IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2004/0698

BETWEEN:

VALENTINE WINIFRED Administratrix of the Estate
Of her minor daughter NICOLE PIERRE (Deceased)

Claimant

AND

MR. JOSEPH CHARLES PRINCIPAL OF
MONGOUGE COMBINED SCHOOL, CHOISEUL

MINISTER OF EDUCATION, HUMAN RESOURCE
DEVELOPMENT, YOUTH AND SPORTS

THE ATTORNEY GENERAL

Defendants

Appearances:
Mr. Colin Foster for Claimant
Mr. Raulston Glasgow for Defendants

……..

2006: February 24
2007: May 15

……..

JUDGMENT

Mason J

[1] I need first of all to apologize for the delay in rendering this decision. After the matter was heard on 24th February 2006, the court's file went missing and only surfaced in late April, 2007.

[2] There is before the Court an application filed by the 3rd Defendant to have struck out the Claimant's claim on the ground that it fails to disclose the grounds for bringing the action against that Defendant.

[3] The action was begun by Claim Form and Statement of Claim filed on 24th September, 2004 against three (3) Defendants viz (1) Mr. Joseph Charles, Principal of Mongouge Combined School (2) the Minister of Education, Human Resource Development, Youth and Sports and (3) the Attorney General.

[4] The Statement of Claim reads:

1. *The Claimant is the mother and administratrix of the estate of her minor daughter Nicole Pierre (hereinafter referred to as the deceased) and brings this action on behalf of the deceased estate.*
2. *The claimant was granted Letters of Administration of the estate of the deceased out of the Eastern Caribbean Supreme Court Saint Lucia in the High Court of Justice on 25th August 2004 as LA No.SLUHLA2004/0175.*
1. *The first Defendant is and was at all material times the principal of Mongouge Combined School – Choiseul and at all material times the deceased who was enrolled as a student of the said School since 7th September 1998, was under the care and control of the first Defendant and*

under the supervision of the second Defendant and the deceased was owed a duty of care by all teaching staff at the said school, namely to treat the deceased child with reasonable professional care and skill. The said duty was owed to the deceased child whilst the deceased attended school.

2. *On or about 26th March 2004, at about 11:30 a.m. or thereabout the deceased was a participant in a sporting event the 'Marathon' organized by the said school when she met her untimely death in the course of her running during that event.*
3. *The said death of the deceased was caused by the negligence of the first and second Defendants.*

[5] The Statement of Claim then sets out the particulars of negligence which the Claimant alleges against the first and second Defendants and which it is not necessary to recount at this stage.

[6] The Defendants on 26th October 2004 filed application which was granted for an extension of time for filing and service of their defence. The Defence was subsequently filed on 30th November 2004.

[7] The Case Management Conference was held on 7th February at which both Counsel were present, and an Order was drawn up and filed by Counsel for the Claimant which by its first term read: *"That the claim against Defendants number 1 and 2 is withdrawn".* The trial of the matter was set for 17th October, 2005.

[8] At the Pre Trial Review on 14th July 2005, the Court made an Order for Defendant No. 2 the Minister of Education, Human Resource Development, Youth and Sports to be removed as a party to the proceedings and for the time for filing and service of Witness Statements to be extended to 9th September 2005.

[9] On 14th October 2005, the Defendant filed the present application for the striking out of the Claimant's Claim.

Submissions

By the Defendant/Applicant

[10] Counsel for the Defendant states that the basis of his application rests on the state of the Claimant's pleadings, that a perusal reveals that there are no pleadings in relation to the third Defendant, viz, the Attorney General, regarding the basis on which that Defendant is joined in the Claim. He contends that the claim against the first and second Defendant having been withdrawn at the case management stage and the Claimant not having sought an amendment to include in the Statement of Claim, the basis on which the Defendant is being joined, that the claim against the Attorney General cannot be sustained.

[11] Counsel relied on the text – Liability of the Crown by Peter Hogg and Patrick Monahan which traces the historical background to the Crown's liability in tort. Counsel made the point that in 1956 Saint Lucia enacted its Crown Proceedings Ordinance which by virtue of section 4 the Crown is made liable in tort in the same manner as private individuals.

[12] Counsel submits that since that Section only exposes the Crown to the same liabilities in tort that a private individual would face, any actions in tort against the Crown would attract the same principles both as to pleading the cause of action in tort against the Crown and as to the content of the law to establish liability. The only obvious difference is the fact that the Crown Proceedings Ordinance creates a nominal Defendant against whom these actions must be brought namely the Attorney General.

[13] Counsel also argued that if a Claimant wishes to bring suit in tort against the Crown, allegations of the manner in which it is sought to establish liability must be pleaded and proved in the same manner as if the Claimant were proceeding against a private individual. The Crown is otherwise entitled to rely on its immunity from suit.

[14] Counsel also argued that the mere joining of the Applicant/Defendant is not sufficient. The Applicant/Defendant's position is that it would be necessary to plead (i) the relationship between the Crown and the other Defendants; and (ii) the basis on which such a relationship renders the Crown liable in tort. If the claimant wishes to assert that the alleged tort was committed as a result of an express directive of the Crown, it would be even more imperative that the pleadings suggest the same. There is nothing in the pleadings in this case that offers any assistance to show the nature of the complaint against the Crown. All that is contended is that the tort was inflicted by the negligence of two individuals neither of whom is alleged to be the Applicant, its servants or agents in the course of their duties or that the Applicant ordered them to act in a manner which led to the damage forming the Claimant's action.

[15] Counsel next referred to Parts 8.6 (1) (a) and 8.7 (1) of the Civil Procedures Rules 2000 regarding the Claimant's duty to set out his case and cited a number of legal authorities to support his contention that the Court must look at the pleadings to see if there is some form of a case against the applicant. Counsel also referred to Part 26.3 (1) (d), by which the Court may strike out a statement of case if it does not comply with the requirements of Part 8.

[16] Counsel contended that under Part 20.1 (3) of the Rules, an application to amend after case management may only be allowed if there is a change in circumstances which only became known after case management and if the Claimant was permitted to this stage to amend his pleadings, such amendment would amount to the pleading of an action against the Crown which would now be prescribed under Articles 2124 and 2129 of the Civil Code taking into account that the claim first arose on March 2004.

[17] The Crown would then be entitled to rely on this defence by virtue of section 26 of the Crown Proceedings Act which stipulates:

This Act shall not prejudice the right of the Crown to take advantage of the provisions of an Act although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provision of any Act which could, if the proceedings were between subjects, be relied upon by the Defendant as a defence to the proceedings whether in whole or in part, or otherwise, may subject to any express provision to the contrary, be so relied upon by the Crown.

- by the Claimant/Respondent

[18] Counsel for the Claimant refutes entirely the representations by Counsel for the Defendant that there are no pleadings against the Attorney General, suggesting that Counsel for the Defendant is attempting to introduce a technicality to avoid the matter.

[19] Counsel states that at the Case Management Conference, Defendants one and two were removed because it was felt that they were not necessary since Defendant three "stood in the shoes of " Defendants one and two who were its agents and / or servants. Counsel also stated that at Case Management, Counsel for the Defendants had the opportunity to bring this same application but never did and in any event, the Attorney General is always joined as a nominal party having been so created by section 4 of the Crown Proceedings Act. He also stated that the Master was not asked to decide this point nor to exercise his authority under Part 26.3 of the Civil Procedure Rules to strike out the matter.

[20] Counsel states that at the Pre Trial Preview, again there was no order made for the matter to be struck out but only for Defendant number two to be removed as a party, the inference being that Defendants one and three should remain. Counsel contends that the pre trial review order had not been appealed against and that if Counsel for the Defendants were unsure, there should have an application for directions.

[21] Counsel submits that the practice and procedure since the inception of the Crown Proceedings Act is that the servants or agents of the Crown are always cited as a Defendant with the Attorney General also cited as a nominal party. He rejects Counsel for

the Defendant's contention that negligence must be pleaded against the Attorney General or the Crown. He submits that such interpretation of section 4 of the Act is a misunderstanding on the part of Counsel for the Defendants. In the premises, he contends, the pleadings are in order except for the minor amendment which is required to remove the second Defendant from mention in the pleadings.

[22] With respect to Counsel for the Defendant's argument for the matter to be prescribed, Counsel contends that the claim was filed within the Statutory period and all procedural rules compiled with A request for amendment would be within the court's discretion, for the rule that an amendment is restricted after the Case Management Conference is not a rule "set in stone" and the Court can move to take into account the overriding objectives of the Civil Procedure Rules to facilitate justice. In this respect Counsel cited the case of Royal Bank of Canada v Bennetton (St. Lucia) Ltd and Another N0 143 of 1995 in which Matthews J referred to Lord Atkin's statement in Evans v Barthem that " a failure to follow the rules of procedure is not to debar a Defendant from seeking judgment on the merits".

[23] Counsel also submitted that an application to amend pleadings which indeed has been allowed even close to the end of civil trials and before judgment, cannot by any stretch of the imagination be seen or taken as an application in which an attack can be made by the opposing party that the proceedings are out of the time limitation period. This point has been expressly made in the case of Jumbo Motors Express Limited v Francois Noli Ltee, Supreme Court of Canada 1984: December 20 1995: April 24.

[24] Counsel also referred the Court to the case of Three Rivers District Council v Governor and Company of the Bank of England (2001) UK HL 16 in which it was stated "that it is a case that should be examined and tested with procedural advantages of a fair and public trial" and "the interests of justice require that the entire action should be permitted to go to trial".

Findings

[25] Counsel for the Claimant in his written submissions sought to trace the history of the matter to relate what transpired at the Case Management Conference. It is my view however that this court cannot be expected to look behind the order of the Master at case management to determine why the Master gave the order that he did. Similarly although the Court is concerned at the disparity in the order given at pre trial review with the order given at case management, the Court cannot be expected to delve into the reason why this particular order was given. It should be noted that both Counsel were present on each occasion. Determination of any dissatisfaction with the order of the Master or of the High Court is solely within the jurisdiction of the Court of Appeal. There is no appeal of either order on record.

[26] Hence it must be stated that the pretrial review order made on 14th July 2005 that the second Defendant be removed as a party to the proceedings is the one which determines for this Court the status of the matter. Consequently the action will proceed against the first and third Defendants. If the Court had intended that Defendant number one be removed as well, it surely would have said so.

[27] That having been said, it still stands to be determined whether as argued by Counsel for the Defendants that no cause of action has been disclosed against the third Defendant or that this is not necessary as argued by Counsel for the Claimant, the third Defendant being merely joined as a nominal party.

[28] The second issue to be determined is whether an amendment could be made thereby curing any defect in the statement of claim or whether an amendment would signify a new cause of action which would in turn cause the action to be prescribed.

The Striking out Action

{29] Section of the Crown Proceedings Act provides:

[30] *Liability of the Crown in Delict*

> *(1) Subject to the provision of this Act, the Crown shall be subject to all those liabilities in delict or quasi-delict to which, if it were a private person of full age and capacity, it would be subject-*
>
> *(a) in respect of delicts or quasi-delicts committed by its servants or agents;*
>
> *(b) in respect of any breach of those duties which a person owes to his or her servants or agents under the Civil Code by reason of being their employer; and*

(c) in respect of any breach of the duties attaching under the Civil Code to the ownership, occupation, possession or control of prosperity

However, proceedings shall not lie against the Crown by virtue of paragraph

(a) in respect of any act or omission of a servant or agent of the Crown

unless the act or omission would apart from the provision of this Act have given rise to a cause of action in delict or quasi-delict against that servant or agent or his or her estate.

(2) Where the Crown is bound by a statutory duty which is binding also upon person other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject, to all those liabilities in delict or quasi-delict (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer if the Crown as such by any enactment having the force of law in Saint Lucia and that officer commits a delict or quasi-delict while performing or purporting to perform those functions, the liabilities of the Crown in respect of such delict or quasi-delict shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.

(4) Any enactment which negatives or limits the amount of the liability of any Government Department or officer of the Crown in respect of any delict or quasi-delict committed by the department or officer shall, in the case of proceedings against the Crown under this section in respect of a delict or quasi-delict committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer.

(5) Proceedings shall not lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested to him or her, or any responsibility which he or she has in connection with the execution of judicial process.

(6) *Proceedings shall not lie against the Crown by virtue of this section in respect of any act, neglect or default of any officer of the Crown, unless that officer has been directly or indirectly appointed by the Crown and was at the material time paid in respect of his or her duties as an officer of the Crown wholly out of the general revenue of Saint Lucia.*

[31] Both parties accept that the Crown by virtue of this section is liable in tort in the same manner as a private individual and is therefore responsible for any delicts/quasi delicts committed by its servants or agents. Article 986 of the Civil Code in part provides that

Masters and employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed. Both parties accept also that the Act creates in the Attorney General a nominal defendant against whom such actions must be brought. By Section 13 (2) of the Crown Proceedings Act it is provided that:

> *"Civil proceedings against the Crown shall be instituted against the Attorney General".*

[32] Now part 8.6 (1) of the Civil Procedure Rules 2000 states what must be included in the claim form:

> *(7) The Claimant must in the claim form-*
>
> *(a) include a short description of the nature of the claim*
>
> *(b) specify any remedy that the Claimant seeks; and*
>
> *(c) give an address for service in accordance with rule 3.11*

[33] Part 8.7 stipulates that it is the duty of the Claimant to set out his case and by paragraph(1) that:

> *The Claimant must include in the claim form or in the statement of claim a statement of all the facts on which the Claimant relies:*

[34] The purpose of pleadings is to make the issues clear as to what is being litigated before the court. The parties have to be properly identified and the issues clarified. Pleadings

are required to mark out the parameters of the case that is being advanced by each party. In particular they are critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: Lord Woolf MR in Mc Philemy v Times Newspapers Ltd (1999) 3AER 775.

[35] Thus where civil proceedings are commenced against the Crown which according to the Crown Proceedings Act is similar to a private individual in cases of tort committed by its servants or agents, the Statement of Claim must include a statement of the circumstances in which the Crown's liability is alleged to have arisen and as to the government department and the officers of the Crown concerned.

[36] The third paragraph of the Statement of Claim reads:

> *"The first Defendant is and was at all material times the principal of Mongouge Combined School- Choiseul and at all material times the deceased who was enrolled as a student of the said School since 7th September 1998, was under the care and control of the first Defendant and under the supervision of the second Defendant and the deceased was owed a duty of care by all teaching staff at the said school, namely to treat the deceased child with reasonable professional care and skill. The said duty was owed to the deceased child whilst the deceased attended school".*

[37] Paragraph 5 states:

"The said death of the deceased was caused by the negligence of the first and second Defendants".

[38] What can be determined from a reading of the relevant paragraphs of the Statement of Claim quoted above is that the first and second Defendant are bound together in a relationship with the Claimant, a relationship which would make them liable for the negligence resulting in the death of the deceased if such negligence can be proved. What cannot however be determined from the Statement of Claim is a relationship between these two Defendants i.e. the first and second Defendant, and the third Defendant whether master and servant or whether Crown and its servants and/or agents, to make the third Defendant responsible for the acts of the first and second Defendants in relation to the deceased. Such relationship must be specifically pleaded in order to make the third Defendant liable. In maintaining these views the Court is still mindful of the fact that the second Defendant has been removed as a part to the proceedings.

[39] I accept the submission by Counsel for the Defendants that a mere joining of the third Defendant to the action is not sufficient and accordingly reject the contention by Counsel for the Claimant that the Attorney General need only be joined as a nominal party and that there need not be any pleading against him. Even as a nominal party there needs be established a nexus between the Crown and the other Defendants as well as the basis on which that connexion renders the third Defendant liable to tort. No person can be a Defendant unless the plaintiff claims some relief against him: see Halsbury's Laws 4th edition volume 37 paragraph 217 citing Deutsche National Bank v Paul (1890) 1Ch 283. The proper Defendant in an action for the tort of negligence is the wrongdoer or the

person who is liable for the acts of the wrongdoer or to whom the liability for the injury has passed. In addition the Court will have to decide the case as between the parties before it and in order to succeed, the Claimant must establish the liability of the Defendant to him: Adams v Naylor (1946) AC 543; Royster v Cavey (1947) KB 204.

[40] Part 26.3 provides for the striking out of a statement of case:

> *(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –*
>
> *(a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings*
>
> *(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;*
>
> *(c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or*
>
> *(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.*

[41] Lord Woolf MR in Biguzzi v Rank Leisure plc (1999) 1 WLR 1926 stated:

Rules of Civil Procedure confer a very wide discretion upon judges to strike out statements of case. It made it clear however that while judges should not tolerate infringements or defaults and should act at the instance of counsel or on their own initiative to prevent default in pleadings or to curtail unnecessary delay, they should not be too strident in taking the draconian steps of striking out cases.

[42] It seems clear therefore that it is only where a statement of case does not amount to a viable claim or defence or is beyond cure that the court may strike out. Justice to the parties in all of the circumstances should be the aim of the judicial role in this regard.

[43] I am satisfied that there is no cause of action pleaded against the third Defendant nor any material facts which would support a cause of action against him, and at this point the Claimant having not proved that the first Defendant is the servant or agent of the third Defendant nor the liability in negligence of the third Defendant the claim against the third Defendant ought to be struck out.

[44] However regard must be had to the conduct of Counsel for the Defendant in the handling of the Defendants' case. While not looking behind the reason for the disparate orders from the Master and the High Court, I am prepared to accept Counsel for the Claimant's argument that Counsel for the Defendants neglected and or refused to raise the present application when the opportunity arose and can be determined to have acquiesced in the jurisdiction of the Court. It is the duty of every litigant to bring forward his whole case at

once and not to bring it forward piecemeal as he found out the objections in his way: In re New York Exchange Ltd (1888) 39 Ch. 1) 415

[45] In Garthwaite v Garthwaite (1964) 2WLR 1108, Diplock LJ had this to say with respect to the connotation of the Court's jurisdiction: Part 9.6 of CPR states:

> *"The High Court is the creation of statute, and its jurisdiction is statutory……. In the narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense) or as to the circumstances in which it will grant a particular kind of relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.*

[46] Part 9.6 of CPR states :

> *A Defendant who files an acknowledgement of service does not by doing so lose any right to dispute the Court's jurisdiction".*

But by Part 9.7 (5) it is provided that:

A Defendant who –

(a) files an acknowledgement of service; and

(b) does not make an application under this rule within the period for filing a defence;

is treated as having accepted that the court has jurisdiction to try the claim

[47] Blackstone's Civil Practice 2004 at paragraph 19.4 indicates that acknowledging service does not affect any right the Defendant might have to contest the jurisdiction of the court but taking any step in the claim other than acknowledging service and applying to contest the court's jurisdiction is extremely dangerous. Any such actions may constitute a voluntary submission to the jurisdiction. Blackstone goes on to say: "It was held in the case of Monrose Investments v Orion Nominees (2001) LTL 3/8/ 2001 (sub nom Montrose Investments v Orion Nominees (applying Sage v Double A Hydraulics Ltd (1992) The Times 2nd April, 1992 that applying for an extension of time for service of a defence without any reference to an intention to contest the jurisdiction constituted a submission to the jurisdiction".

[48] In the present case it should be noted that there were similar circumstances. After filing of the acknowledgement of service, Counsel for the Defendants applied for and was granted an extension of time to file and serve the defence, and as can be seen never challenged the court's jurisdiction whether in its narrow and strict or its wider sense to hear the matter

[49] And so based on these findings I hold that the application by the Defendant must be dismissed.

Amendment to the Statement of Case

[50] The evidence reveals that no amendment was ever requested by Counsel for the Claimant whether at or subsequent to the case management or before this application to strike out the claim against the third Defendant but Counsel for the Claimant contends that the rule that an amendment after case management is restricted is not a rule "set in stone" but that the Court can take into account the overriding objectives of the Rules.

[51] Brett MR in Clarapede and Co v Commercial Union Association (1883) 32 WR 262 at 265 said:

> *The rule of conduct of the court ....is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.*

[52] See also Lord Griffiths in Ketterman v Hansen Properties (1988) 1 AER 38:

> *Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies .....*

Many and diverse factors will bear on the exercise of this discretion .....a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants

[53] Again quoting Blackstone – op. cit. paragraph 33.10 – the court may allow a party to amend rather than striking out but the power to amend will be exercised in accordance with the overriding objective and this may militate against giving permission depending on the circumstances of the case. An amendment should only be permitted as an alternative to striking out if there is a real prospect of establishing the amended case: Charles Church Developments plc v Cronin (1990) FSR 1; Saving and Investment Bank Ltd v Fincker (2001) The Times 15 November 2001.

[54] The overriding objectives of the CPR is to enable the court to deal with cases justly.

[55] Dealing justly with the case includes:

(1) Dealing justly with the case includes:

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

(b) saving expense;

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

(i) amount of money involved

(ii) importance of the case;

(iii) complexity of the issues; and

(iv) financial position of each party

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

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

[56] Part 1.2 states how the overriding objective must be applied:

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

[57] Part 20 CPR sets out very clearly what the procedure is regarding amendments to statements of case. By Part 20.1 it is provided:

(1) A party may change a statement of case at any time before the case management conference without the court's permission unless the change is one to which –

(a) rule 19.4 (special provision about changing parties after the end of a relevant limitation period); or

(b) rule 20.2 (changes to statements of case after the end of a relevant limitation period); applies

(2) An application for permission to change a statement of case may be made at the case management conference

(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some changes in the circumstances which became known after the date of that case management conference.

(4) ……..

(5) ……..

[58] While it is accepted that a judge has a discretion in granting amendments, I am of the opinion that that discretion within the context of Part 20'3 (3) is not an unqualified discretion. The meaning of that rule is very plain, Unless the stipulations contained in the rule are satisfied, viz :

(1) that the court can be satisfied;

(2) that the amendment is necessary;

(3) that there is a change in circumstances; and

(4) this change became known after the case management conference

then it would appear that the court does not have the power to act.

[59] Counsel for the Claimant has not brought to the attention of the court any "change in circumstances" which came to light after the case management conference which would serve to move the court to grant the amendment for, quoting Blackstone op . cit para 31.8:

The modern approach is flexible with amendments being granted in accordance with the justice of the case. Counsel merely seeks to rely on the overriding objective but in the words of May LJ in Vinos v Marks and Spencer plc (2001) 3 AER 784:

> *Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored.*

[60] See also Peter Gibson LJ in the same case:

> *(a) the construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in part 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1 (2) of the work "seek" acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischief which the C*PR were intended to counter were excessive costs and delays. Justice to the Defendant and to the interests of other litigants may require that a Claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried.

A principle of construction is that general words do not derogate from specific words. Where there is an unqualified specific provision, a general provision is not to be taken to override that specific provision.

[61] It would seem therefore that this court is constrained from granting the amendment.

Conclusion

[62] Having regard to the foregoing, it is the decision of this court that both applications will be denied: the application by the Defendant to have the Claimant's statement of case struck out and the application by the Claimant for an amendment to the statement of case.

[63] The legal authorities seem also to suggest that pleadings of negligence and whether they can be sustained can only be determined by a trial where both the facts and the law will be ventilated. Therefore in order to serve the ends of justice, the case will be restored to the cause list so that it may proceed to trial.

[64] Further a decision having been given in favour of each side, each party will bear their own costs.

ORDER

Applications dismissed

Trial date set for 8th April, 2008

No order as to costs

SANDRA MASON Q. C.

High Court Judge