IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2005/0409

BETWEEN:

LIBERTY CLUB LIMITED

Claimant

AND

THE BEACON INSURANCE COMPANY LIMITED

Defendant

Appearances:

Mr. Leslie Haynes, Q.C. and Mr. James Bristol, instructed by Ms. Dia Forrester for the Claimant
Mr. Karl Hudson-Phillips, Q.C and Ms. Jennifer Hudson-Phillips, instructed by Mr. Neil Noel for the Defendant
Mr. Darshan Ramdhani for the Attorney-General

2010: March 8,
November 22

DECISION

[1] **PRICE FINDLAY, J.:** There are two applications before the Court for consideration; one filed on the 18th November 2009, and the other filed on the 25th November 2009.

[2] The first application reads as follows:

> "The Claimant applies to the Court for an order that it be permitted to amend its Reply in order to plead as follows:
>
> (a) that the Defendant by requesting the Claimant to provide a detailed claim and not a claim referred to in Condition 11(b)(i), that is, one with particulars which are reasonably practicable, has waived strict compliance with the said condition;

(b) that further, the Defendant by requesting the said detailed claim could only expect the Claimant to provide such a detailed claim within a reasonable time and the time limit of the 30th of November 2004 was not a reasonable time."

[3] The second application reads as follows:

> "The Claimant, Liberty Club Limited, of Point Salines in the parish of Saint George applies to the Court for an order that it be at liberty to amend its Statement of Claim as appears on the schedule hereto ("the Schedule").

[4] The first application is supported by the affidavits of James Bristol, dated the 18th day of November 2009 and 10th December 2009. There are two affidavits in opposition, the first filed by Neil Jude Noel on 25th November 2009, and the second filed by Adebayo Olowu dated 3rd December 2009.

[5] In support of the application, Mr. Bristol in his 18th November affidavit at para 2 states,

> "In or about June 2008 whilst preparing the pre-trial memorandum, it became evident that the Defendant may have waived restrict compliance with condition 11(b)(i) of the policy of insurance as appears in the Claimant's Pre-Trial Memorandum."

[6] He goes on to state in para 3 of the said affidavit that,

> "The Claimant raised these issues in Article 10 of the witness statement of Mr. Leon Taylor filed on the 30th of June 2008."

[7] At para 4, he states,

> "Although the need to specifically plead these matters became apparent when I was preparing the Pre-Trial Memorandum, CPR Part 20.1 prevented an amendment."

[8] At para 5, he states,

> "Whilst preparing for trial, on the 17th of November 2009, I formed the opinion that the restriction imposed by CPR 20.1(3) may be unconstitutional in that it denies the Claimant in these circumstances a right to a fair hearing guaranteed by section 8(8) of the Constitution."

[9] He further states that the issue of compliance with Condition 11 of the insurance policy "is central to the success of the Claim and to deny the Claimant the right to rely on these grounds on a mere pleading point will be potentially fatal to its Claim and disproportionately prejudicial to it."

[10] The Defendants have opposed the application, citing CPR Part 20.1(3), which states,

> "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 change in the circumstances which became known after the date of that case management conference."

[11] They assert that there has been no change in circumstances which became known after the case management conference. In fact, the Claimant/Applicant do not disagree with this. They admit that there has been no change of circumstances which became known after the case management conference.

[12] The Defendants also oppose the application on the ground that it is not permissible for the Court to seek for the first time to introduce fresh matters in its Reply or to raise matters not pleaded in the Amended Defence.

[13] The Claimant/Applicant also seek to say that CPR 20.1(3) is unconstitutional as it violates section 8(8) of the Grenada Constitution, which states:

> "(8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person

before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

[14] They assert that to not allow the amendment which they seek "may be unconstitutional" so as to deny the Claimant a fair hearing in the matter.

[15] The Attorney-General, on whom the documents were served by Order of the Court, also objected to the application and in its affidavit stated that CPR 20.1(3) was not unconstitutional and raised a procedural issue as to how the Claimant approached the Court on the constitutional issue.

[16] Mr. Bristol, in his final affidavit filed on 10th December 2009, set out the chronology of events and admits that the Claimant in their reply did not raise the issue of waiver, and notes that the issue of waiver cannot be argued if it has not been pleaded.

[17] He asserts that the "restriction imposed by CPR 20.1(3) may infringe the Claimant's right to a fair hearing and "equality of arms" guaranteed by section 8(8) of the Constitution of Grenada."

[18] Mr. Haynes, Q.C., in his arguments said to the Court that there are two issues – "1. You can go for an outright argument saying CPR 20.1(3) is unconstitutional. Alternatively, the Court may find that in the particular circumstances of this case, Rule 20.1(3) would not apply, because in applying 20.1(3) the right to a fair trial would be breached."

[19] As I indicated previously, Mr. Haynes, Q.C., conceded that the Court had no power to grant the amendment sought under CPR 20.1(3) in the first application in that there had been no change in circumstances but that the Court should consider whether the Rule may be unconstitutional as it offends against the right of access to this Court.

[20] He argued that the overriding objective of the CPR should be applied. Rule 1.1 states:

"(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
(2) Dealing justly with the cases 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 issue; 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."

[21] Mr. Hayne, Q.C., argued that CPR 20.1(3) had to bow or give way to section 8 (8) of the Constitution.

[22] The first Case Management Conference was held on the 10th October 2006.

[23] The Claimant contends that it only became aware of the need to plead waiver in June 2008, but did not apply for the amendment due to CPR 20.1.

[24] The Claimant concedes that this Rule has been interpreted strictly, limiting amendments to the conditions stated within the rule.

[25] In the well known case of **Ormiston Ken Boyea and Hudson Williams v Caribbean Flour Mills Ltd.** Civil Appeal No. 3 of 2004, D' Auvergne JA (Ag.) considered the provisions of CPR 20.1(3) and stated:

> "The discretion of the Court to permit changes to the Statement of Claim has to be considered with reference to CPR 20.1(3). It is, in my view, that the overriding objective cannot be used to widen or enlarge what the specific section forbids ..." The section constrains the Court from exercising the power to permit amendments ... except where certain conditions are satisfied."

[26] In **Winston Padmore v James Morgan** CV No. 277 of 2006, Justice Dean Armore held:

"The conjoint effect of my finding and Part 20.1(3) is that the Court is enjoined from granting leave to amend unless there has been a change in circumstances. In so far as it has been accepted on all sides that there has been no change of circumstances, I must consider whether I hold an inherent discretion to depart from the provisions of Part 20.1(3). Alternatively, I must consider whether I am required by the overriding objective to bend the rule and grant leave to amend ...

The overriding objective does not come to the rescue of the Defendant. According to D' Auvergne JA the overriding objective does not in or of itself empower the Court to do anything or grant to it any discretion residual or otherwise ...

When considering an application for leave to amend a Statement of Case, the Court must exercise its discretion in accordance with Part 20.1. The instant application was made at a Pre-trial review. Because there is no allegation that the application was motivated by a change in circumstances, I am constrained to refuse leave to amend."

[27] Counsel argued that there must be equality of arms and that it was the Court's task to determine whether the Claimant was put to a disadvantage by CPR 20.1(3).

[28] In the case of **Capital Bank International Ltd. v Eastern Caribbean Central Bank and Sir K. Dwight Venner** - Civil Appeal Nos. 13 & 14 of 2002, Byron CJ looked at section 8(8) of the Grenada Constitution and stated:

"10. (a) Although the section does not confer the right of access to the courts in express terms it is generally accepted that it does.

(b) Proceedings must be instituted or be likely to be instituted before the provision comes to life.

(c) Although the section is not subject to express limitations all rights are subject to the rights of others and the public interest whether expressly stated or inherent or implied.

(d) It is a right for the determination of the existence or extent of any civil right or obligation. Therefore unless such a determination is invoked the provision cannot be relied on."

[29] "11. The principles on which constitutional provisions are interpreted include reference to the meaning attributed to the sources of these provisions. The high ideals and principles in section 8(8) of the Constitution are part of the fundamental rights and freedoms, which have sought to entrench and guarantee that citizens enjoy the rights and dignity associated with humanity in a democratic society. These rights fit into universal patterns.

12. In this case, section 8(8) of the Constitution is derived from section 6(1) of the European Convention of the Protection of Human Rights. The linkage between this Constitution and international norms for the protection of human rights and fundamental freedoms was expressed in the **Minister of Home Affairs v Fisher** (1979) 3 A.E.R 21 at p. 25 in the well known words of Lord Wilberforce:

> "Chapter 1 is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred. Section 11 of the Constitution forms part of Chapter 1."

13. Section 6(1) of the European Convention has been construed by the European Court of Human Rights. This has been adopted in the participating stats and should inform the meaning that we give to section 8(8) of the Constitution. The fact that it is regarded as conferring a right of access to the court which is subject to limitations was explained, in terms that I adopt and apply, by Lord Bingham in **Brown v Stott** (PC) (2001) 2 W.L.R. 817 at 826:

> "Article 6 contains no express right of access to a court, but in **Golder v United Kingdom** (1975) 1 EHRR 524, 536, para 35 the European Court held that it would be "inconceivable" that article 6 should describe in detain the procedural guarantees afforded to

parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court. The court added, at p. 537, para 38:

> 'The court considers, accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication.'

This expression of view was repeated in **Ashingdane v United Kingdom** (1985) 7 EHRR 528, 546, para 57, where the court ruled:

> 'Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access, 'by its very nature calls for regulations by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals'. In laying down such regulation, the contracting states enjoy a certain margin of appreciation. Whilst the final decision as to observance of the convention's requirements rests with the court, it is no part of the court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field.'

> These principles were repeated in **Fayed v United Kingdom** (1994) 18 EHRR 393, 429, para 65; and in **Tinelly & Sons Ltd. v United Kingdom** (1998) 27 EHRR 249, 288, para 72, the court said that while the right of access to a court might be subject to limitations:

> > 'The final decision as to the observance of the Convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Art. 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship

> of proportionality between the means employed and the aim sought to be achieved.'
>
> The court's judgment **in National and Provincial Building Society v United Kingdom** (1997) 25 EHRR 127, 178, para 105 was to the same effect. Restrictions on the access to court of other potential litigants have also been recognized in the cases of minors (**Golder** at para 39) vexations litigants (**H v United Kingdom** (1985) 45 DR 281) prisoners (**Campbell and Fell v United Kindgom** (1984) 7 EHRR 165) and barıkrupts (**M v United Kingdom** (1987) 52 DR 269): see **Clayton and Tomlinson**, the Law of Human Rights, p. 640, para 11.191."

[30] The right of access to the courts must be exercised in conjunction with the rules which govern the conduct of civil trials. Those rules are encompassed within the CPR 2000.

[31] I find that in this case, the prohibition contained in CPR 20.1(3) has a legitimate objective. The Court is of the view that the Claimant has a right to a fair hearing within a reasonable time. The Rules deal with an integral part of the right to a fair hearing, that is, the right of access to the Court.

[32] "Access to the Court is not an absolute right. Restrictions to that access are permitted but only insofar as they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim which is sought to be achieved." This is set out clearly in Byron CJ's judgment in the Capital Bank case cited earlier.

[33] When one examines the overriding objective of the CPR, they are for the just disposition of matters. It is to ensure that the parties are on equal footing at all times during the course of proceedings. Further, it clearly states that matters are to be dealt with expeditiously.

[34] The right of access to the Courts has to be read in conjunction with the CPR. A fair hearing means in accordance with the Rules of Court. Parties have to bring themselves within the ambit of the Civil Procedure Rules; one cannot ignore the

rules and then seek to set the Rules against the Constitution and claim that they are being denied access to the Court.

[35] One of the legitimate aims of the CPR 2000 was to counter excessive costs and delays. Edward JA in **Goldgar & Ors v Baird**, Civil Appeal No. 13 of 2007, stated:

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

[36] And further, Barrow JA in **Thomas v RBTT**:

> "Litigants and lawyers must now accept that CPR 2000 has gone **significantly further** than the English rules in the hardening of attitude towards the lax practice that previously prevailed in relation to setting aside ..."
>
> "The adherence to the time table provided by the Rules of Court is essential to the orderly conduct of business ..."
>
> **"If the pre conditions are not satisfied, the Court has no discretion to set aside."** (Emphasis mine)

[37] While Barrow JA was referring to an application to set aside, the principle is applicable to the issue before this Court.

[38] In **Ferdinand Frampton v Ian Pickard** and other appeals, Civil Appeal No. 15 of 2005 (Dominica), the Court stated:

> "In the circumstances of this case and in view of its public importance, it is appropriate, at the juncture to state the fundamental premise that there are rules that govern the grant of an extension of time. The Court cannot grant an extension of time purely as a matter of discretion. The Court can only do so in accordance with the rules that are laid down. Not even in a case of the utmost public importance can the Court overrule the rules because in a particular case the Court thinks it fair or reasonable or appropriate or just to do so ..."

[39] It went on:

> "The due application of the rules, therefore, is itself of the utmost public importance because those rules and their due application are the basis upon which opposing parties to litigation are entitled to and must expect their dispute to be determined."

[40] Counsel for the applicant urged that the need to do justice between the parties and the need to deal with the parties justly outweighs the harm suffered in the administration of justice. But, given the circumstances of this case, Counsel for the Claimant ought to have realized with careful consideration of the facts and circumstances of this case that waiver was an issue which ought to have been pleaded. This factor ought to have been front and centre for the claimant, given the slant of their claim. For them to have only come to this realization the day before trial is not a suggestion that finds favour.

> "Every party must be afforded a reasonable opportunity to present his case, including his evidence under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."

[41] The English rules are distinct and different from the CPR. Those of the OECS and Trinidad & Tobago have made the effort to change the way in which civil proceedings are conducted, by seeking to have the parties set out their cases long before the parties go to trial.

[42] This aim would be defeated if parties are of the view that they can always seek amendments to their statements of case at any time during the course of proceedings.

[43] I find that "the right of access to the Court is not absolute but may be subject to limitations at the discretion of the national authority provided these are not of such a degree as to impair the essence of the right, they are for a legitimate aim and are reasonably proportionate to that aim."

[44] The aim of the CPR is to streamline the conduct of matters before the Court. All parties who come before the Court are subject to the same rules, and must abide by them therefore, there exists equality of arms.

[45] The rules do have legitimate aims, these being the efficient, uniform and consistent method of dealing with matters which come before the Court.

[46] I adopt learned Queens Counsel Karl Hudson-Phillips's view, that "the rationale for the particular rule is because of what is perceived to be an unnecessary permissiveness in the way we were conducting our litigation in the Caribbean ..."

[47] "Rule 20.1(3) introduced a new test which an applicant must meet if he wishes to amend a statement of case after the first Case Management Conference. This represents a radical departure from the former law and practice, and the wide latitude previously enjoyed to amend (with or without leave) no longer applies, so it is well for practitioners to bear in mind the attention that courts will now give to statements of case (including defences) an early stage of the proceedings. I say so despite the use of the word 'may' instead perhaps of the word shall". The former may appear to alleviate the harsh effect of the Rule by opening the door of discretion, but if it does so then it is only to allow a court a discretion in deciding what might constitute the appropriate change in circumstances, not whether any ground exists on which to permit a change to be made.

There is little assistance in interpreting Rule 20.1(3) (or Rule 10.6) from the English cases simply because they are based on Rules which are materially

different to ours. In this respect, our CPR may be perhaps regarded as draconian, but it is entirely in keeping with the philosophy that a party must put its case fully and clearly to the other at a very early stage of the proceedings. This requirement is what sets the stage for the first Case Management Conference and underpins the future conduct of the case to its finality. If a party does not fulfill this requirement, then the objective of the Case Management Conference are stymied, the progress of the matter delayed, and the cost increased – all contrary to the overriding objective of the CPR." - **Mallalieu v The Mayor, Alderman and Citizens of the City of Port-of-Spain**.

[48] The Court has no discretion to allow an amendment to pleadings after the first Case Management Conference, and cannot apply the overriding objective to dilute a directive in the Rules.

[49] I find that CPR 20.1(3) has a legitimate aim, that being the aim in seeing that the overriding objective of the Rules is satisfied, that is, dealing justly with cases, seeing the parties are on equal footing, ensuring expeditious dealing with matters, and saving expense.

[50] I also find that CPR 20.1(3) does not offend s. 8(8) of the Constitution of Grenada, in that it does not act to deny any party the right of access to the Court, but merely lays down the procedure by which the party ought to approach the Court.

[51] For the reasons stated above, the application dated 18th November 2009 is denied.

[52] With respect to the application dated 25th November 2009, I find that there has been a change in circumstances since the first case management conference, and will allow the amendment sought in that application.

[53] On the first application, I would award costs to the defendant and the Attorney General to be assessed if not agreed.

[54] I would make no order as to costs on the second application.

[55] The following cases and authorities were cited:

1. **Gordon Lester Brathwaite & anor. v Anthony Potter & anor.** Civil Appeal No. 18 of 2002 (Grenada)
2. **Fuller (Doris) v Attorney-General** [1998] 56 WIR 337
3. **Richard Frederick & anor v Comptroller of Customs & anor.** Civil Appeal No. 37 of 2008 (St. Lucia)
4. **Apostol v Georgia** [2006] ECHR 999
5. **Waite and Kenny v Germany** [1999] ECHR 13
6. **David Goldgar et al v Wycliffe H. Baird** Civil Appeal No. 13 of 2007 (Saint Christopher & Nevis)
7. **Kenrick Thomas v RBTT Bank Caribbean Ltd.** Civil Appeal No. 3 of 200 (St. Vincent & the Grenadines)
8. **Ferdinand Frampton v Ian Pickard** Civil Appeal No. 15 of 2008 (Commonwealth of Dominica)
9. **Bernard Prospere & anor. v Althea Lynch & anor** Claim No. SLUHCV2007/0619 (St. Lucia)
10. **Charlesworth v Relay Roads Ltd.** [2000] 1 WLR 230
11. **Clarke v Marlborough Fine Art (London) Ltd. & Anor.** [2002] 1731
12. **East Caribbean Flour Mills Ltd. v Ormiston Boyea & anor.** Civil Appeal No. 3 of 2004 (Saint Vincent & the Grenadines)
13. **First Caribbean Int'l Bank (B'dos) Ltd. v Laurel Thomas-Egan** Claim No. ANUHCV2005/0497 (Antigua & Barbuda)
15. **Mallalieu v The Mayor, Alderman & Citizens of the City of Port-of-Spain** Claim CV2006-00386 (Trinidad & Tobago)
16. **R v Lord Chancellor, ex parte Witham** [1997] 3 LRC 349
17. **Seebalack v Bernard** Civil Appeal 261 of 2008 (Trinidad & Tobago)
18. **Vinos v Marks & Spencer PLC.** [2001] 3 All ER
19. **Woods v Chaleff & Ors.** [1998] EWCA Civ 1522
20. **Dombo Beheer B.V. v The Netherlands** [1994] 18 EHRR 213
21. **R v Secretary of State for one Department ex p Quinn** [1999] Times 17 April

22. **Ashingdane v United Kingdom** [1985] 7 EHRR 528
23. **Julie Ann Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074
24. **Goode v Martin** [2002] 1 WLR 1828
25. **White Book 1995 Vol. 1** p.371
26. **White Book 2006 Vol. 1** p.403
27. **English Civil Procedure Fundamentals of the New Civil Justice System** by Neil Andrews pp.178-179
28. **Eastern Caribbean Supreme Court Civil Procedure Rules 2000**
29. **Interpretation and General Provisions Act, Cap. 153 s. 3**
30. **Constitution of Grenada ss. 8(a), 16**

[56] I would like to thank Counsel for their assistance in this matter.

Margaret Price Findlay
High Court Judge