

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2019/0021

BETWEEN:

THE ATTORNEY GENERAL OF SAINT LUCIA

Appellant

and

DARREL MONTROPE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Garth Patterson, QC with him, Mr. Mark Maragh and Mr. Rene Williams for the Appellant
Mr. Anthony Astaphan, SC with him, Dr. Kenny D. Anthony and Mr. Kendrickson Kentish for the Respondent
Mr. Vern Gill for the Public Service Commission (the first-named defendant to the substantive claim in the court below)

2019: November 27;
2020: July 9.

Interlocutory appeal — Procedure applicable to claims by way of originating motion — Requirement for leave to amend statement of case — Whether leave was required to amend originating motion — Effect of ambiguous notice of hearing issued by court office – Whether notice of hearing fixed date for first case management conference or for hearing of preliminary objection — Whether leave is required to amend statement of case where an application to strike out the statement of case has been filed but not determined — Effect of application pursuant to rule 9.7 of the Civil Procedure Rules 2000 — Whether an application to strike pursuant to rule 9.7 operates as a stay of all further proceedings pending the determination of the application — Whether learned judge erred in permitting amendments to statement to case — Whether amendments to statement of case in the interest of justice

The respondent, Darrel Montrope ("Mr. Montrope"), was the Cabinet Secretary for the government of Saint Lucia up until January 2017, when he was removed from his post by a decision of the Governor General and transferred to the office of Permanent Secretary in the Department of Labour. As a consequence of the Governor General's decision, Mr. Montrope filed an originating motion in the High Court against the appellant, the Attorney General, and the Public Service Commission, alleging that his transfer was unconstitutional and unlawful. In response, the Attorney General filed an application under rules 9.7 and 9.7A of the Civil Procedure Rules 2000 (the "CPR") challenging the court's jurisdiction to hear Mr. Montrope's claim, and seeking an order that the originating motion be struck out ("the application to strike").

A notice of hearing for 21st September 2017 was issued by the High Court office. The notice did not indicate whether it related to the originating motion or to the application to strike, or to both. On 21st September 2017, the matter came up for hearing before the learned judge. The judge gave directions on the application to strike and adjourned the hearing to a subsequent date. Following this hearing, Mr. Montrope, without seeking the leave of the court, amended and refiled his originating motion. On the next occasion the matter came up, the Attorney General raised a preliminary objection to Mr. Montrope's amendments to his originating motion, and argued that Mr. Montrope required leave to amend his pleadings but that no such leave had been obtained. The judge dismissed the preliminary objection and found that the notice of hearing issued by the High Court office was not a notice of first hearing, and therefore that leave to amend the originating motion was not required as no date had been fixed for the case management conference in the matter; the filing of the application to strike did not prevent Mr. Montrope from amending his originating motion without the court's leave; the filing of the application to strike pursuant to CPR 9.7 did not operate as a stay of the proceedings pending its determination; and that, in any event, it was appropriate in the circumstances to grant Mr. Montrope leave to amend his originating motion. The judge made no findings on the application to strike.

Being dissatisfied with the learned judge's decision, the Attorney General appealed. The issues raised before the Court of Appeal were: (i) whether the notice of hearing issued by the court office related to the originating motion or the application to strike; (ii) whether the filing of an application to strike prevented Mr. Montrope from amending his originating motion without leave of the court; (iii) whether the filing of an application to strike pursuant to CPR 9.7 operates to stay all further proceedings pending the determination of the application; and (iv) if Mr. Montrope required leave to amend the originating motion, whether it was appropriate in the circumstances for the learned judge to have granted leave.

Held: allowing the appeal; setting aside the decision of the learned judge; disallowing the amendments made by Mr. Montrope to his originating motion; striking out Mr. Montrope's amended originating motion; remitting the appellant's CPR 9.7 application to the court below; and making no order as to costs, that:

1. CPR 20.1 requires a party to obtain leave to amend its statement of case at any time after the date fixed for the first case management conference, which, in the

case of an originating motion, is the date fixed for the first hearing of the motion. As the court office invariably schedules the hearing of applications in accordance with the chronological order of their filing, the learned judge ought to have construed the notice of hearing as the notice of first hearing for the originating motion, which was filed prior in time to the application to strike. In the circumstances, a date had been fixed by the court office for the first case management conference in this matter. Accordingly, Mr. Montrope required the court's leave to properly amend his pleadings, as the date fixed for the first case management conference had already passed by the time he amended his originating motion.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Saint Christopher and Nevis High Court Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) applied; **Comodo Holdings Limited v Renaissance Ventures Limited and Joseph Katz** BVIHCP2014/0032 (delivered 3rd May 2016, unreported) applied; Rules 8.4, 20.1, 27.2, 56.7 and 56.11 of the **Civil Procedure Rules 2000** considered.

2. The principle in **Index Communication Network Limited v Capital Solutions Limited and others** and **Maria Agard v Mia Mottley and Anor** is that the filing of an application to strike has the effect of prohibiting a party whose pleadings are under attack from amending its pleadings without the court's leave. While it is true that there is no rule in the CPR which imposes such a requirement for leave, if leave to amend were not required, a party seeking to attack or strike out pleadings would have to address any subsequent amendments made without the court's leave, by perhaps mounting subsequent applications if there remained any basis for doing so. Such an approach would sanction one party 'stealing a march' on the other by curing defects in its pleadings which the application to strike sought to impugn, and would not be in keeping with the overriding objective. The learned judge ought to have been alive to the unfairness which would result in such circumstances, and accordingly erred by failing to apply the principle set out in the **Index** and **Maria Agard** decisions. Applying **Index** and **Maria Agard** to this case, even if no date had been fixed for the first case management conference, Mr. Montrope would still have required leave to amend his pleadings, he having sought to do so after the appellant had filed the application to strike.

Index Communication Network Limited v Capital Solutions Limited and others [2012] JMSC Civ No. 50 followed; **Maria Agard v Mia Mottley and Anor** Barbados High Court Claim No 1753 of 2015 (unreported) followed; **Dr. Ralph E. Gonsalves v Elwardo Lynch et al** Saint Vincent and the Grenadines Civil Appeal No. 9 of 2003 (delivered 2nd July 2003, unreported) distinguished; **Diamantis Diamantides v JP Morgan Chase Bank and others** [2005] EWCA Civ. 1612 considered; **Real Time Systems Limited v Renraw Investments Limited and others** [2014] UKPC 6 considered.

3. It is settled that the effect of an application under CPR 9.7 seeking to dispute the jurisdiction of the court is to stay proceedings pending the determination of the

application. Such an application ought to be determined by the court before any other issue arising on a claim is dealt with. The learned judge accordingly erred when he heard and determined Mr. Montrope's oral application to amend his originating motion before he considered the application to strike pursuant to CPR 9.7, which was filed before the oral application was made.

St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited Saint Christopher and Nevis High Court Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported) applied; **Diamantis Diamantides v JP Morgan Chase Bank and others** [2005] EWCA Civ 1612 distinguished.

4. Even if leave of the court was not required to amend Mr. Montrope's originating motion (which it was), the judge ought only to have permitted the amendments if it was in the interest of justice to do so, and if the amendments were not fanciful or served some real purpose. The amendments permitted by the judge were either factually unsubstantiated by Mr. Montrope, expressly found to be fanciful by the learned judge, or outside the scope of the preliminary objection filed by the respondent and therefore served no real purpose. In the circumstances, the learned judge improperly exercised his discretion by permitting the amendments.

George Allert et al v Joshua Matheson et al GDAHCVAP2014/0007 (delivered 24th November 2014, unreported) applied; **Comodo Holdings Limited v Renaissance Ventures Limited and Joseph Katz** BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported) applied; **Three Rivers District Council and others v Bank of England (No.3)** [2001] 2 All ER 513 considered; **Practice Direction 20** No. 5 of 2011 considered.

JUDGMENT

- [1] **PEREIRA CJ:** This appeal arises from the decision of the learned judge dismissing a preliminary objection by the appellant (the "Attorney General") to amendments made by the respondent, Mr. Darrel Montrope, ("Mr. Montrope") to his originating motion filed in the court below. At the heart of this appeal lies the question of whether Mr. Montrope required the leave of the court to amend his originating motion, and if so, whether such leave ought properly to have been granted. I now take the liberty of outlining the background facts so as to place the appeal into greater context.

Background

- [2] In November 2011, general elections were held in Saint Lucia and the then opposition, the Saint Lucia Labour Party, prevailed and formed the new government. In June 2012, Mr. Montrope was appointed to the public office of Cabinet Secretary.
- [3] The next general elections in Saint Lucia took place in June 2016. The United Workers Party prevailed and formed the new government under the leadership of the Honourable Prime Minister Allen Chastanet. In January 2017, pursuant to the decision of the Governor General, acting on the advice of the Public Service Commission, Mr. Montrope was removed from his post as Cabinet Secretary and transferred to the office of Permanent Secretary in the Department of Labour.
- [4] As a consequence of the Governor General's decision, on 14th June 2017, Mr. Montrope issued a fixed date claim by way of originating motion in the High Court against the Public Service Commission and the Attorney General. He alleged that his removal from the post of Cabinet Secretary and his transfer to the post of Permanent Secretary was unconstitutional, in excess of jurisdiction and otherwise unlawful on several grounds.
- [5] On 31st July 2017, the appellant filed an application under rules 9.7 and 9.7A of the **Civil Procedure Rules 2000** (the "CPR") for a declaration that the court had no jurisdiction to try Mr. Montrope's claim and for the originating motion to be struck out, either in its entirety or against the Attorney General ("the application to strike"). The appellant also asserted that it was wrongly made a party to the proceedings below and that the proceedings were an abuse of the process of the court.
- [6] Subsequently, on 12th September 2017, a notice of hearing for 21st September 2017 was issued by the High Court office. It is common ground between the parties that the notice of hearing failed to indicate whether it related to the originating motion or to the application to strike or to both.

[7] On 21st September 2017, the matter came up for hearing before the learned judge. He gave directions on the application to strike and, on Mr. Montrope's application, adjourned the hearing to a subsequent date. On 28th November 2017, Mr. Montrope, without seeking the leave of the court, amended his originating motion, which he revised and refiled on 18th December 2017.

[8] The matter again came up for hearing on 27th April 2018. At the hearing, the appellant raised a preliminary objection to Mr. Montrope's amendments to his originating motion. The crux of the preliminary objection was that Mr. Montrope required leave to amend his pleadings and no such leave had been obtained. At paragraph 3 of the judgment, the learned judge characterised the limbs of the Attorney General's preliminary objection as follows:

"Distilled to their essence, [the Attorney General's] preliminary objections were that: (1) under CPR 20.1, Mr. Montrope could only amend his statement of case once without leave at any time before the date on which the matter is fixed for case management; (2) since the statement of case was amended after the date fixed for case management, leave to amend was therefore required to amend; (3) no leave was applied for and, in any event, this was not a proper case for the court to exercise its discretion to grant leave to amend; (4) even if the statement of case had not been previously amended and no date for case management had been fixed, once an application to strike out a party's statement of case is before the court, that statement of case cannot be amended without leave of the court; (5) the effect of the Attorney General's application to strike, made pursuant to CPR 9.7, is to stay all proceedings pending the determination of the application and to take precedence over any other application since its determination in favour of the Attorney General could result in the matter being brought to an end; that being the case, any application for leave to amend the pleadings would have to come after the determination of the application to strike under Part 9.7."

[9] In essence, the appellant's position was that, for the purposes of determining the application to strike, the amendments made without leave should be disregarded and the matter should be determined on the pleadings as originally filed by Mr. Montrope. In response, Mr. Montrope contended that no leave was required to amend the originating motion as no date had been fixed for case management of

the matter. He further contended that even if leave were required to amend, the court ought to be satisfied in the circumstances that the amendments should be permitted. On that basis, he made an oral request at the hearing for leave to amend.

Decision on the Preliminary Objection

[10] At the outset, the learned judge stated that the question of whether Mr. Montrope needed leave to amend his pleadings hinged upon whether a date had been fixed for case management of the matter, which depended upon the proper interpretation to be given to the relevant provisions of the CPR. In his judgment, the learned judge stated:

“[11] Part 27.2(1) says that when a fixed date claim is issued, the court must fix a date for the first hearing of the claim. It does not expressly say that that first hearing shall be or is the case management conference. However, Part 27.1(2) provides that in addition to any other powers that the court may have, the court shall have all the powers of a case management conference. Part 27.2(3) provides that the court may treat the first hearing as a trial of the claim if it has not been defended or if it can be dealt with summarily.

[12] I agree...that the effect of those provisions is that a court has two options at a first hearing: either case manage the matter or try it summarily. It therefore seems that the intention of the rule is that the first hearing serves as the case management conference. The invariable court practice is indeed that the first hearing is the case management conference. This is bolstered by Part 56.

...

[14] CPR Part 27.2 read with Part 56.11 puts it beyond doubt, I think, that the first hearing is the case management conference for fixed date claims...”.

[11] The learned judge, having found that the first hearing is the case management conference for fixed date claims, concluded that the notice of hearing was not a notice of first hearing, and therefore that no date had been fixed for the case management conference. At paragraphs 18 and 19 of the judgment, he expressed thus:

“[18] ...It is beyond dispute that once a fixed dated claim has been issued, the court office must fix a date for first hearing. It is also true that the first

notice that emanates from the court office, following the issuance of a fixed date claim, is in fact the notice of first hearing. It might even be that the notices that issue from the court office for first hearing of fixed date claims, as a matter of practice, simply state “notice of hearing

[19] There is an obvious and material difference between a “notice of hearing” and a “notice of first hearing”. Given that there was the pending originating motion to which a first hearing would relate as well as an application to strike to which a notice of hearing would relate, was it not reasonable to presume that the notice of hearing related to the application to strike? Mr. Patterson invites the court to find that any ambiguity should be resolved in favour of the Attorney General since the invariable practice is that notice of first hearing is what issues from the court office following the fixed date claim. But why should a litigant be prejudiced because of an omission or failure on the part of the court office to state whether the hearing was a first hearing or other hearing? I think the ambiguity created by the notice of hearing ought, as a matter of justice and fairness, to be resolved in favour of the party who stands to be more greatly prejudiced by an ambiguous court notice.”

[12] Additionally, the learned judge concluded that the filing of the application to strike did not prevent Mr. Montrope from amending his statement of case without the court’s leave. Referring to the judgment of the Supreme Court of Jamaica in **Index Communication Network Limited v Capital Solutions Limited and Others**,¹ the learned judge at paragraphs 26 and 27 of the judgment stated as follows:

“[26] I am troubled by the finding in **Index** that even if a statement of case has not been previously amended, and the case management conference has not yet taken place, once a strike out application has been filed there can be no amendment without the court’s leave. CPR Part 20.1(1) provides that a statement of case may be amended once, without the court’s permission, at any time prior to the date fixed for case management conference. I think that the intention behind that rule is to give effect to the recognition that, litigation being what it is, a party might have omitted something important from his pleadings or otherwise filed faulty pleadings and should be allowed a change to amend without leave provided that no date has been fixed for case management. The reason why no amendments are allowed once the case management date has been fixed is because the philosophy behind the CPR is that all interlocutory applications should be dealt with, as far as is practicable, at

¹ [2012] JMSC Civ. No. 50.

the case management conference so that thereafter the matter can proceed systematically to trial.

[27] It seems to me that if on every occasion a party files a faulty pleading the other party would be able to file a strike out application thereby preventing that party from amending without leave, this would defeat not only the intention behind rule 20.1(1) but also the objective of the CPR that all such matters be dealt with at case management. That would encourage the proliferation of applications being taken prior to case management in addition to others that might be taken at case management.”

The learned judge also considered that he was not bound to follow **Index** as it is not a decision of the Eastern Caribbean Supreme Court and the approach in that case appears to run counter to the approach endorsed by Byron CJ in **Dr. Ralph E. Gonsalves v Elwardo Lynch et al.**² This will be addressed later in this judgment.

[13] After a detailed analysis of the relevant case law, the learned judge reasoned that if leave was required to amend, the filing of an application under CPR 9.7 did not operate as a stay of the proceedings pending its determination and that the court could grant Mr. Montrope leave to amend his originating motion. He went further to state that it was an appropriate case for him to exercise his discretion to grant leave to amend, having considered the substance of each of Mr. Montrope’s amendments in turn.

[14] Accordingly, the learned judge dismissed the preliminary objection and deemed Mr. Montrope’s revised amended originating motion to have been properly filed. He also granted the appellant leave to amend the application to strike which was based on the unamended originating motion. It is significant that the learned judge’s decision only relates to the appellant’s preliminary objection. The application to strike under CPR 9.7 has not yet been determined.

² Saint Vincent and the Grenadines Civil Appeal No. 9 of 2003 (delivered 2nd July 2003, unreported).

The Appeal

[15] The appellant appealed the learned judge's dismissal of its preliminary objection on 9 grounds. Having regard to the aspects of the decision set out above, the grounds of appeal understandably revolve around the question of whether the judge erred in dismissing the appellant's preliminary objection to the amendments to Mr. Montrope's originating motion on the basis that: (i) Mr. Montrope did not require leave to amend the motion; and (ii) it was appropriate in the circumstances to grant Mr. Montrope leave to amend the motion, if leave was required. At the beginning of the hearing of the appeal, learned Queen's Counsel on behalf of the appellant, Mr. Garth Patterson, distilled the following issues which arise for this Court's determination:

- (1) whether the notice of hearing issued by the court office related to the originating motion or the application to strike (the "first hearing issue");
- (2) whether the filing of an application to strike prevented Mr. Montrope from amending his originating motion without prior leave of the court (the "Index case issue");
- (3) whether the filing of an application to strike under CPR 9.7 operates to stay all further proceedings pending the determination of the application (the "stay issue"); and
- (4) if Mr. Montrope required leave to amend the originating motion, whether it was appropriate in the circumstances for the learned judge to have granted leave to amend (the "hopelessness issue").

Issue 1 – The First Hearing Issue

[16] The nub of the appellant's submissions on this issue is that the learned judge erred in concluding that the notice of hearing related to the application to strike. The appellant's submissions on this issue are two-fold. First, Mr. Patterson, QC stated that neither the originating motion nor the application to strike had return dates for hearing inserted into them. He also stated that the notice of hearing

failed to specify whether it related to the application to strike or the originating motion. Relying on the decision of this Court in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**,³ he contended that as the originating motion was filed before the application to strike, the learned judge ought to have found that the notice was a notice of first hearing, or at the very least that it was in relation to both the motion and the application.

[17] Second, Mr. Patterson, QC submitted that the scheme of the CPR is such that in a matter which is commenced by fixed date claim form, the court at the first hearing is empowered to make orders akin to those made at a case management conference. He therefore submitted that the first hearing is in effect the case management conference for fixed date claims. He stated that this Court in **Comodo Holdings Limited v Renaissance Ventures Limited and Joseph Katz**,⁴ observed that leave is required to amend pleadings after the date fixed for the first case management conference. On that basis, he argued that the learned judge ought to have found that Mr. Montrope required leave to amend his originating motion, as the amendments were made after that date.

[18] In response, Mr. Anthony Astaphan, SC submitted that Mr. Montrope should not be penalised for any ambiguity in the language of the notice of hearing issued by the court office. He contended that the learned judge correctly determined that the notice of hearing related to the application to strike.

Discussion

[19] A convenient starting point in resolving the 'first hearing issue' is the relevant provisions of the CPR.

[20] Part 20 of the CPR deals with amendments to statements of case or pleadings. Of relevance to this appeal is CPR 20.1 which provides that a statement of case may

³ Saint Christopher and Nevis High Court Civil Appeal No. 6 of 2002 (delivered 31st March 2003, unreported).

⁴ BVIHCP2014/0032 (delivered 3rd May 2016, unreported).

be amended once without the leave of the court, at any time before the date fixed by the court for the first case management conference. The corollary of that rule is once the date fixed for the case management conference has passed, there can be no valid amendment of pleadings without first obtaining the leave of the court to do so. Indeed, the principle is well settled by the decision of this Court in **Commodo Holdings** where Blenman JA stated:

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

- [21] This brings me to the question of whether a date for the first case management conference had been fixed by the court office. As stated earlier, Mr. Montrope commenced proceedings by way of originating motion. Since the introduction of the CPR, an originating motion is no longer ordinarily recognised as a means of initiating proceedings. CPR 8.1 provides that claims which were required to be commenced by originating motion should now be commenced by fixed date claim form. However, CPR 56.7, in keeping with the prescription set out under relevant constitutional provisions, provides that where a claim is for relief under the constitution, a fixed date claim form ought to be filed with the heading ‘Originating Motion’. Mr. Montrope’s claim, being for relief under the **Constitution of Saint Lucia**,⁵ is a claim within the category of claims seeking administrative orders and accordingly, falls to be considered as a fixed date claim filed pursuant to Part 56. In fixed date claims, there is no formal case management conference like in ordinary claims. Rather, there is a ‘first hearing’ which is typically the date on which the parties will appear in the High Court before the judge for the first time. In that regard, it is necessary to consider whether the first hearing is the case management conference for fixed date claims.

⁵ Cap 1.01 of the Revised Laws of Saint Lucia.

[22] On this point, Part 27 of the CPR, which deals with the procedures by which the court will manage cases, is relevant. CPR 27.2 specifically outlines the procedures the court must follow upon the filing of a fixed date claim. CPR 27.2(1) expressly states that when a fixed date claim is issued, the court must fix a date for the first hearing of the claim. Indeed, it is the practice that the first notice issued by the court office upon the filing of a fixed date claim is the notice of first hearing. CPR 27.2(2) further provides in clear terms that, at the first hearing, 'in addition to any other powers that the court may have, the court shall have all the powers of a case management conference'. CPR 27.2(3) permits the court to treat the first hearing as the trial of the claim if it is not defended or if it considers that the claim can be dealt with summarily. It is apparent that the aim of CPR 27.2 is to provide an occasion on which fixed date claims may be case managed for trial (if the claim is defended or cannot be dealt with summarily) in a manner akin to a case management conference for ordinary claims.

[23] Further support for that interpretation is found in CPR 56.11 which provides that at the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim. Under CPR 56.11, the provisions of Parts 25 to 27, which concern the scope of the court's case management powers and the procedure to be followed in the exercise thereof, apply. To my mind, the provisions of rules 27.2 and 56.11 of the CPR when read together lead to the ineluctable conclusion that the first hearing is the case management conference for fixed date claims and indeed a claim falling, as here, under CPR Part 56. On the basis of these provisions, I agree with the view expressed by the learned judge at paragraph 12 of the judgment that:

“...the effect of those provisions is that a court has two options at a first hearing: either case manage the matter or try it summarily. It therefore seems that the intention of the rule is that the first hearing serves as the case management conference. The invariable court practice is indeed that the first hearing is the case management conference. This is bolstered by Part 56.”

[24] Having concluded that the first hearing is the case management conference for fixed date claims, the question of whether the notice of hearing related to the application to strike or the originating motion can now be properly resolved. It appears from the judgment that the learned judge, in concluding that the notice was not a notice of first hearing, considered the decision of this Court in **Caribbean 6/49 Limited**. To my mind, the learned judge did not properly contextualise the Court's pronouncements in that decision to the circumstances of this case. I consider the principle emanating from **Caribbean 6/49** to be aptly stated by Saunders JA [Ag.] in the following terms:

“The overriding objective of the Rules is not furthered when the course and result of the litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first. **Chronologically and logically the bank's application was prior in time and should have been first determined.** The failure of the court office to ensure that sequence resulted in denial of justice to the bank.” (Emphasis mine)

[25] In my view, **Caribbean 6/49** ought not to be read as establishing any principle that ambiguity occasioned by the court office must be resolved in favour of the party who stands to be more greatly prejudiced. I understand Saunders JA [Ag.] to be stating that the court office in determining which of two applications should be heard first, ought logically to schedule the application filed earlier in time first. Indeed, the court office invariably schedules the hearing of applications in accordance with the chronological order of their filing. Applying the Court's approach in **Caribbean 6/49** to the circumstances of this case, it is clear that the learned judge ought to have construed the notice of hearing as the notice of first hearing, the originating motion having been filed prior in time to the application to strike.

[26] In any event, in light of the conclusion that the first hearing serves as the case management conference for fixed date claims, it was open to the learned judge to treat the notice of hearing as relating to both the originating motion and the application to strike, as both matters could have been suitably dealt with at the first hearing. Such a course would not properly invite a consideration of whether one

side was more prejudiced than the other. To my mind, the hearing on 21st September 2017 would still qualify as a first hearing even if the business dealt with at that hearing concerned the application to strike. This is even more so as the learned judge seemed to have accepted (in my view, rightly) that interlocutory applications (such as the application to strike) should be dealt with as far as practicable at the case management conference, so that thereafter the matter can proceed systematically to trial. In my view, treating the notice of hearing as relating to both matters would certainly have furthered the overriding objective of the CPR.

[27] I agree with Mr. Patterson's submission that the learned judge ought to have found that the notice was a notice of first hearing, or at the very least that it related to both the originating motion and the application to strike. At the hearing on 21st September 2017, in addition to adjourning the matter to a subsequent date, the learned judge made orders akin to orders made at a case management conference. This, contrary to the learned judge's conclusion, supports the position that the hearing on 21st September 2017 was the first hearing. It follows that a date had in fact been fixed by the court office for the first hearing or the first case management conference of this matter and CPR 20.1 would therefore have been engaged. Accordingly, in my view, Mr. Montrope required the court's leave to properly amend his pleadings, as the date fixed for the first case management conference had already passed by the time he amended his originating motion.

[28] Before turning to the second issue on this appeal, I take the opportunity to highlight the importance of using unambiguous language in the drafting of notices of hearing. It may well be the case that nothing would turn on a lack of specificity in a notice of hearing in most cases. In this case, however, the ambiguity in the notice of hearing has spawned proceedings in the court below on a preliminary objection and an appeal before this Court against the decision on that preliminary objection. The circumstances are even more so undesirable when one considers that there remains an application to strike to be determined by the court below,

nearly three years after its filing. I therefore encourage the court office in each Member State and Territory to ensure as far as is practicable that notices of hearing specify the date, time, place and **the nature** of the hearing to which the notice relates.

- [29] Even if no date had been fixed for the case management conference, it is relevant that Mr. Montrope amended his originating motion after the appellant filed an application to strike out the motion. In that context, I now propose to address the **Index** case issue which concerns the effect of the filing of the application to strike on Mr. Montrope's ability to amend his pleadings.

Issue 2 – The Index Case Issue

- [30] The second aspect of the learned judge's decision challenged by the appellant is the finding that the filing of an application to strike did not prevent Mr. Montrope from amending his pleadings without the court's leave. In so finding, the judge declined to follow the reasoning of the Supreme Court of Jamaica and the Barbados High Court in **Index** and **Maria Agard v Mia Mottley and Anor**⁶ respectively. Those decisions suggest that, even if no date has been fixed for the case management conference, once an application to strike out has been filed there can be no amendment to pleadings without the court's leave.
- [31] Here, the crux of Mr. Patterson's submissions is that the learned judge's reasons for rejecting the ratio of **Index** and **Maria Agard** are flawed. He stated that the judge's finding that amendments were not to be allowed once the case management date had been fixed reinforces the point that amendments should not be allowed once the matter was set down for first hearing. Mr. Patterson, QC also posited that the learned judge should not have declined to follow **Index** and **Maria Agard** for the reason that those cases do not emanate from this jurisdiction. He stated that the principles from those cases are not at variance with any authorities binding on the court below. He also claimed that the decision of Byron

⁶ Barbados High Court Claim No 1753 of 2015 (unreported).

CJ in **Gonsalves v Lynch** which was cited by the learned judge, in no way negates the ratio of **Index** and **Maria Agard**, nor does the ratio in those cases run counter to the pronouncements of Byron CJ.

[32] Mr. Patterson, QC therefore contended that the principle emanating from **Index** and **Maria Agard** should be preferred. The principle, he explained, promotes the overriding objective, as significant costs and judicial time are wasted if a litigant who sits back and waits for his pleadings to be attacked before amending, could defeat an application to strike by amending his pleadings on the eve of the hearing of that application. Mr. Patterson, QC argued that the overriding objective requires that, after an application to strike out is filed, the party whose pleadings are under attack, must, at the hearing of that application, seek permission of the court to amend it. He therefore submitted that the learned judge was wrong to reject the ratio of **Index** and **Maria Agard** and ought to have found that Mr. Montrope required leave to amend his originating motion.

[33] In response, Mr. Astaphan, SC argued that the learned judge correctly applied the overriding objective in finding that leave was not required to amend the originating motion, having regard to the loss of time, money and resources that could result from the claim being reinstated or a formal application to amend being made. Learned Senior Counsel also argued that if leave to amend were required, it was appropriate for the learned judge to grant leave in the circumstances. I will come to that issue later in this judgment.

[34] At this juncture, I propose to consider the reasoning of **Index** and **Maria Agard**. In **Index**, Mangatal J concluded that even if no previous amendments have been made and the case management conference has not taken place, the effect of the filing of an application to strike out is to preclude amendments to pleadings without the court's leave. Mangatal J explained thus:

“I am of the view that, even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, **it is not correct that a party could**

simply, “pull the rug out” from under the feet of the party applying to strike out on the basis of alleged weaknesses in the pleaded case, or omissions or admissions, by simply turning up with a newly amended statement of case that has been filed without the court’s leave. In Jamaican parlance, leaving the applicant to simply “Hug, it (the amendment) up!” or “Love dat!” In my judgment, that would, at the very least, offend the rules of natural justice and the Constitutional right to a fair hearing. Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party’s Statement of Case, the Statement of Case cannot be amended without the leave of the Court.” (Emphasis mine)

[35] The reasoning of Mangatal J in **Index** was adopted by Alleyne J in **Maria Agard** where at paragraphs 29 to 33 of the decision, he explained that:

“[29] ...CPR 20.1 regulates the filing of an amended statement of case in the ordinary course of things. It does not address the amendment of a statement of case that is the subject of an application to strike.

[30] In this respect, I endorse entirely the general thrust of a pronouncement made by Mangatal J in *Index Communications Networks Limited v Capital Solutions Limited et al* HCV 739 of 2011 (Jamaica Supreme Court, date of decision 3 May 2012) with respect to rule 20.1 of the Civil Procedure Rules, 2002 of Jamaica. Generally, that rule permits a party to amend a statement of case ‘at any time before the case management conference without the court’s permission’...

[31] In interpreting CPR 20.1 in this restrictive way, I have sought to give effect to the overriding objective of the CPR expressed in CPR 1.1(1), as I am required to do by CPR 1.3. That objective is to enable the Court to deal with cases justly. CPR 1.1(2) provides that dealing justly with a case includes, so far as is practicable, ensuring that parties are on equal footing and ensuring that a case is dealt with expeditiously and fairly.

[32] To hold that CPR 20.1 is applicable in the circumstances of this case would be to encourage the injection of unfairness and disorder into proceedings which though not irremediable might lead to an inefficient use of time. The defendants were not present to shoot at a moving target. They came to make out a case against the [fixed date claim form] and the claimant’s affidavit.

[33] The amended [fixed date claim form] must therefore be at risk of being struck out and can play no role in these proceedings except with the leave of the Court. The claimant made no application in that respect...”.

[36] It is accepted that there is no rule in the CPR (and similarly in Jamaica and Barbados) which provides that the filing of an application to strike has the effect of prohibiting a party, whose pleadings are under attack, from amending without the court’s leave, even where the case management conference has not yet taken place. While it is true that CPR 20.1 provides that pleadings may be amended once, without the court’s leave, before the date fixed for the case management conference, it appears that the principle in **Index** and **Maria Agard** is premised on the overriding objective of the CPR and considerations of justice and fairness. To my mind, the principle laid down in those cases is quite persuasive. In the context of an adversarial system, were this to be approached differently, it would defeat the overriding objective as a defendant attacking a claimant’s pleading could be faced with a claimant constantly shifting the goal post of his pleaded case and neutralising the defendant’s attack. The ability to strike out weak or unviable pleadings would be rendered a toothless tiger. Equally, a claimant would be absolved of its duty to assist the court in furthering the overriding of objective by, in the first place, pleading viable claims in a manner that is in keeping with the CPR.

[37] I agree with Mr. Patterson’s submission that the learned judge’s reasons for declining to apply the learning from **Index** and **Maria Agard** cases are flawed. Logically, if leave to amend in the face of an application to strike were not required, the party seeking to attack the other side’s pleadings would have to address any subsequent amendments, made without the court’s leave, by perhaps mounting another application if there remained any basis for doing so. Adopting the words of Alleyne J in **Maria Agard**, such an approach would indeed be tantamount to the party attacking the pleadings ‘[shooting] at a moving target’.⁷ As Mangatal J in **Index** puts it, it is inconceivable that a party could simply, ‘pull the rug out’ from under the feet of the party applying to strike by simply turning up with

⁷ See para. 32.

new pleadings that have been filed without the court's leave. It is clear that the approach adopted by the learned judge would sanction one party 'stealing a march' on the other by curing the defects in its pleadings which the very application to strike sought to impugn. This could render the application nugatory.

[38] Further, as costs usually follow the event, it is possible, although I would think highly unlikely, that the party who has filed an application to strike could be penalised in costs if the effect of the amendment is to undermine the very basis of the application. Such a course should ordinarily lead to an award of costs thrown away in favour of the applicant. For reasons which are apparent, it seems to me that the learned judge's approach cannot be said to be in furtherance of the overriding objective. In my view, the learned judge ought to have been alive to the unfairness which would result if a litigant who sits back and waits for his pleadings to be attacked before amending, could defeat an application to strike by amending his pleadings on the eve of the hearing of that application.

[39] I hasten to add that although **Index** and **Maria Agard** are not decisions of the Eastern Caribbean Supreme Court, they emanate from other superior courts of the Commonwealth Caribbean and concern the application of rules of court similar to those being considered in this appeal. It is well-settled that such decisions may be persuasive authority, provided that there is no conflicting decision which is binding upon the High Court. As mentioned earlier, the learned judge found that the approach in **Index** and **Maria Agard** appears to run counter to the approach endorsed by Byron CJ in **Gonsalves v Lynch**. In that case, Byron CJ commented as follows:

"During the argument counsel for the respondent warned against rushing the proceedings and I think that it may be appropriate to use this opportunity to comment on my expectation of management of the process under CPR 2000. These proceedings have been in process since September 2002. Some nine months have elapsed. The proceedings have two appearances before the judges on pleading points, and one appeal on a pleading point. No directions have been given on the essential issues of discovery and related matters necessary for determination of the real issues. My criticism is that, one of the intentions

of the case management process was to reduce the incidents of multiple interlocutory applications, which used to be a major factor in causing delay between the initiation and disposition of cases. I would like to encourage the use of the case management conference to address as many issues at the same time as is reasonable. It is quite likely that had these proceedings followed that procedural route, a final resolution would have been reached by now.”

[40] I do not regard the above passage from **Gonsalves v Lynch** on which the learned judge relied, or any part of the ratio decidendi of the case, to be in any way negating or conflicting with the reasoning in **Index** and **Maria Agard**. In fact, Byron CJ in his judgment did not specifically address the issue which **Index** and **Maria Agard** were concerned. It is consistent, in my view, with the overriding objective of the CPR to require that after an application to strike has been filed, the party whose pleadings are under attack must seek the leave of the court to amend it. Indeed, the issue of whether to grant leave to amend could suitably be determined at the hearing of the application to strike. In dealing with a typical application to strike, described as a nuclear option, the court is empowered to give leave to a party to amend rather than striking out the claim.⁸ This would be in keeping with the duty of the court to manage cases and would facilitate the judge’s control of the amendment process. Indeed, the guidance of Byron CJ provides additional support for my earlier conclusion that the notice of hearing issued by the court office was a notice of first hearing. To me, if the learned judge’s approach is to be followed, the party applying to strike would be required to amend its application in order to take into account the amendments made, which in turn could result in further delays in the proceedings and concomitant costs.

[41] In the premises, there is no doubt to my mind that the approach adopted in **Index** and **Maria Agard** is to be preferred. A practical expression of the approach may be observed from the conduct of the parties in the English Court of Appeal

⁸ See *Real Time Systems Limited v Renraw Investments Limited and Anor* [2014] UKPC 6, and *Diamantis Diamantides v JP Morgan Chase Bank and others* [2005] EWCA Civ. 1612 at 16, quoted at paragraph 41 herein.

decision of **Diamantis Diamantides v JP Morgan Chase Bank and others**.⁹ In **Diamantis**, the defendant applied to strike out the claim and particulars of claim, in response to which the claimant filed an application for leave to amend the particulars of claim. At paragraph 16 of its decision, the Court of Appeal addressed the manner in which a judge should exercise the discretion to strike out a claim in those circumstances, and stated:

“...on an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, **it is usually better to give permission to amend** rather than strike out the claim and leave the claimant to start again.”
(Emphasis mine)

Subject to my observations later in this judgment in respect of a CPR 9.7 strike out application, this may also be said to be the approach approved by the Privy Council in **Real Time Systems Limited v Renraw Investments Limited and others**.¹⁰

- [42] It is of significance that in **Diamantis**, the application to strike out was made less than three weeks after the statement of case was served. This suggests that the case management conference had not yet taken place at the time the application was made. The facts of **Diamantis** are therefore entirely consistent with the approach set out in **Index** and **Maria Agard**. In my view, the learned judge erred in so far as he rejected the reasoning in those decisions. Accordingly, I hold the view that even if no date had been fixed for the first case management conference, Mr. Montrope would still have required leave to amend his pleadings, he having sought to do so after the appellant had filed an application to strike.

Issue 3 – The Stay Issue

- [43] This brings me to consider the stay issue. On this point, Mr. Patterson, QC submitted, on the authority of **Caribbean 6/49**, that the effect of the filing of an

⁹ [2005] EWCA Civ 1612.

¹⁰ [2014] UKPC 6.

application to strike pursuant to CPR 9.7 is to stay all further proceedings pending the determination of the application. He stated that it was therefore not open to the learned judge at the hearing to consider Mr. Montrope's oral application for leave to amend. This, he argued, is because it would have been contrary to the stay for the court to entertain another application before the CPR 9.7 application was determined.

[44] In response, Mr. Astaphan, SC argued that the filing of an application under CPR 9.7 did not prevent the learned judge from granting Mr. Montrope leave to amend. Relying on the decision of the Privy Council in **Real Time Systems**, he argued that the overriding objective required the court to grant leave to amend, rather than denying it leaving Mr. Montrope to commence proceedings afresh in the event that his motion is struck out.

[45] It is clear from the face of the application that the appellant's application was made pursuant to CPR 9.7(1). The rule provides that a defendant who disputes the court's jurisdiction to try the claim may apply to the court for a declaration to that effect. The effect of the rule on extant proceedings was considered in **Caribbean 6/49**, where Georges JA [Ag.] stated that:

"[2] As I see it, an application under Part 9.7 of the Civil Procedure Rules, if made within the period for filing a Defence, operates as a stay of proceedings until the application is heard and determined. That view is reinforced by paragraph 7(b) of Part 9.7 which stipulates that: "If on application under this rule the court does not make a declaration, it (b) must make an order as to the period for filing a Defence.

...

[5] I am therefore fully satisfied that **the application [to strike under CPR 9.7] effectively stayed the proceedings until it was heard and determined and would have taken precedence over any other application** or request since its determination in favour of the appellant/defendant could result in the matter being brought to an end." (Emphasis mine)

[46] In my view, the learned judge erred in distinguishing **Caribbean 6/49** on the basis that the other application before the court was an application for summary judgment and not an application for leave to amend as in this case. There is

nothing in the judgment of Georges JA [Ag.] in **Caribbean 6/49** which suggests that an application for leave to amend is to be treated differently from any other application. In fact, Georges JA [Ag.] made it plain that the application under CPR 9.7 would take precedence **over any other application**. It seems to be settled by **Caribbean 6/49** that the effect of the filing of an application to strike under CPR 9.7 is to stay the proceedings pending its determination. The rationale is simply that an application made pursuant to CPR 9.7 is one seeking to dispute the court's jurisdiction to hear a particular matter and it therefore raises a threshold issue. Such an issue ought to be determined by the court before dealing with any other issue. I consider the reasoning in **Caribbean 6/49** to be binding on the court below and indeed on this Court in these circumstances.

- [47] The effect of an application under CPR 9.7 becomes even more obvious when one considers CPR 9.7(7)(b) and 9.7(8). Those rules allow the court to vary the timeline for filing a defence in a claim pending the determination of a CPR 9.7 application. The rules when read together clearly suggest that proceedings are in effect stayed to facilitate the resolution of the issue of jurisdiction, which becomes live upon the filing of a CPR 9.7 application.
- [48] It seems to me that the learned judge erred in relying on **Diamantis** in arriving at his conclusion. It is apparent from the judgment of Lord Justice Moore-Bick in **Diamantis** that the application to strike out the statement of claim was in that case made under rule 3.4(2) of the English Civil Procedure Rules,¹¹ or pursuant to the court's inherent jurisdiction, on the ground that it disclosed no cause of action. In other words, the application in that case was made on the basis that the pleadings were defective, which is distinct from an application under CPR 9.7 which principally disputes the court's jurisdiction to try the claim. I am persuaded by Mr. Patterson's submission that this Court ought to distinguish between an ordinary application to strike out a statement of case based substantively on the ground that it discloses no cause of action nor defence, on the one hand, and a CPR 9.7

¹¹ Rule 3.4 of English Civil Procedure Rules govern the court's power to strike out a statement of case.

application disputing the court's jurisdiction to try the claim, on the other. While a claim which fails to adequately particularise a cause of action can be saved by a legitimate amendment, the same is not possible for one which is defective due to the court's lack of jurisdiction. Since the issue of jurisdiction is a threshold issue, it stands to reason that an application to strike out made under Part 9.7 could not be treated in the same manner as an application to strike made on the basis of inadequate pleadings. For this reason, the principles in **Real Time Systems** relied on by Mr. Astaphan, SC are not aptly engaged.

- [49] Additionally, the determination of the CPR 9.7 application to strike in the appellant's favour could result in Mr. Montrope's claim being brought to an end. Thus, any application for leave to amend the pleadings could only be properly heard after the determination of the application to strike. To my mind, the learned judge failed to adequately appreciate that the effect of an application under CPR 9.7 is to stay the proceedings pending its determination. Accordingly, the learned judge was precluded from hearing Mr. Montrope's oral request to amend his originating motion before determining the CPR 9.7 application to strike, the proceedings having been stayed. Although the learned judge ought not to have entertained Mr. Montrope's application, I propose for completeness to address his decision to allow Mr. Montrope's amendments.

The Hopelessness Issue

- [50] Queen's Counsel, Mr. Patterson, says the amendments are hopeless and fanciful. I am mindful that the appellant's CPR 9.7 strike out application is yet to be heard. Treating with this issue should not in any way be viewed or taken as expressing any view on the merits of that application. This issue concerns whether the learned judge erred in allowing Mr. Montrope's amendments to the originating motion. The principles which govern the exercise of the court's discretion to grant leave to amend pleadings were canvassed by this Court in **George Allert et al v Joshua Matheson et al**¹² and were restated in the later decision of **Comodo**. In

¹² GDAHCVAP2014/0007 (delivered 24th November 2014, unreported).

Comodo, Blenman JA explained the principles stated in **George Allert** in the following manner:

“[73] ...In *George Allert v Joshua Matheson*, this Court distilled the principles that are relevant to applications to amend pleadings. It was stated that the main factor that the Court will take into account in determining whether or not to grant leave is the interest of justice. When faced with late amendment applications, the Court will therefore take a number of factors into account including; the exact stage reached in the proceedings, how great a change is made in the issues by the proposed amendments and whether the other side would be prejudiced in a manner for which they cannot be properly compensated...

[78] ...It is the law that a court which is asked to grant permission to amend will base its decision on the overriding objective. Generally, disposing of a case justly will mean the amendments should be allowed to enable the real issues to be determined. There is a public interest in allowing a party to deploy its real case, provided it is relevant and has a real prospect of success. **The court is competent to refuse to grant leave to amend the pleadings if the proposed amendments will serve no useful purpose or are fanciful.**” (Emphasis mine)

[51] The House of Lords in **Three Rivers District Council and others v Bank of England (No.3)**¹³ explained the meaning of ‘fanciful’ in the following terms:

“...it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.”

[52] **Practice Direction 20**¹⁴ sets out additional factors to which the court must have regard on an application for leave to amend pleadings. Part 4.1 of **Practice Direction 20** states:

“When considering an application to change a statement of case pursuant to rule 20.1(2) the factors to which the court must have regard 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 changes were permitted;
- (4) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

¹³ [2001] 2 All ER 513.

¹⁴ PD No. 5 of 2011.

(5) whether the trial date or any likely trial date can still be met if the application is granted; [and]
(6) the administration of justice.”

[53] On the basis of the above considerations, I now turn to address the substance of the amendments made to Mr. Montrope’s pleadings with a view to determining whether it was in the interest of justice for the judge to permit them and therefore whether leave to amend ought to have been granted.

The Proposed Amendments

[54] It appears from the judgment that the learned judge considered it appropriate to grant Mr. Montrope leave to amend. He explained that:

“[37] I am satisfied that most of these factors weight on the side of granting leave: (1) the amendments appear to raise serious issues which might be the real issues to be determined; (2) resistance to the amendment is partly based on the mere technicality of whether the notice of hearing issued was a notice of first hearing; (3) the proceedings are at a very early stage so the Attorney General will not be prejudiced; (4) there can be no lost judicial time since there has been no case management of the originating motion; (5) the amendment is not a last minute change to the fundamental basis of the case since the originating motion has not yet been case managed...”

...

[38] Mr. Patterson concentrated his arguments primarily on one factor, namely, that the proposed amendments were fanciful and would serve no useful purpose. I accept that if indeed the proposed amendments are fanciful with no real prospect of success then this would be a prevailing factor. If the proposed amendments are fanciful no point would be served in allowing it even if the other factors are in favour of the grant of leave to amend.”

[55] The learned judge itemised the ‘proposed amendments’ as follows:

“(1) A declaration that the Governor General in acting on the advice of the Public Service Commission failed to ensure that the Public Service Commission acted constitutionally judiciously, and/or fairly including ensuring that the post of permanent secretary was of the same rank, status and reputation as that of secretary to the cabinet before purporting to remove or transfer the Claimant. (paragraph (i) of the motion).

(2) The Claimant was and is entitled to remain in the post of secretary to the cabinet until the age of retirement unless removed for reasonable cause. (paragraph (ii) (a) of the motion).

(3) The post of secretary to the cabinet is a special constitutional post or office and is substantially different in terms of, among other things, status and rank to that of the post of permanent secretary. (paragraph (ii) (b) of the motion).

(4) The Claimant was purportedly and unlawfully transferred to a post of permanent secretary and therefore removed in breach of the provisions of section 87 of the Constitution of Saint Lucia SI 1978 No 1901, principles of fairness and the protection of the law contrary to section 8 (8) of the said Constitution and/or without reasonable cause. (paragraph (ii) (d) of the motion).

(5) A Declaration that the Public Service Commission acted unlawfully and/or in breach of its constitutional duties and obligations under the Constitution when: (b) it acted on the instructions, advice or control of and/or merely “rubberstamped” the instructions, advice or control of the prime minister and/or cabinet contrary to the provisions of sections 85 (12) of the Constitution. (paragraph (ii) (b) of the motion.

(6) The First Defendant failed to provide further particulars, reasons or explanation for its decision including its statement that “after consideration of the programme for Labour Relations and assessment of [the Claimant’s] skills, knowledge, and competencies, it is the view that [the Claimant] would be best placed to advance the Government’s work programme in the area of labour” and “the Honourable Prime Minister has indicated that members of Cabinet are “more comfortable” working with the Claimant’s Successor as Cabinet Secretary; (paragraph (iv) (b) of the motion.

(7) The First Defendant failed to give the Claimant a fair or reasonable opportunity to be heard on these prejudicial and adverse matters in that no particulars or facts were disclosed or provided to him, and additionally the matters relied on were never properly explained or defined by the First Defendant despite the Claimant’s requests. (paragraph (iv) (c).”

[56] Before this Court, Mr. Patterson, QC focused his arguments on the assertion that Mr. Montrope’s amendments are fanciful and therefore should not have been allowed by the learned judge. Mr. Astaphan, SC, however, stated that a decision as to whether to grant leave to amend involves the exercise of discretion. He relied on well-known principles in **Dufour and others v Helenair Corporation Ltd**

and others¹⁵ for the assertion that it cannot be said that the learned judge took into account irrelevant factors or erred in principle in order for this Court to interfere with his decision.

[57] I now address each amendment in turn.

Amendment Concerning the Governor General

[58] Mr. Montrope, without the leave of the court, amended his originating motion to claim relief against the Governor General. In concluding that the amendment concerning the Governor General should be allowed, the learned judge stated:

“[44] Paragraph (i) of the amended motion might not have been drafted in the most felicitous language. But the proposed amendment has to be read against the backdrop of the entire motion, including the original unamended portion, to see if what is proposed is fanciful. The motion is expressed to be brought pursuant to sections 16 and 105 of the Constitution... Mr. Montrope is therefore invoking the court’s constitutional jurisdiction under both available routes.

[45] Section 87(1) of constitution governs the process of transfer from certain offices including that of Cabinet Secretary. Section 87(2) states that that power is exercised by the Governor General acting in accordance with the advice of the Public Service Commission. Mr. Montrope (at paragraph ii (d) of the proposed amendment) claims a breach of section 87 of the constitution.

[46] When that is read with paragraph (i) of the amended motion the allegation is that section 87 of the constitution is breached because (a) the Governor General transferred the Cabinet Secretary who was entitled to remain in the post until retirement or removed for reasonable cause or (b) the Governor General acted on the advice of the PSC without first ensuring that the Cabinet Secretary was being transferred to a post of equal rank, status and reputation. I do not think that this is a fanciful claim and if Mr. Montrope were to succeed in proving what he offers to prove – that the PSC was merely rubberstamping a decision of the prime minister/cabinet and a Cabinet Secretary is entitled to remain in [the] post until retirement or removed for case – then he would be entitled to the relief he seeks.”

¹⁵ (1996) 52 WIR 188.

[59] Mr. Patterson, QC was keen to highlight that an application for leave to amend pleadings must be supported by affidavit evidence as outlined in Part 2.2(1) of **Practice Direction 20**. He submitted that in seeking to determine whether the proposed amendments were hopeless, the court may only make this determination upon the assessment of evidence adduced in support of the application, and in absence of such evidence, the court is entitled to assume that no such supporting evidence is available. During his oral submissions, Mr. Patterson, QC intimated that one of the bases on which the appellant sought previously to strike out Mr. Montrope's claim was that the unamended originating motion made no reference at all to the Governor General. He stated that this resulted in the appellant being made an improper party to the claim, as the Attorney General was not a decision maker in the matter of Mr. Montrope's transfer, and further could not be a party in any representative capacity where there were no claims against any person whom the Attorney General would represent.

[60] Mr. Patterson, QC argued strenuously that the proposed amendment concerning the Governor General serves no useful purpose since it merely sets out the relief of a declaration sought without more, there being no scintilla of evidence placed before the court to support the grant of such a relief. He asserted that there were no pleaded facts or affidavit evidence on the part of the respondent which particularised any factual allegations whatsoever against the Governor General, and upon which the judge could have based his assessment of the prospects of the proposed amendments succeeding. In support of his submission, he relied on the decision of **Al-Hassani v Nettler and another**,¹⁶ which suggests that amendments should only be permitted where the claims have a realistic prospect of success.

[61] In response, Mr. Astaphan, SC also submitted that the amendment concerning the Governor General was necessitated by the decision of this Court in **Gemma Bain-**

¹⁶ [2019] EWHC 640 (Ch).

Thomas v The Attorney General of Grenada and Anor,¹⁷ which he stated clarified the role of the Governor General as the decision maker in circumstances similar to this case. He stated that where an attempt is made to strike out amended pleadings, at the stage at which the appellant's application was made, the application proceeds on the presumption that the allegations, as put forth, are true. Mr. Astaphan, SC also submitted that, due to the stage at which the application to strike was filed, no further actions were taken in relation to the matter. He stated that Mr. Montrope was therefore not in a position to present evidence on which the learned judge could have determined whether the amendments were hopeless.

[62] To my mind, Mr. Astaphan, SC seems to have conflated on the one hand, an application to strike, which is made on the basis of a pleaded case without any evidence, and on the other, circumstances where one is seeking permission to amend a statement of case and therefore must set out affidavit evidence in support of that application. The critical question here is which of these applications was being dealt with in the context of the appellant's preliminary objection. In the circumstances, it was certainly the application seeking leave to amend which was being considered by the judge in the form of an oral request made by Mr. Montrope at the hearing on 27th April 2018. I therefore find no merit in Mr. Astaphan's assertions that the stage at which the application to strike was filed somehow precluded Mr. Montrope from presenting the court with evidence in support of his request for leave to amend his pleadings. In fact, it appears that up until the hearing of the preliminary objection, Mr. Montrope's primary position was that leave was not required to amend. When one considers the matter in that light, it is understandable why an oral request for leave to amend was made at the hearing, instead of a formal application supported by affidavit evidence. Further, I do not consider the decision in **Bain-Thomas** as somehow sanctioning Mr. Montrope's circumvention of the procedure for amending his pleadings.

¹⁷ (2017) 91 WIR 324.

[63] In the absence of any such evidence from Mr. Montrope to support the allegations made in the amendments against the Governor General, I am inclined to agree with Mr. Patterson, QC that the learned judge would not have had any sufficient basis on which to conclude that the relevant amendment to the motion was not fanciful. I am of the considered view that it was not open to the learned judge to cure the defects in the proposed amendments by inferring factual bases for allegations against the Governor General, where no such evidence had been particularised by Mr. Montrope. It is no function of the court to redraft or supplement a party's proposed amendments. The prospects of the amendments succeeding must be weighed on the basis of the material before the court and not on the basis of a hypothetical set of facts. Therefore, I also agree with Mr. Patterson, QC that the learned judge's conclusion was a liberal and generous interpretation, and went beyond the discretion that was properly exercisable by the court.

The Amendment Concerning the Denial of a Fair Hearing

[64] This is a short point. Mr. Montrope amended his originating motion to allege a breach of his constitutional right to a fair hearing. The learned judge, after considering evidence in the form of lengthy exchanges¹⁸ between the Public Service Commission and Mr. Montrope regarding his transfer, concluded that he was given a full and adequate opportunity to put his case to the Public Service Commission. Despite concluding that the 'factual basis of the claim to have been denied a fair hearing is devoid of substance as to be fanciful', the learned judge concluded that he was only making an observation which could not have any consequential effect since he had concluded that no leave was required to amend.

[65] In the circumstances, I have already determined that Mr. Montrope required leave to amend his pleadings. Thus, there is much force in Mr. Patterson's submission that if the proposed amendment was fanciful and leave of the court was required to amend, then the learned judge was wrong to allow it to stand. It is clear from

¹⁸ See para. 48 of the judgment.

the principles espoused in **George Allert** and **Comodo** that the court should refuse to grant leave to amend if the amendments are fanciful or will serve no useful purpose. Without restating the evidence before the learned judge, it being evident from the exchanges between Mr. Montrope and the Public Service Commission that an allegation of a denial of a fair hearing would have no realistic prospect of success at trial, the learned judge ought to have disallowed the amendment.

The Amendment Concerning Discrimination

[66] In his analysis on this point, the learned judge addressed the allegations in Mr. Montrope's claim that his transfer was due to political discrimination. It appears from the list of proposed amendments at paragraph 55 of this judgment that there were no actual amendments relating to allegations of discrimination. Those allegations were made in the unamended motion. In his oral submissions, Mr. Patterson, QC argued that the issue of discrimination was already canvassed in the unamended originating motion and that there were no amendments made in relation to the issue. He therefore argued that in so far as the learned judge was only dealing with amendments, which was the focus of the appellant's preliminary objection, his findings on the discrimination point ought not to stand, since it would have the effect of trespassing on an issue which arises for determination on the pending Part 9.7 application. There is merit in Mr. Patterson's assertions. There were simply no amendments before the judge on this point. I therefore find that the learned judge's conclusion, that the issue of discrimination was not fanciful, was premature and outside of the scope of the appellant's preliminary objection.

[67] In my view, the learned judge ought not to have permitted any of the amendments made by Mr. Montrope. On the authority of **George Allert** and **Comodo**, the amendments concerning the Governor General and the allegations of a denial of a fair hearing are fanciful and disclose no realistic prospect of success. The allegation of political discrimination will no doubt feature in the appellant's CPR 9.7

application being already pleaded in the original motion and I would refrain from making any finding thereon.

- [68] In the premises, the appellant's appeal against the learned judge's decision should be allowed.

Costs

- [69] The public law nature of Mr. Montrope's substantive claim justifies the application of the general rule that there should be no order as to costs in matters of this kind. Further, I am of the considered view that the proceedings in the court below and before this Court arose primarily as a result of the failure of the court office to issue an unambiguous notice of hearing. In those circumstances, it would also not be appropriate to make an order as to costs.

Conclusion

- [70] For all the above reasons, I would allow the appeal, set aside the learned judge's order dated 4th May 2018 and make no order as to costs. I would therefore make the following orders:

- (1) The appeal against the learned judge's decision dated 4th May 2018 is allowed.
- (2) The order of the learned judge is set aside.
- (3) The amendments made by the respondent to his originating motion are hereby disallowed.
- (4) The respondent's amended originating motion which was revised and refiled on 18th December 2017 is hereby struck out.
- (5) The matter is remitted to the court below for the hearing of the appellant's CPR 9.7 application to strike and the Registry of the High Court shall fix a date for the hearing of the application.
- (6) There is no order as to costs.

[71] I am grateful to learned counsel for their detailed submissions, both written and oral, which were of much assistance.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar