GRENADA

IN THE COURT OF APPEAL

HCVAP 2010/029

BETWEEN:

THE BEACON INSURANCE COMPANY LIMITED

Appellant

and

LIBERTY CLUB LIMITED

Respondent

HCVAP 2010/030

LIBERTY CLUB LIMITED

Appellant

THE BEACON INSURANCE COMPANY LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal

Appearances:

Mr. Karl Hudson Phillips, QC with Ms. Jennifer Hudson Phillips
for The Beacon Insurance Company Limited
Mr. Leslie Haynes, QC with Ms. Ria Marshall for Liberty Club Limited
Mr. Darshan Ramdahni on behalf of the Attorney General

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. 2011: April 5;
April 7.

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Applications for permission to amend statements of case after case management conference – Rule 20.1(3) Civil Procedure Rules 2000 ("CPR 20.13") – Amendment to statement of claim to plead different sums of loss – Change of circumstances –

Amendment to reply to plead waiver – No change of circumstances alleged – Whether CPR 20.1(3) applying conventional principles of construction amounts to a violation of right of access to the court – Right to fair hearing – Section 8(8) of the Grenada Constitution Order 1973 ("the Grenada Constitution")

The respondent in Appeal No. 29 of 2010 and the appellant in Appeal No. 30 of 2010, Liberty Club Limited ("Liberty"), applied on the date fixed for trial of its claim, for permission to amend its Reply and also made an oral application for permission to amend its Statement of Claim. The application to amend the Reply so as to plead waiver asserted no change in circumstances since the first case management conference but rather challenged the constitutionality of CPR 20.1(3) in the context of the limitation placed on the right of access to the court. The trial had to be put off. Submissions were invited from the Attorney General in light of the Constitutional argument being raised. The application for permission to amend the Statement of Claim alleged a change of circumstances and sought to amend certain sums under the various heads of loss being claimed. The applications were opposed by The Beacon Insurance Company Limited ("Beacon"). On the applications coming on together for hearing on 8th March 2010, the trial judge in a written decision delivered on 22nd November 2010 refused permission to amend the Reply and awarded costs to Beacon. She allowed the amendment to Liberty's Statement of Claim stating that there was a change of circumstances and made no order as to costs, nor did she grant leave to Beacon to consequentially amend its Defence. Beacon appealed against the decision granting permission to Liberty to amend its Statement of Claim and disallowance of costs thereon to Beacon and Liberty appealed against the refusal to permit amendment of its Reply.

Held: allowing Beacon's appeal with costs on the application below and on appeal, that:

1. The learned trial judge erred in holding that there was a change of circumstances which occurred after the first case management conference which made it necessary to amend the statement of case. The question whether the basis for assessment of loss is to be on an indemnity basis or a reinstatement basis is an issue to be determined at trial and does not amount to a change of circumstances.

2. The amendment to change the sums claimed under the various heads albeit reduced was not necessary. A party who claims a higher sum may obtain judgment only on such sums as he is able to prove at trial.

3. The learned trial judge erred in disallowing Beacon its costs in accordance with CPR 65.11(3) in the absence of special circumstances.

Dismissing Liberty's appeal with costs to Beacon:

1. That restrictions on the right of access to the court are permissible but only in so far 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.

Principle in Ashingdane v United Kingdom[1] and Goode v Martin[2] approved.

2. That CPR 20.1(3) has a legitimate aim, namely to counter excessive costs and delays.

3. That the restriction imposed by CPR 20.1(3) on the right of access to the court and the refusal of the amendment was not, in the peculiar circumstances of this case, taking into account the inordinate delay which was not justifiably explained, disproportionate to the aim sought to be achieved. Accordingly the trial judge was right to refuse permission to amend.

   Circumstances in Goode v Martin distinguished.

ORAL JUDGMENT

[1] PEREIRA, J.A.: These two procedural appeals were conveniently heard together as they raised the common issue involving permission to amend a statement of case under CPR 20.1(3) which is crafted in fairly strict terms. In essence, it restricts the court's discretion to permit an amendment to a statement of case after the first case management conference to circumstances where a party is able to show that the change is necessary because of some change in the circumstances which became known after the date of the first case management conference. Reference to the strict requirement of this rule and similar time sensitive provisions and the rationale for them has been made in several decisions of this court since the ushering in of the CPR[3].

[2] Appeal No. 29 of 2010, brought by The Beacon Insurance Company Limited ("Beacon") concerns the permission given by the trial judge to Liberty Club Limited ("Liberty") to amend its Statement of Claim to plead reduced sums of loss on their claim on the basis that there had been a change of circumstances. What was found to be a change of circumstances was not addressed. In allowing the

[1] (1985) 7 E.H.R.R. 528.
[2] [2001] EWCA Civ. 1899.
[3] See: for example dicta in:
(1) Gordon Lester Braithwaite et al v Anthony Potter et al (Civil Appeal No. 18 of 2002 - Grenada);
(2) Kenrick Thomas v RBTT (Civil Appeal No. 3 of 2005 - Saint Vincent and the Grenadines);
(3) Ferdinand Frampton v Ian Pinard et al (Civil Appeal No. 15 of 2005 - Commonwealth of Dominica).

amendment the learned trial judge also made no order as to costs and did not say what circumstances justified departure from CPR 65.11(3) which says, in effect, that on an application to amend a statement of case the court must (my emphasis) order the applicant to pay the costs of the respondent unless there are special circumstances. Neither did she grant leave to Beacon to make any consequential amendments to its Defence.

[3] Appeal No. 30 of 2010 brought by Liberty, concerns the learned judge's refusal to allow Liberty to amend its Reply to plead waiver. Liberty, on their application, does not contend that there was a change of circumstances (that there was no change of circumstances is common ground). Rather, Liberty contends that in applying CPR 20.1(3) in its strict terms and thus denying the amendment, would in the circumstances amount to a denial of access to justice or the right to a fair trial, in violation of the fundamental right to such, as guaranteed by section 8(8) of the Grenada Constitution.

[4] A chronology of how the pleadings unfolded in the court below places the matter in perspective.

1. Liberty's original statement of claim, as set out in the claim form, was filed on 16th September 2005. In paragraph 8, Liberty stated that particulars of losses in respect of Plant Machinery and Equipment ("PME") and Furniture Fixtures and Fittings ("FFF") which should be claimed on an indemnity basis, were to be provided on discovery. This is notwithstanding that at paragraph 5 of its Statement of Claim, Liberty had claimed a specific sum for PME and FFF. The overall claim amounted to approximately $18,000.00.

2. Liberty amended its claim once more in October 2005, to correct the name of Beacon.

3. Beacon filed its Defence on 17th October 2005. In paragraphs 13 to 16 thereof, Beacon essentially pleaded that Liberty's claim was time barred under Condition No. 11 of the Policy of Insurance. Accordingly, Liberty would have been fully aware as from October 2005, that a principal ground of Beacon's defence to its claim was that the time for submission of its claim had expired.

4. On 6th November 2005, Liberty re-amended its statement of claim and amended paragraph 8 to read: "Particulars of these losses are set out thereunder" and specific sums under each head were stated. There is no reference to these sums being estimates. The overall sum claimed was now reduced to approximately $16,000.00.

5. There then followed several interlocutory applications. It would appear that the first case management conference took place on 15th November 2005, and the last took place on 10th October 2006.

6. After the matter proceeded to pre-trial review, witness statements having been exchanged, the date of 18th November 2009, was fixed for the commencement of trial. It was on that date that Liberty filed an application seeking to amend its Reply so as to plead waiver to Beacon's allegation of the time limitation contained in the Policy of Insurance, as pleaded in its Defence since October 2005, relying on the constitutionality of applying CPR 20.1(3) on its strict wording. They also gave oral notice of their intention to seek permission to further amend their Statement of Claim. This caused the trial dates to be vacated, we are told, at considerable costs and inconvenience and led to a request for the Attorney General to be heard on the constitutional point raised by Liberty in its application.

7. Both applications for permission to amend came on for hearing before the learned judge on 8th March 2011. In respect of the application to amend the Statement of Claim, Liberty relied on the fact that the buildings had been re-instated and that the cost of same was now known, and that the

figures for PME and FFF as well as that for consequential loss had been settled with Beacon's co-insurers. These new sums reduced the overall claim further, to approximately $13,000.00.

Amendment to the Statement of Claim

[5] Dealing firstly with the amendment to the Statement of Claim, learned Queen's Counsel Mr. Hudson Phillips for Beacon argues that there was no change in circumstances after the first case management conference – Liberty would have known well in advance that it was reinstating the property; further, that in any event the amendments were not necessary and were in essence irrelevant, in as much as the claim cannot now be assessed on a reinstatement basis, the conditions of the Policy of Insurance not having been complied with. He posits that the only reason for seeking the amendment is in an attempt to meet Beacon's assertion that Liberty's claim is fraudulent and that it had fraudulently inflated its claim. Learned Queen's Counsel Mr. Leslie Haynes for Liberty on the other hand says:

(a) That Liberty was merely seeking to do that which it was obliged to do – that is, place the true quantum of its claim before the court.

(b) That the Court in exercising its discretion must apply the overriding objective and allow the amendment so that the real dispute between the parties may be determined. The Court however, is mindful of the principle that the overriding objective cannot be prayed in aid to dis-apply a specific and existing rule[4].

(c) That the claimant may be prejudiced at trial as it will not be able to prove the amount pleaded as those amounts no longer hold true and its claim may therefore fail. It is trite that at a trial, notwithstanding that a claimant may have pleaded some higher sum, he may obtain judgment only on so much of his claim as he has been able to prove.

[4] See: Ormiston Ken Boyea et al v Caribbean Flour Mills Ltd. (Civil Appeal No.3 of 2004 – Saint Vincent and the Grenadines).

[6] The fact that different sums have been pleaded in respect of heads of loss being claimed to accord with one basis or method of assessment does not amount to a change of circumstances. Whether loss is to be assessed on an indemnity basis or on a reinstatement basis is an issue to be decided at trial. Accordingly it is not accepted that the amendments are necessary because of a change in circumstances becoming known after the first case management conference. The claim as originally framed and as subsequently amended, particularised the heads of loss and quoted specific sums. There was no indication that these sums were estimates, or that reinstatement was being undertaken. Indeed the dates of the commencement or its completion are not disclosed on the application or the amendment.

[7] Accordingly, the learned trial judge erred in allowing the amendment to the Statement of Claim, and I would set aside that decision.

Costs on the application to amend the Statement of Claim

[8] CPR 65.11(3) is in mandatory terms absent special circumstances. No special circumstances for disallowing Beacon's costs were alluded to by the learned judge. None has been advanced here which bears consideration by this Court. The question whether there may be some duplication of items in respect of the application to amend the Reply is a matter which can be adequately addressed on the assessment. The trial judge accordingly also erred in disallowing Beacon its costs on the application. Beacon is entitled to costs. The costs are to be assessed unless agreed within 21 days. Costs on this appeal shall be two thirds of the sum as agreed or assessed by the court below in favour of Beacon.

Amendment of Reply to Plead Waiver

[9] It is not disputed that waiver must be pleaded. Liberty says that such a plea furnishes a complete defence to Beacon's time limitation point taken under the Policy of Insurance. It is common ground that there is no change of

circumstances. Liberty no longer seeks to say that CPR 20.1(3) is unconstitutional as contravening section 8(8) of the Grenada Constitution. Rather it is said, in essence, that in the peculiar circumstances of the case the amendment ought to be allowed so as to ensure compliance with Liberty's constitutional right to a fair trial. Counsel relies on the case of Ashingdane v United Kingdom, a decision of the European Court of Human Rights where at paragraph 59, in relation to a restriction on liberty of movement contained in the Mental Health Act 1959 of the UK, viewed against Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms1950 ("the Convention"), the following was stated:

> "Without losing sight of the general context of the case, the Court would recall that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the concrete case before it. Accordingly, the Court's task in assessing the permissibility of the limitation imposed is not to review section 141 of the 1959 Act as such but the circumstances and manner (my emphasis) in which that section was actually applied to Mr. Ashingdane."

Counsel says that to deny Liberty the right to reply on the time limitation point taken by Beacon pursuant to Condition 11 of the Policy of Insurance on a mere pleading point applying rule 20.1(3) CPR strictly, is potentially fatal to its claim and is disproportionately prejudicial to it.

[10] No issue is taken of the trial judge's distillation of the legal principles engaged in a consideration of a person's right of access to the court, and its correlation to the exercise of that right, in accordance with rules of procedure as discussed in paragraphs 28 to 30 of her judgment. At paragraph 30 she opined that the right of access to the courts must be exercised in conjunction with the rules, namely the CPR, which govern the conduct of civil trials. At paragraph 32 the learned trial judge quoted Byron CJ in his judgment in Capital Bank International Ltd. v Eastern Caribbean Central Bank et al[5] who in turn relied on a passage from the judgment in Al-Fayed v United Kingdom[6] to the effect that restrictions on the

[5] Civil Appeal Nos. 13 & 14 of 2002 – Grenada.
[6] (1994) 18 E.H.R.R 393.

right of access to the court are permissible "but only in so far 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."

[11] The trial judge went on to conclude, in essence, that CPR 20.1(3) has a legitimate aim, one being to counter excessive costs and delays and that overall, the legitimate aim of the CPR is to streamline and bring about an efficient, uniform and consistent method of dealing with matters coming before the Court, and ensuring equality of arms[7]. We agree with these statements.

[12] Counsel for Liberty accepts that these are legitimate aims. What he contends however, is that the learned judge failed to consider whether in the particular circumstances of this case there was a reasonable relationship of proportionality between the means employed and the aim which is sought to be achieved. Liberty says the circumstances of this case make it disproportionate. Reliance is placed on the case of Goode v Martin a decision of the Court of Appeal (UK). It is necessary to give a brief summary of the facts of that case:

The claimant suffered severe head injuries as a novice sailor on board a racing yacht. She suffered amnesia and had to depend on others to tell her what happened. She brought proceedings against the defendant who was a yacht master, for compensation in October 1997. Her Statement of Claim set out one version of how the accident occurred. A court defence was served in November 1997. However, in January 1998, the defendant sent an amended draft defence which set out for the first time the yacht master's version of how the accident occurred. The amended defence was served in February 1999. The claimant's draft amended Statement of Claim putting her case on an alternative basis, was not served until April 2000 – some eight months after the limitation period. The defendant opposed the application for permission to amend even though the proposed amendment was founded on the version of the facts that he was setting out to prove at trial. He relied on CPR 17.4(2) which permitted the court to allow a

[7] See judgment of learned judge paragraphs 33, 35, 41, 42, 44 and 45.

post-limitation amendment whose effect will be to add… "a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." The amendment was refused on the basis that the new claim did not arise out of the same facts as a claim in respect of which the claimant had already claimed a remedy within the meaning of CPR 17.4(2). On appeal the claimant contended that the proposed amendment was permissible if the rule 17.4(2) was interpreted to read:

> "The court may allow an amendment whose effect will be to add … a new claim, but only if the new claim arises out of the same facts … as <u>are already in issue</u> on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

The issue on appeal was, if the rule did not permit this interpretation under normal principles of construction, whether it was possible under the Human Rights Act (giving effect to the Convention) to read the words (here underlined), into rule 17.4(2) in order to give effect to the claimant's right of access to the court under the Convention. The Court of Appeal held that although it would not have been possible on conventional principles of construction to interpret rule 17.4(2) so as to produce a just result, the Human Rights Act had altered the position; that no sound policy reason could be detected why the claimant should not add to her claim the alternative plea which she proposed. No new facts were being introduced: she merely wished to say that if the defendant succeeded in establishing his version of the facts, she would still win because those facts too showed that he had been negligent; that in those circumstances, to prevent her from putting that case before the court would impose an impediment on her access to the court which would require justification. When applied to the facts of the case, rule 17.4(2), as interpreted by the Master and judge below, did not have any legitimate aim and even if it did, the means used by the rule-maker would not be reasonably proportionate to that aim; that under the Act it was possible to interpret the rule in the manner suggested by the claimant and in that way there would be no violation of her rights under Article 6 of the Convention and the Court would be enabled to deal with the case justly as it was required to do by the CPR.

[13] Learned Queens Counsel Mr. Haynes urges that Goode v Martin bears similarity to this case. Whilst the general principle enunciated in Goode v Martin finds favour with this court in construing CPR 20.1(3) in the sense that any rule which restricts the right of access to the court must be interpreted in the context and against the background of the guaranteed constitutional right of access to the court, the facts and circumstances pertaining there are clearly distinguishable from the facts and circumstances of the instant case:

Firstly, it cannot be said that the new claim being made arises out of the same facts or the same facts as are already in issue. Beacon did not raise a case of waiver, or plead any case relying or suggesting waiver. This is a whole new issue based on a new set of facts set out for the first time in Liberty's witness statements. It is not sought to rely on any matter as pleaded by Beacon to ground its case of waiver. In fact it is quite the opposite to the circumstances in Goode v Martin.

Secondly, in considering the issue of proportionality several factors come into play. Counsel for Liberty alluded to the amounts involved, and the equality of arms as matters to be considered. Another factor which must enter the equation here in achieving the legitimate aim of the rule is delay. There was inordinate delay in seeking to raise the new issue of waiver. Even though the learned trial judge did not specifically address her mind to the concept of proportionality in dealing with delay, it seems clear from the tenor of her judgment that she was concerned with the excessive delay in seeking such an amendment within the context of fulfilling the legitimate aims of the CPR. At paragraph 40 of her judgment the learned trial judge had this to say:

> "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."

I would also add given the specific pleading of Beacon praying in aid the time limitation contained in Condition 11 of the Policy of Insurance from as early as October 2005, when the claim had just commenced and Beacon had served its defence. "For them to have only come to this realization the day before trial is not a suggestion that finds favour."

Indeed it gets worse if, as Liberty says, it became aware of the need to plead waiver at the time of preparation of its pre-trial memorandum in June 2008, but then took another 17 months to seek to amend to plead waiver in November 2009, on the day of trial.

[14] The sentiments expressed by the learned trial judge are well founded. Even if it is accepted (which it is not) that the learned trial judge did not address her mind to the issue of proportionality in considering whether, in the context of this case CPR 20.1(3) amounted to a disproportionate restriction on Liberty's right of access to the court as guaranteed by section 8(8) of the Grenada Constitution, when the factors and circumstances of this case are weighed in their totality, in considering the issue of the proportionality of the means used to achieve that rule's legitimate aim, it is clear that the means used to achieve that aim was proportionate. The entire trial was derailed due to Liberty's inordinate delay which has not been justifiably explained. This cannot augur well for the due administration of justice; neither can it truly be said to be in accordance with the overriding objective of the CPR in dealing with cases justly.

[15] For these reasons I would dismiss the appeal by Liberty.

[16] In relation to costs, Liberty shall bear Beacon's costs in this appeal which shall be fixed at two thirds of the amount on assessment of the costs of the application below.

[17] The following orders are accordingly made:

1. The appeal by Beacon Insurance Company Limited is allowed and the learned trial judge's order allowing the amendment to the Statement of Claim is set aside.

2. The order of the learned trial judge in which she made no order as to costs is also set aside and Beacon shall have its costs on the application to amend below to be assessed by the court below, unless agreed within twenty one days, and its costs on the appeal fixed at two thirds of the costs as assessed or agreed.

3. The appeal by Liberty is dismissed and the decision of the trial judge is affirmed. Beacon shall have its costs on the appeal fixed at two thirds of the sum assessed by the court below.

Janice M. Pereira
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal