

**EASTERN CARIBBEAN SUPREME COURT
ST. CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2012/0168

BETWEEN:

DEVELOPMENT BANK OF ST. KITTS-NEVIS

Claimant

And

**[1] OSBERT CHAPMAN
[2] LIONEL R. WILLIAMS
[3] PRUDENCE FRANCE**

Defendants

Appearances:

Mr Arudranauth Gossai of Gonsalves Hamel-Smith for the 3rd Defendant/Applicant
Mr Glenford Hamilton of Hamilton & Co. for the Claimant/Respondent

2013: February 15th
March 15th
March 22nd

2013: June 7th

DECISION

[1] **THOMAS J (AG)** On 30th January 2013 the claimant filed a notice of application seeking the following:

- (1) That the claimant be granted leave to amend the claim form herein.
- (2) That the claimant be granted an extension of time to file witness statements in the matter herein.

[2] On 4th March 2013 the claimant filed an amended application seeking orders that:

- (1) Counsel who until the 28th January 2013 had conduct of the matter on behalf of Hamilton & Co., as solicitors for the applicant, may be at liberty to file his affidavit dated 27th day of February 2013, notwithstanding that the Case Management Conference has passed and the original application was filed on 30th January 2013.
 - (2) That the applicant be at liberty to rely on the said affidavit of counsel in support of its application on 30th January 2013.
 - (3) That the applicant may be granted liberty to file its witness statements out of time notwithstanding that the time set for filing has elapsed.
 - (4) That the applicant may be granted relief from sanctions.
 - (5) Such further or other directions as the court seem just.
- [3] The grounds on which the amended application is based are as follows:
- (1) Counsel having conduct of this matter was on the 28th day of January 2013 appointed to public office on short notice and became unable to act as counsel;
 - (2) Counsel sought to make arrangements to provide on his matters to other counsel but was overtaken by events and accordingly;
 - (3) On the 30th January 2013 counsel hurriedly caused an application to be made to court for *inter alia* an extension of time within which to file witness statements which were due on that very day.
 - (4) The witness statements which were required to be filed and served by 30th January 2013 were not so filed and served as ordered.
 - (5) No sanction for non-compliance was imposed by any rule direction or order.
 - (6) New counsel in the matter seek to have the procedural error rectified and provide for permission to file and serve the witness statements out of time and to be relieved from sanctions.

Affidavits in Support

- [4] There are three affidavits in this regard: Kristyl Bristol, filed 30th January 2013. Jason Hamilton, filed 27th February, 2013 and Beverly Liburd, filed 4th March 2013.

Kristyl Bristol

- [5] Kristyl Bristol deposes as to the circumstances giving rise to her knowledge to the order, discontinuance against the 1st and 2nd defendants and also the circumstances pertaining to the 3rd defendant. The affiant also speaks as to her information as to the need for consequential amendments to claim form having regard to the fact that the first Case Management Conference had been held, and the deadline for the filing of witness statements had passed.

Jason Hamilton

- [6] Jason Hamilton deposes that he is an Attorney-at-Law having conduct of the matter before the court up to the 28th January 2013 on behalf of his firm, Hamilton & Co, which represents the claimant bank.

- [7] Further, in the affidavit, the affiant outlines the circumstances he faced on 28th January 2013 and his focus thereafter.

- [8] The deponent says further that he was advised that the affidavit which he prepared hastily in support of the application was deficient to properly support the application.

Beverly Liburd

- [9] Beverly Liburd deposes that she is a legal executive of Hamilton & Co. and in that capacity has the responsibility for collating and filing documents with the court. It is further deposed by Beverly Liburd that she has knowledge of the instant matter and assisted Jason Hamilton in the filing of papers thereof.

- [10] At paragraphs 4 to 9 of the said affidavit the following events are deposed:

- (1) On 25th January 2013 there was a meeting with Jason Hamilton at which it was determined that the witness statements would be completed and filed not later than 30th January, 2013 being the deadline imposed by the court.
- (2) Very early on the morning of 28th January 2013 she was informed by Jason Hamilton and Glenford Hamilton that by 3 p.m. on the said day Jason Hamilton would be sworn in as Attorney General of St. Kitts and Nevis and would no longer be an active partner of Hamilton & Co.
- (3) All members of staff of Hamilton and Co. then proceeded to deal with matters which Jason Hamilton was involved in or had conduct of, especially matters with deadlines to be met.
- (4) A decision was taken to immediately prepare an application for an extension of time within which to file the witness statements.
- (5) The application was hurriedly prepared and signed by Glenford Hamilton; the first draft of the affidavit in support was prepared by Jason Hamilton and sworn to by Kristyl Bristol.
- (6) She, the affiant, was informed by Glenford Hamilton that the affidavit was insufficient to deal with the orders prayed for in the application by which time Jason Hamilton had been sworn in as Attorney General aforesaid.
- (7) Jason Hamilton swore to a final affidavit on 27th February 2013.
- (8) She was advised by Glenford Hamilton and verily believed that the deadline for the filing of the witness statements could not be met and an application was made to the court for an extension of time within which to file the said witness statements.
- (9) The failure to comply with the 30th January 2013 filing date was not intentional and due entirely to the fact that Jason Hamilton was on the afternoon of 28th January 2013 and thereafter unable to function as counsel having conduct of this matter.

[11] Prudence France, the third defendant, swore to and filed two affidavits on her own behalf and in opposition to the claimant's notice of application seeking leave to amend the claim form.

[12] Prudence France's affidavit filed on 13th February 2013 is directed at the notice of application and the affidavit in support. And based her own knowledge and the advice of her counsel which she verily believes the following issues are raised:

- (1) The claimant notice of application was filed on 30th January 2013 and served on her counsel's chambers on 7th February 2013.
- (2) As regards paragraph 1 of the grounds of application, there was no requirement to file a notice of discontinuance against the 1st and 2nd defendants.
- (3) In relation to Kristyl Bristol's affidavit filed on 30th January 2013 the master never ordered a notice of discontinuance be filed but rather the date by which it should be filed.
- (4) Kristyl Bristol failed to state the source of her information contained in paragraph 4, 5, 7 and 8 of her said affidavit.
- (5) In relation to paragraph 8 of Kristyl Bristol's said affidavit based on a meeting on 30th January, 2013 between Jason Hamilton and her counsel, her counsel was informed by Jason Hamilton that he (Hamilton) would not be in a position to file the witness statements on 30th January 2013. Her counsel informed Jason Hamilton that the 3rd defendant's witness statement would be filed under seal given the circumstances, and that an application for an extension of time would be necessary which the 3rd defendant would not oppose.
- (6) It was learnt by her counsel at the said meeting of 30th January 2013 that the notice of discontinuance was in fact filed by the claimant against the 1st and 2nd defendants and served on her counsel's chambers on 31st January 2013.

- [13] In a supplemental affidavit filed on 22nd February 2013 Prudence France seeks to supplement the affidavit filed on 13th February 2013. Again, the facts deposed are said to be within the deponent's own knowledge and from sources identified.
- [14] In summary, the deponent seeks to deal with two loan accounts in the name of the 1st defendant involving in my advice by the claimant. Further that the 3rd defendant is one of the guarantors of the loan to the 1st defendant signed on 24th March 2004. The deponent goes on to deal with the 1st defendant's delinquency in repayment of the two loans and despite an ultimatum issued to the 1st defendant on 17th December 2009 no action was taken until 1st May 2012.
- [15] This supplemental affidavit will be further addressed at a later stage.
- [16] In summary the following matters are before the court for determination arising for the claimant notice of application and amended notice of application:
- (1) Whether the claimant should be granted leave to amend the claim form filed on 30th January, 2013.
 - (2) Whether the claimant should be granted an extension of time to file witness statements in the matter.
 - (3) Whether the claimant's former counsel should be at liberty to file and rely on his affidavit dated 27th February 2013 in connection with the application filed on 30th January 2013.
 - (4) Whether the claimant/applicant should be granted relief from sanctions.
 - (5) Whether the claim as a whole can survive or be dismissed.
- [17] On the order of the court, submissions were filed by both sides. And in what appears to have been perceived, as the sole issue, the submissions on behalf of the claimant/applicant relate to the issue as to whether the applicant should be granted an extension of time within which to file its witness statements.

Submissions

- [18] In the submissions on behalf of the Applicant there advanced the following:
- “The applicant no longer wishes to pursue an application to change its statement of case, and accordingly, that portion of the original application of 30th January 2013 is withdrawn”.
- [19] On behalf of the 3rd defendant broad submissions are advanced, with respect to both the notice of application and the amended notice of application, as follows: defects in application to amend the claim form, likelihood of success of the proposed amended claim.
- [20] As noted before, learned counsel for the 3rd defendant in his submissions impugns both the notice of application on several forms. The first of these is headed “defects in application to amend claim form”.
- [21] The submission highlight the following: Rule 11.09 of **CPR 2000** as to read the affidavit evidence in support of an application; rule 30.3(2)(b)(ii) of **CPR 2000** as to the content of an affidavit in support on a procedural or interlocutory application and section 75 of the **Evidence Act** No. 30 of 2011 which permits the use of hearsay evidence in interlocutory proceedings so long as the source of such evidence is identified¹.
- [22] The submissions continue thus:
- “10. The claimant’s Notice of Application is supported by an Affidavit sworn to by one Kristyl Bristol and the 3rd Defendant at paragraph 7 of her Affidavit in Opposition pointed out that Ms Bristol failed to state the source of her (Ms. Bristol’s) information in relation to paragraphs 4, 5, 7 and 8 of her (Ms. Bristol’s) Affidavit.
13. It is respectfully submitted, based on the foregoing, that the failure by Ms, Bristol to disclose her source of information renders paragraphs 4, 5, 7 and 8 of her Affidavit inadmissible.
14. The remaining paragraphs of Ms Bristol’s Affidavit, namely 1, 2, 3, 6 and 9 do not, in any way, support the grounds stated in the

¹ In this regard the authority of *In Re J.L. Young Manufacturing Company Limited* [1900] 2 CL 753 is also quoted.

Notice of Application nor do they disclose any good reason for seeking leave to amend the Claim Form.

15. So long as the Affidavit in Support is struck out, as the 3rd Defendant respectfully submits that it should be, then the Notice of Application will not be supported by any affidavit evidence and should be struck out as well".

[23] In further submissions paragraph 2.2 of **Practice Direction 20** (No.5 of 2011) is cited to show that the requirements where an application is made to change a statement of case which are the filing of an affidavit in support and a copy of the statement of case which are the filing of an affidavit in support and a copy of the statement of case with the proposed changes. The case of **Jason Hamilton v Edward Drew and the Attorney General** is also cited to show the application of these requirements.

[24] It is further submitted on behalf of the 3rd defendant that the 3rd defendant is not aware whether the claimant has filed a copy of the statement of case with the proposed changes as none was served and that in the event it was not filed it would render the application defective.

[25] After quoting paragraph 4 of **Practice Direction 20**, which sets out the factors which the court must consider in considering an application to change a statement of case the submissions on behalf of the 3rd defendant continue thus:

- "21. In the instant case, as stated earlier, the Claimant filed a Notice of Discontinuance on 11th October, 2012 and it was not until the day to file its witness statement, approximately four months later, that the Claimant made the instant application seeking to amend the Claim Form. This, it is respectfully submitted, is inordinate delay on the part of the Claimant and there is no explanation in the Affidavit in Support as to the reason(s) for such a long delay.
22. Further, the Claimant has not alluded to any prejudice that it may likely suffer if the application were refused and it is therefore reasonable to conclude that none, perhaps, exists.
23. The prejudice to the 3rd Defendant is discussed below.
24. The trial window set by the Learned Master may be affected as the 3rd Defendant will, if the application is successful be compelled to file an Amended Defence and witness statement and will require reasonable time within which to do so.

25. The Claimant had not produced any information as to the attempts/efforts made to serve the 1st and 2nd Defendants but merely stated that it was unable to serve the 1st and 2nd Defendants and hence its election to discontinue the matter against those Defendants. For the reasons set out below, this discontinuance against the 1st and 2nd Defendants has the effect of discharging/releasing the 3rd Defendant from any liability in this matter.
26. For the foregoing reasons, it is respectfully submitted that the Notice of Application is defective in many instances for failure to comply with the Rules and Practice Direction and should therefore be struck out with costs to the 3rd Defendant with such costs to be assessed in accordance with Rule 65.11 of the CPR 2000.
- Part C – Likelihood of success of the proposed Amended Claim
27. Rule 26.3(1)(b) of the CPR 2000 provides that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim.
28. It is respectfully submitted that Rule 26.3(1)(b) applies with equal force to an application for leave to amend a claim in that the court may refuse leave if the amended claim does not disclose any reasonable ground for bringing the claim”.

Analysis

- [26] This analysis must necessarily begin with the statement of the principle recently re-stated by our Court of Appeal that pleadings cannot be amended by submissions. Therefore, the applicant having filed a notice of application seeking to amend the claim form cannot in submissions seek to withdraw reliance on the notice of application. This means that both the notice of application and the amended notice of application are properly before the court for consideration.
- [27] And because of the applicant's reliance on the purported withdrawal of the notice of application no submissions were filed in this regard. The submissions on behalf of the 3rd defendant therefore fall to be considered in isolation.
- [28] As noted above, the notice of application is questioned on the legal grounds the legality of the affidavit in support of the notice of application, the grounds in

support of said application, and the filing of the proposed changes to the claim form.

Affidavit in Support

- [29] The affidavit of Kristyl Bristol is questioned on the basis that the affiant does not identify the sources of her information contained in paragraphs 4, 5, 7 and 8 of her affidavit.
- [30] It is trite law that such a principle exists even before **CPR 2000** in relation to interlocutory proceeding². Now the rule is contained in Part 30.3(2)(b)(ii) of **CPR 2000** plus section 75 of the **Evidence Act** No. 30/2011.
- [31] An examination of the said paragraphs of Kristyl Bristol's affidavit reveals what her information is and no source is identified. The court therefore agrees with the submission of learned counsel for the 3rd defendant that those paragraphs, being 4, 5, 7, and 8, are inadmissible.
- [32] But there is a further challenge to paragraph 1, 2, 3, 6 and 9 of the said affidavit on the basis that they do not support the grounds stated in the notice of application. These grounds relate to the filing of a notice of discontinuance in relation to the 1st and 2nd defendants and the consequential changes to the claim form pursuant to Rule 20 of **CPR 2000**.
- [33] Again, the learned counsel for the 3rd defendant submitted that the remaining paragraph, being 1, 2, 3, 6 and 9 do not support the grounds contained in the notice of application. In this regard learned counsel for the 3rd defendant points to paragraph 6 of the 3rd defendant's affidavit in opposition which addressed paragraph 3 of Kristyl Bristol's affidavit in support follows:

"6. In relation to paragraph 3 of the Affidavit sworn by Ms Kristyl Bristol on 30th January, 2013, I am informed by Mr Gossai and verily believe that the Master did not order that a Notice of Discontinuance be filed but rather directed the date upon which such Notice should be filed after the Claimant's Counsel, Mr.

² See: In Re J.L. Young Manufacturing Company Limited (1900) 2 CL. 753

Jason Hamilton informed the Court that the Claimant was unable to locate the 1st and 2nd Defendants and that the Claimant intended to file a Notice of Discontinuance. I am further informed by Mr. Gossai and verily believe that the Master never made any order or ruling that the 1st and 2nd Defendants were not 'properly parties' to the claim".

- [34] The material paragraphs of Kristyl Bristol's affidavits being 3 to 9 are hereby struck out on the legal basis examined above. And, as learned counsel for the 3rd defendant contends, the notice of application is without support and as such breaches Rule 11.9 of **CPR 2000** and should be struck out. The court agrees.

Failure to file the proposed changes

- [35] There is hardly a need to debate these issues as the requirements of Paragraph 2.2 of **Practice Direction 20** have not been met as there is no document before the court indicating the proposed changes.
- [36] Learned counsel for the 3rd defendant contends further that the applicant is also in breach of paragraph 4 of **Practice Direction No. 2** which requires, the court to consider, *inter alia* how promptly an application for changes to its statement of case was made.
- [37] It is submitted that the application in this case was made on 30th January 2013 when the notice of discontinuance with respect to the 1st and 2nd defendants was filed on 11th October 2012 this permitting a period of about four months to elapse before the filing of the instant application which is inordinate. The court agrees.
- [38] The foregoing represents a further basis for striking out the notice of application.

Likelihood of success of the proposed Amended Claim

- [39] It is submitted on behalf of the 3rd defendant that a further legal basis for striking out the claimant's statement of case to be found in Part 26.3(1)(b) of **CPR 2000**. This rule provides for the striking out of the statement of case if it disclosed no reasonable ground for bringing or defending a claim.

[40] It is further submitted that Rule 26.3(1)(b) of **CPR 2000** applies with equal force to an application to amend a claim. A number of authorities are cited in this connection³.

[41] More importantly, it is submitted on behalf of the 3rd defendant that the issues of the discontinuance against the 1st and 2nd defendants and the manner in which the claimant administered the loan payments by the 1st defendant have a bearing on the likelihood of success.

Notice of Discontinuance

[42] The submissions in this regard are in these terms:

"33. Rule 37.5 of CPR 2000 provides that where a notice of discontinuance is filed, a claim or the relevant part of a claim is brought to an end as against the defendant on the date when the said notice is filed.

In this instant case this means that the case against the 1st defendant (principal debtor) and the 2nd defendant (co-guarantor) was brought to an end on 11th October, 2012. It is respectfully submitted that bringing the matter to an end against the 1st and 2nd defendants had the effect of releasing and/or discharging these defendants from any further liability to pay the debts owing to the claimant...

The principle that the release and/or a co-guarantor without the consent of the other guarantor(s) also release these other guarantors from any and all liability under the guarantee is well established".

[43] A number of authorities⁴ are cited by learned counsel for the 3rd defendant. Essentially, the authorities bear on the point and the court was pointed to part of reasoning Lord Hanworth, MR in **Smith v Wood** [1929] 1 CL 14, 24:

"The reasoning of the case I have cited appears to be that where such an agreement has been entered into as contained in the deed..., it is not possible for the creditor to make a particular and separate bargain with one of the other parties releasing the security put up by him from liability

³ See: *Belize Tele Media Ltd v Magistrate Usher* [2008] 75 WIR 138 *Index Communications Network Limited v Capital Solutions Limited et al* [2012] JMSC Civ No. 50 at para.47 per Mangatal, J.

⁴ These include: *Mercantile Bank of Sydney v Taylor* [1893] AC 317; *Smith v Wood* [1929] 1 Ch 14; *Bank of Montreal v Manogna* [1988] Can Lic 2890 *Esson, JA* at paras. 5 and 13; *John Anthony Jeans v John Richard Bruce* [2004] NSWBC 539

without the consent of the other parties to the deed, whose rights *inter se* and whose responsibility in respect of the sum for which they were making their properties liable was or might be altered by reason of that separate bargain. For this reason I have come to the conclusion that the judgment of the learned Vice Chancellor is right and the appeal must be dismissed".

[44] And it is to be noted that in the court below part of the said Vice Chancellor's reasoning was this:

"The release by the defendant of any one of the securities was interference with the contracted right of the other sureties and therefore released there absolutely and entirely, except in the case of the plaintiff...who had acquiesced in the release".

Statement of loan repayment delinquency and loan repayments

[45] At paragraphs 12 of supplemental Affidavit, the following is deposed by Prudence France:

"12. I am advised by Mr Gossai and verily believe the same to be true that the Claimant's wilful decision since 2008 not to pursue the 1st Defendant for his default on the loan and now to seek to pursue the matter against me is very unfair and highly prejudicial to me. I [was] also advised by Mr Gossai and verily believe to be true that the actions of the Claimant may amount to bad faith in permitting the default of the 1st Defendant to accrue for such a long time without taking action or seeking to recover the debt from the 1st Defendant and without also notifying me of the 1st Defendant's default and their deliberate decision not to take any action against him and advancing the second loan when it was clear that he could not manage the first loan.

13. Mr Gossai also informed me and I verily believe the same to be true that he noticed from the documents disclosed by the Claimant that the 1st Defendant was making substantial payments to the Claimant and the Claimant applied all the monies paid by the 1st Defendant to the second loan only (account number 3336045) and did not apply any of the monies to the first loan (account number 334011). I am also informed by Mr Gossai and verily believe the same to be true that he noticed from the account statement for the two loans that while monies were being paid by the 1st Defendant for more than seven (7) years no amount was applied to the first loan (account number 3334011) during these seven (7) years. Mr Gossai further informed me and I verily believe the same to be true that he noticed that on 20th October 2011 that the 1st Defendant made a payment of \$5000.00 and the entire amount was applied to the second loan (account number

3336045) but the Claimant apparently decided to reverse half of that payment and apply it to the first loan...”.

Conclusion

[46] In agreement with learned counsel for the 3rd defendant the application to amend the claim form is refused for the following reasons:

- (1) The affidavit in support filed by Kristyl Bristol did not satisfy the law and was struck out and as a consequence the application was without evidence.
- (2) The proposed changes to the claim form were not filed as required by paragraph 2.2 of **Practice Direction 20**.
- (3) The claim form was filed in October 2012 and the present application was filed on 30th January 2013.
- (4) The applicant did not address the question of prejudice if the application was refused as required by **Practice Direction 20**.
- (5) Having regard to the fact of notice of discontinuance against the 1st and 2nd defendants, and the applicant's treatment of loan repayment and delinquency loan repayment there does not exist any reasonable ground for the amended claim form to succeed.

ISSUE NO. 2

Whether the applicant/claimant should be granted an extension of time within while to file its witness statements

Submissions

[47] The following are the main submissions on behalf of the claimant/applicant:

Submissions as to governing legal principles

“8. The rule governing extension of time exist in Rule 26.1(2)(k) of the Civil Procedure Rule 2000 (CPR 2000) which states:

26.1(2) Except where these rules provide otherwise, the Court may:-

- (k) extend or shorten the time for compliance with any rule, practice, direction, order or direction of the Court even if

the application for an extension is made after the time for compliance has passed.

9. CPR 2000 does not specify any criteria for granting an application for extension of time. However, CPR 1.2 states that 'the Court must seek to give effect to the overriding objective when it (a) exercises any discretion given to it by the Rules or (b) interprets any rule'.

[48] After outlining the context of the overriding objective of **CPR 2000** and the manner in which Rule 26.9 is to be exercised certain authorities⁵ are identified upon which reliance will be placed the submissions continue:

- "13. This application is made in accordance with the provisions of Part 11 and it follows form 6 of the prescribed forms to the CPR 2000 in that:-
 - (a) The application is in writing
 - (b) It states the grounds on which the Applicant is seeking the order together with the orders that are being sought.
 - (c) There is a draft order attached and this said draft order was filed with the application.
 - (d) Notice of the application was given to the Respondent, Prudence France.
 - (e) The evidence in support of this application is contained in three affidavits, one by Kristyl Bristol, on[e] by Jason [Hamilton] and one by Beverly Liburd.
 - (f) The notice states the date, time and place when the application is to be heard and was served on the Respondent within the time provided there for.
14. The main thrust of the amendment is to withdraw the prayer in the application which seeks to amend the statement of case.
15. The application which the Court is at this time being asked to consider are that:
 - (a) The applicant be at liberty to file its witness statements out of time notwithstanding that the time set for the filing thereof has elapsed.

⁵ John Cecil Rose v Anne Marie Uralis Rose St. Lucia Civil Appeal No. 19/2003 (delivered 22nd November 2003); Carleen Pemberton v Mark Brantley, St. Christopher & Nevis HCVAP2011/0009 (delivered 14th October 2011; C.O. Williams Construction (St. Lucia) Ltd v Inter Island Dregging Co. Ltd, St. Lucia HCVCP2011/0107 (delivered March, 2012)

- (b) Counsel who until 28th January 2013 had conduct of this matter on behalf of Hamilton & Co., as solicitors for the Applicant, may be at liberty to file his affidavit of circumstances dated 27th day of February 2013, notwithstanding that Case Management Conference has past and the original application was filed on 30th January 2013.
- (c) The applicant be permitted to amend its application having regard to the circumstances alluded to in the affidavits of Erstwhile Counsel and Beverly Liburd, and
- (d) The applicant be at liberty to rely additionally on the said affidavits of Erstwhile Counsel and Beverly Liburd in support of its application.

Part 11 applications under the CPR 2000 do not constitute statements of case. CPR 2.4 provides:

“Statement of case” means:-

- (a) a claim form, statement of claim, defence, counterclaim, ancillary claim for or defence and a reply; and
- (b) any further information given in relation to any statement of case under Part 34 either voluntary or by order of the Court.

Part 20 Rules 1, 2 and 3 as amended provide the framework for changing of cases.

There is no prohibition anywhere in the CPR 2000 (as amended) which stops a party from amending a Part 11 application prior to the hearing of that application.

The following dicta are also cited to the court:

“In **John Cecil Rose v Anne Marie Uralis Rose**, Sir Dennis Byron, CJ had this to say:

Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the Applicant for good and substantial reasons. The matters which the Court will consider are:

- (1) The length of the delay
- (2) The reasons for the delay
- (3) The chances of the matter succeeding if the extension is granted; and
- (4) The degree of prejudice to the Respondent if the application is granted.

In **Carleen Pemberton v. Mark Brantley**, Saint Christopher and Nevis HCVAP2011/0009 (delivered 14th October 2011, unreported Mde. Janice M. Pereira JA, as she then was, cited with approval of the above mentioned passage of Byron CJ and had this to say:

"In fact one of the earliest decisions on the ushering in of CPR 2000 is the case of **John Cecil Rose v Anne Marie Uralis Rose** a judgment of Byron CJ (as he then was) sitting also as a single judge in which he dealt with an application for an extension of time to appeal. This case, in my view, captures the essence of the exercise of the discretion with respect to application of this type and applications for extensions of time generally, (where no sanction is specified for failure)".

[49] The submissions then go on to consider the various considerations, as laid down in **John Cecil Rose v Anne Marie Rose**, to be applied by the court as follows:

- "32. The witness statements are integral to the Applicant/Claimant's case. Without the witness statements the Applicant could not proceed to advance its case and this would be fatal.
33. The circumstances to the Applicant would be dire as it would be deprived of the opportunity to reap the benefits of its agreement which was voluntarily entered into as between itself and the Respondent/Defendant.

The Applicant prays that this application may be granted".

[50] The following in the view of the court are the main points raise on behalf of the Applicant: Rule 26.1 (1)(r) gives the court the power to be exercise judicially; reliance is placed on a number of cases beginning with **John Cecil Rose v Anne Mari Uralis Rose** and which lay down the criteria to be applied in considering applications for extension of time: (a) length of delay; (b) reasons for delay; (c) chances of success of extension is granted (4) the degree of prejudice if the application is granted.

[51] As far as the applicant is concerned, the law has been satisfied and the amended notice of application should succeed. The validity or other side of this conclusion must await the analysis of the counter submissions on behalf of the 3rd defendant which are as follows:

"The length of the Delay

22. In this case the application was filed on the very day as the time limited for filing the witness statement was to have expired.
23. The Applicant submits that this delay was not inordinate.
24. The Applicant submits that the delay between the filing of the witness statements and the application for an extension of time within which to file said witness statements was minimal and in any event less than one day.
25. It is further submitted that the more critical question is whether the delay was excusable.

Reasons for the Delay

26. In the supporting affidavit of Jason Hamilton it gives the reasons for the delay at paragraphs 3 – 6 where he says:
 3. Until the 28th January 2013 I had conduct of this matter on behalf of my firm Hamilton & Co. which represents the Claimant Bank.
 4. I was totally aware that the 30th day of January 2013 was the day designated for me to file witness statements in this matter and I was prepared and ready to do so.
 5. On the 28th day of January 2013 my circumstances changed dramatically and I was no longer in a position to continue conduct of this matter. I sought hastily to put this aspect of my 'house' in order but it was challenging and almost impossible to have the said witness statements filed by the 30th day of January 2013. Instead I focused on making application to the Court for an extension of time so that the other member of my firm could regularize the matter subsequently.
 6. The application was made immediately after I became aware that the circumstances had changed going forward. I would be unable to have conduct of the matter"
27. The Applicant submits that the reason given by Hamilton in his affidavit represents a clear explanation of the reason why there was a delay.
28. It is further submitted that the reason put forward is a good and sufficient one.

The chances of the Applicant succeeding if the application is granted

29. The Applicant submits that the facts of the matter at bar are similar to those in the Antiguan case of *S. ROY MENDES v. TEXACO WEST INDIES LIMITED*, Civil Appeal No. 4/1986 and will rely on the judgment of the Court of Appeal and particularly the judgment of BISHOP CJ (Acting) who rendered the leading judgment”.

[52] As noted before, the matter of extension of time generally under **CPR 2000** is to be measured by four criteria: (1) length of delay; (2) reason for the delay; (3) chances of succeeding if the extension is granted; and (4) the degree of prejudice of the extension is granted.

[53] The above criteria were extensively examined in **John Cecil Rose v Anne Marie Uralis Rose**⁶, **Carleen Pemberton v Mark Brantley**⁷ and it must be fair to say that the principle of reasonableness permeates both decisions and must be applied hereto.

Length of delay

[54] It is common ground that the Case Management Conference was held on 9th October 2012 at which the, *inter alia*, witness statements.

[55] It is also common ground that the notice of application and the notice of amended claim form were filed on 30th January 2013 and 4th March 2013, respectively.

[56] There is hardly any doubt that on 12th October 2012 with the filing of the notice of discontinuance and thereafter the claimant would reasonably be aware of the need for amendments to the its statement of case. This was not forthcoming until 30th January 2013, being the same day on which the witness statements were required to be filed.

Reasons for the delay

[57] The absolute reason for the delay was the call to public service on 28th January 2013 of learned counsel in the matter. But this does more harm than good. This

⁶ Civil Appeal No. 19/2003 [SLU] declined 22nd September 2003

⁷ HCVAP 2011/009 [SKN] delivered 14th October 2011

rests on the fact that the Case Management Conference was held on 9th November 2012 – being more than two months prior. Further the maxim exists that **CPR 2000** outlawed one man practice and there ought not to be virtually last minute effort to get witness statements ready between 28th and 30th January 2013.

Chances of success

- [58] This criteria has already been dealt with under the other issue with the conclusion being that the changes are entirely negative.

Degree of Prejudice

- [59] The import of the notice of discontinuance has been examined and the degree of prejudice to the 3rd defendant is requested to bear. This is \$455,776.44 plus \$13,030.98 in interest at the date of the filing of the claim form. And this interest is fixed at 11% per annum.

Conclusion

- [60] Having regard to the foregoing, it is reasonable to conclude that the claimant has not satisfied any of the criteria relevant to Rule 26.1(2)(k) of **CPR 2000** so as to permit the court to grant the application.
- [61] Accordingly the application to extent time to file witness statements is refused.

ISSUES 3 & 4

- [62] These issues are respectively:
- (1) **Whether the claimant's former counsel should be at liberty to file and rely on his affidavit dated 27th February 2013 in connection with the application filed on 30th January 2013.**
 - (2) **Whether the claimant/applicant should be granted relief from sanctions.**

[63] In view of the prior negative determinations of the court regarding the application to amend the claim form and the granting of extension of time to file witness statements, these issues do not fall to be considered.

ISSUE 5

Whether the action as a whole can survive or dismissed.

[64] Central to this issue is the matter of the legal implications of the discontinuance of the action against the 1st and 2nd defendants and the position of the 3rd defendant in that context.

[65] It is therefore the determination of the court that the claim cannot survive and is accordingly dismissed.

Costs

[66] Given that the claimant's claim is dismissed Rule 65.5 and Appendices B and C of **CPR 2000** became operative, since the 3rd defendant would become entitled to prescribed costs.

[67] The value of the claim is \$408,807.40 and based on Appendix C the matter has reached the stage of "case management and up to and including listing questionnaire". This translates to mean 70% of the total costs on the value of the claim.

[68] The total costs on the value of claim is \$55,630.00 and 70% thereof is \$38,941.50.

ORDER

[69] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The Application to amend the claim form is refused for the following reasons

- (1) The affidavit in support filed by Kristyl Bristol did not satisfy the law and as such was struck out and as a

consequence the application is without evidence in support.

- (2) The proposed changes to the claim form were not filed as required by paragraph 2.2 of **Practice Direction 20**.
- (3) The claim form was filed in October 2012 at the present application was filed on 30th January 2013.
- (4) The applicant did not address the question of prejudice and the application was refused as required by **Practice Direction 20**.
- (5) Having regard to the fact of the notice of discontinuance against the 1st and 2nd defendants and the applicant's treatment of loan repayments and delinquency loan repayment there does not exist any reasonable ground for the amended claim form to succeed.

2. The applicant has not satisfied any of the criteria relevant to Rule 26.1(2)(k) of **CPR 2000** so as to enable the court an extension of time to file witness statements.
3. Having regard to the foregoing the matter of claimant's former counsel relying on his affidavit of 27th February 2013; and matter of granting of relief from sanction do not arise for consideration.
4. Having regard to the legal implications of the discontinuance against the 1st and 2nd defendants and the position of the 3rd defendant the claim is dismissed.
5. The claimant must pay the 3rd defendants costs in the amount of \$38,941.50.



Errol L Thomas
High Court Judge (Ag)