according to Lord Collins in the Privy Council decision in **Texan Management Ltd v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 “it has often been said that, in the pursuit of justice, procedure is a servant and not a master”. In essence, if a claim would not fail for procedural irregularities then it is submitted that the applicant’s omission of a word or failure to file the supporting documents with the Claim Form, as contended by Counsel for the defendant, should not cause his application to fail.

[21] Counsel further submitted that in keeping with the overriding objective of the **Civil Procedure Rules, 2000** and the administration of justice that the Court ought to exercise its discretion in favour of the applicant and grant the application as prayed.

Submissions of the defendant/respondent

[22] Counsel for the 2nd defendant submitted inter alia that the Courts have a general discretion to permit amendments where it is just and appropriate. The Civil Procedure Rules 2000 as amended under Part 20 govern the application for amendment to statement of case. The **Practice Direction No. 5 of 2011** at part 4 sets out the factors the Court must have regard to in considering an application pursuant to Rule 20. These are:

- (a) **Promptitude;**
- (b) **The prejudice of the applicant if application were refused;**
- (c) **Whether any prejudice to the other parties if the amendment was permitted;**
- (d) **Whether any prejudice can be compensated by payment of costs or interest;**
- (e) **Whether the trial date or any likely trial date can still be met if application is granted and;**
- (f) **The administration of justice;**

Counsel submitted too that in the case of **Willis Arnold Charlesworth v Relay Roads Ltd and Others**, [2000] 1 WLR 230.

- [23] the Court stated the settled principle that an amendment should be allowed if there is no injustice to the other side. However negligent or careless may have been the first omission and however late the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.
- [24] Counsel also submitted that though the present application was made shortly after the 1st defendant received the judgment on the assessment of damages in BVIHCV2017/0206. Although the application to amend was made some months before the proposed trial date in October, that this was a late amendment because permission was sought at a time when the pleadings were closed, and disclosure had been completed.
- [25] Counsel posited that in the case of **CIP Properties (AIPT) Limited and Galliford Try Infrastructure Limited and Others** 2015 [2015] EWHC 1345 (TCC) (21 May 2015), the Court did an analysis of the law in disputed applications. The court stated that the right approach to amendments at paragraph 19(a) to (c). "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... .." The authorities show that the party seeking the amendment should provide the court with an explanation for its lateness. The court has determined that this is an important factor in the necessary balancing exercise. That the 1st defendant failed to put forward any good reason for its delay in failing to seek the amendment after obtaining judgment in default. And that the applicant sat on its rights after receiving a judgment, which determined liability of the 2nd defendant.
- [26] Counsel further posited that there would be no prejudice if the application is refused. The basis of the claimant's claim is that either or both defendants are liable. The applicant has always been aware of the issue between himself and the 2nd defendant as to causation. To deny the application for amendment means that the issues between the parties remain live to be determined at trial.
- [27] Counsel further posited that the judgment received by the 1st defendant was not founded on any admission by the 2nd defendant as to causation. The Judgment was not founded on the Court determining causation. The Judgment was founded on a technicality. That the 2nd defendant failed to comply/respond to the claim served upon him. That the issue of causation should remain live as between the 1st and 2nd defendants. The judgment in BVIHCV2017/0206 did not resolve the

controversy between the parties but merely gave the 1st defendant a technical victory as to liability in that case.

[28] Counsel went further to submit that the law was clear. That when the Court is exercising its discretion about the application to amend, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice. **Mark Brantley v Dwight Cozier**, SKBHCVAP2014/0027. The general principles at common law and Rule 20 of CPR 2000 are similar in that both require the Court to consider the prejudice to the parties, that is whether there is any injustice that arises from permitting the amendment.

[29] Counsel also submitted that the amendment sought would prevent the controversy between the parties being determined by the trial Court. The amendment would estop the 2nd defendant from making any averment inconsistent with the judgment in case BVIHCV2017/0206 which is a case where liability was determined as a result of a technicality.

[30] Counsel also posited that the amendment would cause severe prejudice to the 2nd defendant as it sought to quash the issues between the parties as to whether the 1st or the 2nd defendant's action caused the accident. That the 2nd defendant would require an amendment of its statement of case and the trial would inevitably have to be adjourned. This would also carry all the disruption and increased costs consequences to all the parties.

[31] Counsel further posited that the general rule that in circumstances where any potential prejudice can be compensated by costs does not apply here. An award of costs cannot compensate the 2nd defendant where he would be denied his right to defend his actions in relation to the 1st defendant. Further, delay would be occasioned on the claimant for an incident that occurred in 2011.

[32] Counsel for the 2nd defendant submitted that should the applicant be permitted to amend in the terms stated, it would have the effect of shutting out the 2nd defendant from the seat of justice. That he would not be permitted to rely on facts that provided a complete defense to the claim. Namely, that the 1st defendant made a turn into oncoming traffic. The Court was urged to have regard to the overriding objective as set out in Rule 1.1 of the Civil Procedure Rules to deal with cases justly. As stated in **Blackstone's Civil Practice 2004** "Shutting out a litigant through a technical breach of the Rules will not be consistent with this. The primary purpose of the Civil Courts is to decide cases on their merits."

[33] Counsel also submitted that to allow the amendment would defeat the overriding objective of the Rules of the Court. The 2nd defendant would be estopped from making averment contrary to the Judgment in BVIHCV2017/0206. It would have the effect of "shutting him out as a result of a technical breach" which was inconsistent with doing justice and deciding the case on its merits.

[34] Counsel further posited that a technical breach occurred in BVIHCV2017/0206, the application was late, and the amendment would prevent the trial of this matter being determined on its merit. Therefore, the amendment would cause delay and costs consequences for all the parties involved.

[35] Counsel finally posited that the application of the 1st defendant to amend its statement of case be denied in the best interest of the administration of justice.

Issues

[36] The issues for determination are:

- a. Whether there is a good explanation for the changes to the defense not having been made prior to the case management conference;
- b. Whether the application to make the change was made promptly;
- c. If both are answered in the affirmative, further consideration will be required as to:
 - i. Where the interest of the administration of justice lies;
 - ii. Whether the change has become necessary because of a failure of the party or his attorney;
 - iii. Whether the change is factually inconsistent with what is already certified to be the truth;
 - iv. Whether the change is necessary because of some circumstance which became known after the date of the first case management conference;
 - v. Whether the trial date or any likely trial date can still be met if permission is given to amend the Defense; and
 - vi. Whether any prejudice may be caused to the parties if permission is given or refused.

Analysis of the Law

[37] **Changes to statement of case 20.1 –**

- (1) 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.**

(2) 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.

(3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –

(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 or interest;

(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.

[38] The relevant principles to be considered are outlined in the leading Court of Appeal decision in the case of **Estate Management and Business Development Ltd v Saiscon Ltd** – CA Civ P104 of 2016. In that case Jamadar J.A. affirmed that if the application is made “after” the first CMC,

“a statement of case may be changed, but only with the court’s permission AND provided the criteria at Rules 20.1(3) and (3A) are satisfied”.

[39] Applying the useful guidance in the aforementioned Judgment of Jamadar JA, the Court is bound to consider whether there is a good explanation for the proposed changes to the defense AND whether the application was made promptly. Further, if the answer to either of those two (2) criteria is in the negative, the Defendant’s application must fail. The dicta of Rahim J in the authority of **Roberts v Bhagan end Medcorp Ltd** CV2010-01117 cited by the Defendant herein is clear in this regard,

“The court must find both that there is a good explanation for the change not having been made prior to the first CMC and that it was made promptly to grant the applicant permission to amend. The grant of permission is not automatic even after the requirements in Rule 20.1(3) are met. The court may grant permission and in considering whether to do so must have regard to the factors set out at Rule 20.1(3A).” (emphasis mine).

[40] This is buttressed by the statement of the Court of Appeal in the **Estate Management Ltd** case supra, where Jamadar J.A. opined at paragraph 41 of his judgment that:

“I also agree with Jones, J.A. that the threshold requirements of Rule 20.1(3) having not been satisfied there is no need to go further in the analysis to consider the requirements of Rule 20.1(3A)”.

[41] It is necessary at this stage to also refer to the provisions of the **Eastern Caribbean (EC) Civil Proceedings Rules (“the CPR, 2000”)** which are material to this application.

“1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it –

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

[42] **Rule 1.1** of the **C.P.R, 2000** speaks to the overriding objectives which are aimed at enabling the court to deal with cases justly, such as, ensuring that a case is dealt with expeditiously and fairly. The case of **Keene v Martin and another** [1999] ALL ER 1207, made the substantive point that the overriding objective would more likely be furthered where the court actively manages cases brought before it.

[43] It is accepted though and the court must be mindful, as made lucidly in the judgment of Kay, L.J in **Totty v Snowden** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules, **“Where there are clear express words, as pointed out by Peter Gibson, LJ in Vinos’ case, the court cannot use the overriding**

objective ‘to give effect to what it may otherwise consider to be the just way of dealing with the case’.”

However, **“Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective”.**

There is no doubt therefore that the court, in interpreting the rules, must always give effect to the overriding objective, and to that extent in the circumstances of this case, in dealing with the case justly, would include, although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court’s time.

The Rules give no guidance as to the way in which the overriding objective is to be applied. In the absence of practice directions, appellate guidance and principles of general application governing the exercise of discretion, which have been enunciated in previously decided cases, may be useful.

[44]The statutory provision in our CPR 1.1 permits relevant common law principles to be considered and applied by a judge when exercising any discretion or interpreting the rules, in my view, since in this provision, by the existence of the word "includes" in rule 1.1 (2), it contemplates that the considerations listed in CPR 1.1 (2) (a) to (e) are not exhaustive of the matters to be taken into account, when the court strives to deal justly with cases. However, in applying any such principles the court's discretion, by its very nature should be guided and not fettered by the principles. It must also be borne in mind that the **CPR 2000** has significantly changed the practice in relation to applications, and the court must be cautious in applying the common law principles under the old rules, which may not necessarily reflect the transformation under the new regime.

[45]In **Vinos v Marks and Spencer**¹ Lord Justice May opined that:

"The Civil Procedure Rules are a new procedural code, and [in considering whether the court has the power to extend time for service of a claim form where the claimant applied after the expiration of the period provided for in Rule 7.6(2) of the English CPR] the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former rules. The court is not in the first instance concerned with the exercise of discretion.

¹ [2001] 3 All E.R., 784 at para. 26

Decisions about the exercise of the court's discretion to strike out cases for delay are not in point. There is, in my judgment, no basis for supposing that rule 7.6 in particular was intended to replicate, or for that matter not to replicate, the provisions of former rules as they had been interpreted."

[46] Having regard to the overriding objective, Lord Justice Peter Gibson in **Michael Vinos v Marks & Spencers** (supra) aptly observed and I concur with him, that: **"The language of the rule to be interpreted [in the Civil Procedure Rules] may be so clear and jussive that the Court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant [or claimant] and to the interest of other litigants may require that a claimant [or defendant] who ignores time limits prescribed by the rules forfeits the right to have his claim tried..."**

[47] **Vinos** (supra) explained the impact, of the overriding objective. This was an action for damages for personal injuries and the claimant issued proceedings one week before the expiry date of the limitation period. He did not serve the claim form until 9 days after the 4-month period (Page 9 of 11 provided by the rule (7(5)2)) had elapsed. The delay could not be related to any difficulty over service, which was a requirement for extension of time. The English Court of Appeal was faced with a question of construction of the Civil Procedure Rules as the present application had presented. The Court in **Vinos** had to determine whether it had the power to extend time for service of a claim form if the claimant only applied after the period provided for in rule 7.6(2) of the English CPR had expired, and the conditions in Rule 7.6 (3) were inapplicable. It is the principle that is being extracted from **Vinos** as to how rule 3.1(2) (a), which is similar to our CPR 26.1 (2) (k) should be construed where there is a specific rule setting out, in detail, what the non-compliant party must do if that party wants an extension of time, and the circumstances in which the Court may exercise the discretion.

[48] The Judge in the reviewing Court below in **Vinos** held that the Court had no discretion to consider whether to extend time. He noted that the English Rule 3.1(2) (a) {equivalent to our CPR 26.1 (2) (k)} empowers the Court to extend time for compliance with the rule even if any application for extension is made after the time for compliance has expired; but that power is expressed to apply

“except where these rules provide otherwise.” He found that Rule 7.6 (3) does provide otherwise in that it prescribes the only circumstance in which the Court is able to extend the period for serving the claim form if the application is made after the period for service has expired. It is worth noting what the reviewing Judge said:

i. **“It is accepted by the defense that if the Court had a discretion the Court would only realistically exercise it in favour of the claimant, because it is not suggested for a moment that any prejudice has arisen or that any other considerations would apply to say that any kind of injustice would be done to the defendant... In this matter I find myself distinctly unhappy as to the correct approach. The instinct that one has is to say, “no harm is done, let the action proceed so that the appropriate person, that is the defendant’s insurers, can meet the claimant’s apparently justified claim for compensation. But on the other hand it does seem to me that where “the rules have specifically provided for failure to serve a claim form within a set time and provided two, and only two circumstances under which extensions can be given that it would be wrong to ignore those. It seems to me, therefore, that I am persuaded that a rigid interpretation is called for, and that accordingly the district judge was right in the decision which he made.”²**

[49]The Court of Appeal, in agreement with the judge in the court below held that neither the overriding objective nor the court’s case management powers enable the court to do what the rule expressly forbade. Peter Gibson L. J. in appraising the role of the overriding objective said:

“The construction of the Civil Procedures Rules, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the Civil Procedure Rules, unlike their predecessors, spell out in Part 1 the overriding objective of the new procedural code. The court must seek to give effect so that objective when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word “seek” acknowledges that the court can only do what is possible. The

² Michael Vinos v Marks & Spencer [2001] 3 All ER 784

language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the Civil Procedure Rules were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.”

[50] In **Nevis Island Administration v La Copproprete Du Navire**³, guidance was given as to how CPR 26.8 should be approached. Barrow J.A. said:

[17] “There are mandatory conditions imposed by this rule. It is stated in sub-rule (1) that the application must be made promptly and it must be supported by an affidavit. The application, in this case, satisfies both these requirements. In sub-rule (2) a strict fetter is imposed upon the court’s discretion- the court may grant relief only if it is satisfied that the failure to comply was not intentional, that there is a good explanation for the failure and the party in default has generally been compliant. This means that the court must conduct an examination of the evidence before it (normally the applicant’s affidavit) to decide if that evidence satisfies the court that the failure to comply was not intentional, that there is good explanation for the failure and the applicant has been generally compliant...”

[19] The applicants did not address even one of the three conditions that must be satisfied. The rule is uncompromising so that the Court is prohibited from exercising its discretion to grant relief from sanctions if these conditions are not satisfied...the failure of the applicants to comply with the requirements of the rule puts the applicants in a hopeless position...”

[51] In adopting the approach of Barrow JA (as he then was) in the foregoing case **Nevis** (supra), this means that the court must conduct an examination of the evidence before it (normally the applicant’s affidavit), to decide if that evidence satisfies the court that permission may be given for

³ Civ. App. No. 7 of 2005

the defendant to amend its defence.

Amendment of Statements of Case/Defence

[52] The effect of the amendment of the Civil Procedure Rules 2000 is that the court now has a very wide discretion in relation to the granting of permission to amend statements of claim. Guidance on the exercise of this discretion is to be found in relevant case law. Counsel for the claimant relied in his submissions in support of the application, on the cases of **Cropper v Smith** (1884) 26 Ch. D 700; **The Attorney General v. Maurice Francis** Unreported SCCA 13/95 (March 26, 1999); and **Cobbold v London Borough of Greenwich** (Unreported August 9, 1999) (United Kingdom) Civil Procedure 2009 (the White Book), volume 1 at 17.3.5.

[53] In **Cropper v Smith** there were competing claims to patents. In the Court of Appeal, the court considered whether a party should be granted leave to amend when he had failed to make any application for amendment and maintained that no amendment was necessary. The court held that the amendment would not be granted because of that party's failure to ask for leave to amend and because he had maintained the view that an amendment was unnecessary. The dissenting opinion of Bowen L.J. has however been repeatedly cited with approval in numerous subsequent decisions.

[54] At page 710 of the report Bowen L.J. opined,

Now, I think it is a well-established principle that the object of Courts 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. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, 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 in controversy, and I do not regard such amendment as a matter of favour or of 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... I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been

unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine...” [Emphasis added]

[55] The aforementioned dictum of Bowen L.J. was applied by the Jamaican Court of Appeal in the **Maurice Francis case**. The Court of Appeal affirmed the decision of the trial judge who granted an amendment to pleadings which was requested at the close of submissions. The decision was held to be proper even though the Defendant argued that the application was particularly prejudicial because of its exceptionally late timing and the fact that the costs of an adjournment could not remedy that prejudice.

[56] At page 11, Langrin, J.A (Ag) (as he then was) observed:

It is settled law that at the trial of an action leave to amend may be granted when to do so will not cause injustice to the other side and on proper terms as to cost and the adjournment of the trial if necessary. The discretion of the Court is based on considerations of prejudice and injustice.

[57] The dicta of Peter Gibson L.J. in **Cobbold v London Borough of Greenwich**, where the learned judge said.

The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.

[58] I hasten to state that legal practitioners must accordingly again be reminded that the phrases “as a matter of urgency, and it is not practicable” as terms of these rules, must not be treated as pro non scripto. The mere existence of some urgency cannot therefore necessarily justify an applicant not abiding by the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance is merely to serve as the case here, the claim form without the statement of claim or affidavit. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors, must carefully analyse the facts of each case to determine whether a

greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey the rules and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies the case demands, and these exigencies must appear from the affidavits. On the practical level it will follow that there must be a marked degree of urgency before it is justifiable for the court to exercise its discretion.

[59] **“Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of the matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice.”⁴**

[60] **“The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities nor is the triumph of the administration of justice to be found in successfully picking ones between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.”⁵**

Findings & Conclusion

[61] The court must consider all relevant circumstances in considering all the possibilities available to it. In fact, all parties must help the court to further the overriding objective. It is no longer appropriate to “let sleeping dogs lie” (See **Asiansky Properties Television plc and Anor v Bayer – Rosin (a firm)** [2001] EWCA Civ. 1792).

[62] Therefore, I examined the decision in **Watson v Fernandes** [2007] CCJ 1 where reference was made to **Baptiste v Supersad** (1967) 12 WIR 140 at 144B, in which Wooding CJ cautioned that: **“the law is not a game, nor is the court an arena. It is...the function and duty of a judge to see that justice is done as far as may be according to the merits”**. It has also been said that **“the attainment of true justice is over the highway of realities and not through the valley of**

⁴ Savannah N. Maziya Sandanezwe V GDI Concepts and Project Management (Properties) Limited High Court Case No. 905/2005 Her Lordship, Ota J, said in page 7.

⁵ Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009.

technicalities”: Musmanno J in **Potter Title & Trust Co. v Lattavo Bros Inc.** 88 A.2d 91 at 93.

[63] This court has said repeatedly that the **CPR, 2000** provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot abuse the process and expect the court to sanction such abuse.

[64] Additionally, it was stated that: “...**Courts exist to do justice between litigants through balancing the interests of an individual litigant against the interests of litigants as a whole... Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys...**”

[65] I find that this is a reasonable starting point, and I am persuaded by dicta in the above case. I find that the claimant in this case would be deprived of having his case heard on its merit because of an error on the part of his Counsel.

[66] I also examined the case of **Vinos v Marks & Spencer [2001] 3 All ER 784**. In seeking to paraphrase the words of May LJ, he concluded by noting that there was nothing unjust in a system which says that if you leave issuing proceedings to the last moment and fail to comply with a time requirement of the CPR, your claim will be statute barred. This I find would not apply, as in this matter although the claim was filed close to the date at which it would have become statute barred, the application to serve the Claim Form without the supporting documents would have been made within time.

[67] The decision of the court to grant permission for the amendments sought is also in keeping with the judgment in the case of **Charlesworth v Relay Roads Limited [1999] 4 All ER**, In the **Charlesworth case** Neuberger J, as he then was, at page 401 highlighted that on an application to amend a statement of case or to call evidence for which permission is required, assessment of the justice of the case involved two competing factors. Firstly, that it is desirable that a party is allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. If any damage suffered by the opposing party may be compensated by costs a powerful case would normally be made out for the amendment to be allowed. Secondly, the court had to consider whether the success of an application to amend or to call new evidence would interfere with the administration of justice and the interests of other litigants who had cases waiting to be heard.

[68] In this case as the amendments:

- a. mainly seek to further particularise the defence to the claim;
- b. will enable the 1st defendant to more specifically meet the claim brought; and
- c. are such that an appropriate consequential order in relation to costs can compensate the 2nd defendant for any prejudice occasioned, in keeping with the considerations highlighted in **Charlesworth**, balancing the competing interests appropriately, dictates that the application for the amendments should be granted.

[69] It should be noted that the granting of the amendments will not necessarily prejudice the trial date and therefore the amendments may not impact at all on other litigants or on the overall administration of justice. Even if it does however, the amendments should still be granted since – adopting the words of Brooks J at page 10 of the **NHDC case** – allowing the amendments will assist the court, "in determining the real questions in controversy between the parties". The amendments will therefore ultimately facilitate the resolution of the matter fairly and justly.

[70] The question therefore arises whether this court could cure the defect to give the 1st defendant permission to amend its defence whether any order could be made to set matters right in order to give effect to the overriding objective of ensuring that justice is done. The administration of justice would be advanced by the court seeking to cure the defect that the defence of the 1st defendant be amended.

[71] I believe the court retains the jurisdiction and discretion to correct or cure certain defects or technicalities depending on the circumstances, and if the interests of justice require it, and it is my view that the formal defect or procedural technicalities in the application in this matter may be cured by the court and in fact should be so cured at the date of the hearing of this application. I find that it amounted to a procedural inadequacy which should not be fatal to the claim itself or defence of the claim by the 2nd defendant, as the court should in the circumstances be able to exercise its discretionary powers to put things right in order to give effect to the overriding objective.

[72] In resolving the present 'Issue' I find then that the application of the claimant does satisfy the requirements as set out in Rule 20.1 (2) and (3), which would allow this Honourable Court to grant permission to the 1st defendant to amend its defence.

[73]The interpretation of the application made, and the order requested thereon must therefore be tempered with reason and with due regard to the purpose for which it was sought. I therefore find that this is a case in which the court has the discretion to permit the amendment of the defence sought by the 1st defendant.

[74] Order

- (i) The 1st defendant's application for amendment to its defence is granted, based on the foregoing reasons.
- (ii) The 1st defendant is also to file and serve the amended defence on the claimant and on the 2nd defendant on or before December 18, 2020.
- (iii) No order as to costs.
- (iv) Matter is to be referred to mediation at the pre-crystallisation stage of these proceedings.
- (v) Matter is to be set for case management on February 18, 2021 at the next sitting of the Master's Court in the Virgin Islands.
- (vi) The 1st defendant shall file and serve this order.

Ricardo Sandcroft
Master [Ag]

By the Court

Registrar