

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

Claim Numbers: **BVIHCV2020/0047**

Between

**RAWLEIGH FORBES
[BY HIS NEXT FRIEND JOYCELYN FORBES]**

Claimant/Applicant

and

THE BVI HEALTH SERVICES AUTHORITY

Defendant/Respondent

Appearances

Mrs. Corine N. George-Massicote of Counsel for the Claimant
Ms. Sarah Potter Washington of Counsel for the Defendant

**2020: March, 3rd
2020: June, 3rd & 8th**

JUDGMENT

Introduction

- [1] **SANDCROFT, M. [Ag.]**: This is an application seeking permission for the Claim Form in this matter to be filed as a matter of urgency without the Statement of Claim and supporting documents. The defendant/respondent minutely and voraciously objected to the application of the claimant/applicant.

Background/Chronology

- [2] On August 30, 2019, Mrs. Forbes stated that she was informed by the attending physician that her husband's inability to stand may have been due to his prolonged bed hospitalization. Mrs. Forbes further stated that, upon their return to St Croix, she was informed that the injury sustained by the applicant may have been attributed to the hospital care received. As a result of this information she then sought legal advice and was advised on February 3, 2020.

- [3] Accordingly, Mrs. Forbes acted on advice obtained on February 3rd, 2020 and filed the claim within the 28-day period as stated in the rule, thereby satisfying CPR 8.2 (4) (a).
- [4] Mrs. Forbes had previously stated that she was aware that medical evidence was needed in support of the claim, but she was not in possession of the required medical evidence to support the claimant's/applicant's claim and thus one reason for the difficulty in filing the accompanying documents in support of the claim.

Submissions of the claimant/applicant

- [5] Counsel for the claimant/applicant submitted inter alia that the term "practicable" meant reasonably capable of being accomplished; feasible, realistic. That for completeness, it would be also prudent to consider the term "reasonable", which refers to fair, proper, or moderate under the circumstances. It could be deduced from these meanings that what was or was not "practicable" depended on the circumstances or facts of each case. And it was for this very reason why such a mechanism was available to applicants whose circumstances may impact the feasibility of complying with the requirements.
- [6] Counsel also submitted that in examining the term "difficult" the Oxford Dictionary referred to it as hard to do, deal with, or understand; troublesome. It was further submitted that if a person was having a difficulty or if there was a hindrance to accomplishing a task, it could be interpreted that the person may not find it realistic or possible to complete that task given the difficulty being experienced.
- [7] Counsel also posited that the granting of the application did not prove liability on the part of the health authority; that, it was quite apparent that the viability of this claim was dependent upon the receipt of medical evidence, which required a medical practitioner to examine medical records for the two-months period of the claimant's/applicant's admission to hospital in the Virgin Islands. Counsel also submitted that obtaining such evidence, within a short period of time was unrealistic to meet the expiration of the limitation period.
- [8] 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.

- [9] 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

- [10] Counsel for the defendant submitted inter alia that, Rule 8.2(4) set out the criteria which must be met by the applicant to satisfy the court that permission should be granted to serve the Claim Form without the Statement of Claim, Affidavit or other supporting document.

CPR 2000, Rule 8.2(4) provides as follows:

The court may give permission under paragraph (1) only if it is satisfied that –

(a) a relevant limitation period is about to expire and the claimant has obtained legal advice relating to the claim for the first time within the 28 days prior to the date that the claimant wishes to file the claim; or

(b) the claim form must be issued as a matter of urgency and it is not practicable for the claimant to prepare a statement of claim or affidavit.

- [11] Counsel submitted too that based on section 2 of the **Public Authorities Protection Act**, Cap. 62, it was clear that the claimant was required to commence proceedings against the defendant within six months of the incident complained of; that being the 27th day of February, 2020.

- [12] Counsel also submitted that there was no indication from Mrs. Forbes of when, or whether or not the 30th of January was the first time that she sought legal advice in respect of the matter; she had however only indicated the she was advised by Counsel, on the 3rd day of February, 2020.

- [13] Counsel posited that in the absence of a clear statement from Mrs. Forbes indicating that the first time she sought legal advice in this matter was on the 3rd day of February, 2020, it was respectfully submitted that the claimant/applicant had not met the requirements of rule 8.2 (4) (a).

- [14] Counsel further posited that Rule 8.2(4) (b) indicated that the Claim Form must be issued as a matter of urgency and that it was not practicable for the claimant/applicant to prepare a Statement of Claim or Affidavit. Practicable is defined by **Merriam-Webster Dictionary** as “capable of being put into practice or of being done or accomplished: feasible.”

[15] Counsel further posited that **Munkman: Employer's Liability**, Chapter 5 Breach of statutory duty/Construction of key words used to define the nature and extent of statutory duties/Practicable states the following:

To do what is practicable involves more than taking reasonable care. 'Practicable' means that which is feasible, that which can be done. Lord Goddard said in Lee v Nursery Furnishings Ltd [1945] 1 All ER 387:

""Practicable"" is defined in the Oxford Dictionary as ""capable of being carried out in action"" or ""feasible""."

And Hallett J said in Schwalb v H Fass & Son Ltd (1946) 175 LT 345:

"Clearly, the fact that the use of the appliances would slow up production does not render their use impracticable; and I have no right to substitute for the word ""impracticable"" expressions such as ""difficult"", ""not too easy"" or ""inconvenient"" or any other word."

[16] Counsel went further to submit that Mrs. Forbes, although being the care-taker of her husband, clearly indicated in her affidavit (paragraph 11) that she was well aware, and considered that it would be practicable, although difficult, for her to obtain and submit the medical evidence in support of the claim before the expiry of the limitation period; that is, by or before February 28th, 2020. The period for which the documents were to be obtained, being approximately four (4) weeks, between Mrs. Forbes being advised by counsel and the date for filing the claim.

[17] Counsel also submitted that the period in which the claimant had between the time she was advised on February 3rd, 2020 and the time for filing the claim on February 28th, 2020; was sufficient time for the claimant to prepare the Statement of Claim or Affidavit. The claimant considered that the task of obtaining and submitting the relevant documents within the time frame would be "difficult" but not impossible or impracticable to accomplish.

[18] Counsel also posited that alternatively, for the court to be satisfied that the requirements of rule 8.2(4) are met, the basic requirements of the Claim Form as outlined in rules 8.6(1) and 8.9(3) must also be met. The claimant failed to attach any report from a medical practitioner on the personal injuries sustained by Mr. Forbes.

Rule 8.9(3) of the CPR 2000 provides:

If the claimant intends to rely at trial on the evidence of a medical practitioner, the claimant must attach to the claim form a report from the medical practitioner on the personal injuries alleged in the claim.

[19] Counsel finally posited that the claimant did not satisfy the requirements as set out in Rule 8.2 (4) (b), which would allow this Honourable Court to grant permission to the claimant to serve the Claim Form without the Statement of Claim or Affidavit or other documents; and as such the defendant averred that the application before the court should be denied.

[20] Counsel for the defendant/applicant had also inadvertently submitted that the discretion of the Court is fettered by the two requirements stated in the requirements of rule 8.2(4) (a) & (b).

Issues

[21] The issues for my determination are:

- (i) whether the claimant's claim form had been issued within the six months period permitted by law
- (ii) If not, whether an extension of time can be granted for the claim form, filed out of time, to be allowed to stand and
- (iii) whether the Court should exercise its discretion and grant permission to the claimant/applicant to serve the Claim Form without the Statement of Claim and supporting documents

Analysis of the Law

[22] It is necessary at this stage to refer to the provisions of the **Easter 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.

...

CPR 8.2(1) states that:

“a claim form may be issued and served without the statement of claim or affidavit or other document required by rule 8.1 (1) (b) or (c) only if the – (a) claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9; or

(b) court gives permission.”

CPR 8.2(4) states that the court may give permission under paragraph 8.2 (1) only if it is satisfied that

i) a relevant limitation period is about to expire, and the claimant has obtained legal advice relating to the claim for the first time within the 28 days prior to the date that the claimant wishes to file the claim: or

ii) the claim form must be issued as a matter of urgency and it is not practicable for the claimant to prepare a statement of claim or affidavit.

...

8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. ...

8.10(1) This rule sets out additional requirements with which a claimant in a claim for personal injuries must comply. ... (4) The claimant must include in, or attach to, his claim form or statement of case a schedule of any special damages claimed.

[23] **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 over-riding objective would more likely be furthered where the court actively manages cases brought before it

[24] 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 at all times 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.

[25] 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.

[26] 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."

[27] 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..."

[28] **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.

[29] 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 defence 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**

[30] 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.”

[31] 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...”

[32] 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 claim form to be issued and served without the statement of claim or affidavit or other document, required by rule 8.1 (1) (b) or (c).

A relevant Limitation Period is about to Expire

[33] Section 2 of the **Public Authorities Protection Act, Cap 62** of the Laws of the Virgin Islands provides that

“where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority of or any alleged neglect or default in execution of any such act, duty, or authority, the following provisions shall have effect (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof...”

[34] Mrs. Forbes stated in her affidavit that; on August 30th, 2019, she was informed by the attending physician that her husband’s inability to stand may have been due to his prolonged confinement to a bed during his hospitalization (paragraph 6 of the affidavit). Mrs. Forbes further stated that, upon their return to St Croix, she was informed that the injury sustained by her husband may have been attributed to the hospital care received (paragraph 8 of the said affidavit). As a result of the latter information she then sought legal advice and was advised on February 3rd, 2020.

[35] Counsel for the defendant/respondent submitted inter alia that the claimant/applicant had failed to satisfy the court of CPR 8.2 (4) (a) as **“there is no indication from Mrs. Forbes when, or whether or not this is the first time that she sought legal advice in respect of the matter...”** However it was posited by Counsel for the claimant/applicant that the test was not whether the person sought legal advice for the first time within the 28 days prior to the date that the claimant/applicant wished to file the claim, but it was whether that advice was obtained for the first time within the 28 days prior to the date that the Claimant wished to file the claim. It is to be noted, in the affidavit of Ms. Staycy L. Abel, an attorney-at-law, that a teleconference was convened with both the daughter and the wife of the claimant/applicant on January 30, 2020; where the wife and

daughter were both informed by counsel that a claim against the defendant/applicant would have to be commenced within a six (6) months period.

- [36] Therefore, I cannot agree with counsel for the claimant/respondent that the daughter and wife of the claimant/applicant obtained legal advice on February 3rd, 2020. In fact, I find that the affidavit of Ms. S. Abel is instructive and confirms the position of counsel for the defendant/respondent, that the Claim should have been filed on the 27th day of February, 2020, the claimant/respondent having first obtained advice on January 30th, 2020. Therefore, the relevant limitation period is about to expire and the claimant has obtained legal advice relating to the claim for the first time within the 28 days prior to the date that the claimant wishes to file the claim may have been prescribed by one day. What a difference one day makes where the rule prescribes a certain time period. Hence, permission cannot be granted under rule 8.2 (4) (a) of the **CPR, 2000**.

“Matter of ... and it is not practicable”

- [37] Practicable means **reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge and to the financial implications.**⁴ What is "practicable" must be determined by reference to the specific circumstances of the individual claimant. Mrs. Forbes stated in her affidavit that her husband had dementia and was immobile and was limited physically by his immobility. Hence, I find that in the circumstances of taking care of her husband during his present medical predicament would have been the prevailing state of mind of Mrs. Forbes at the time.

- [38] I also find that what is "practicable" should also not be confined to what is capable physically of being done. In light of the foregoing, Mrs. Forbes too would have been physically incapable of attending to recover medical reports from the hospital in light of the fact that her husband required continued therapy for muscle strengthening and ambulation until he returned to his pre-admission state. No doubt Mrs. Forbes would have been mentally and physically preoccupied with her husband's post-admission state and it would not have been "practicable" to procure medical reports at that stage.

⁴ www.lawinsider.com

[39] Finally, I find that what is "practicable" should take into account the mental state of the claimant. I will not rehearse the foregoing findings and observations but only note that the mental state of the claimant would be inextricably linked to his physical condition which would have rendered it impracticable at the time to do anything else but attend to the immediate physical and medical needs which directly impacted on his survival.

[40] 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.

[41] **"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."**⁵

[42] **"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**

⁵ 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.

between the pitfalls of technicalities. Justice can only be done if the substance of the matter is considered.”⁶

Findings & Conclusion

[43] The court must take into account 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.

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

[45] 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.

[46] 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...”**

[47] 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.

[48] 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

⁶ Phumzile Myeza and Others v The Director of Public Prosecutions and Another Case No. 728/2009.

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.

- [49] In any event an examination of the substance of the notice of application to serve the Claim Form without the supporting documents and the affidavit in support shows that the application is one seeking permission, that the claim form must be issued as a matter of urgency, and that it was not practicable for the claimant to prepare a statement of claim or affidavit. I believe however, that it would be absurd if an error of the nature where the attorney filed the claim form one day outside of the 28 days, or whether it was impracticable for the claimant to prepare a statement of claim or affidavit, had the potentially far-reaching effect of preventing the claimant from prosecuting his claim and this that could not be rectified by the court.
- [50] The question therefore arises whether this court can cure the defect to give life to the claim form or in other words, 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 claim form must be issued as a matter of urgency when it is not practicable for the claimant to prepare a statement of claim or affidavit.
- [51] 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 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.
- [52] In resolving the present 'Issue' I find then, that the application of the claimant does satisfy the requirements as set out in Rule 8.2 (4) (b), which would allow this Honourable Court to grant permission to the claimant to serve the Claim Form without the Statement of Claim.
- [53] 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 that the claim form be issued and

served as a matter of urgency, and that it was not practicable for the claimant to prepare a statement of claim.

[54] Order

- (i) The claimant's application for permission to serve the claim form in this matter as filed, as a matter of urgency, and it not being practicable for the claimant to prepare a statement of claim is granted, on the basis of the foregoing reasons.
- (ii) The claimant's application to have Mrs. Forbes appointed as next friend is also granted.
- (iii) The claimant is also to file and serve a preliminary report from the medical practitioner on the personal injuries alleged in the claim with the statement of claim.
- (iv) The statement of claim is to be served with an affidavit of the next friend.
- (v) No order as to costs.
- (vi) Matter is to be referred to mediation at the pre-crystallisation stage of these proceedings.
- (vii) Matter is to be set for case management on September 21st, 2020 at the next sitting of the Master's Court in the British Virgin Islands.
- (viii) The Claimant shall file and serve this order.

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar