IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 1994/0566

BETWEEN:

WILSON & CO.
(A FIRM)

Claimant

and

PRICE WATERHOUSE
(A FIRM)

Defendant

Appearances:

Mrs. Celia Edwards, Q.C, and Mr. Deloni Edwards for the Claimant
Mr. Dickon Mitchell for the Defendant

2014: February 13;
May 29.

DECISION

[1] MOHAMMED, J.: When the Civil Procedure Rules 2000 ("the CPR") were introduced in the member states of the Eastern Caribbean Supreme Court ("the ECSC"), some 14 years ago, it could not have been expected nor anticipated that an action started some six years before its introduction would still be meandering through the civil justice system in Grenada. After all "The principal mischief which the Civil Procedure Rules were intended to counter were excessive costs and delays"[1]. If the success of the CPR in Grenada is to be assessed by the instant matter then I fear that the only conclusion one can draw is it has failed.

[1] Mitchell JA in Kyle David v AG of Commonwealth of Dominica and Ors DOMHCVAP 2013/0004 at paragraph 4

[2] In this longstanding matter, there are two applications for determination by the Court. The first was filed on the 11th April 2003 by the Defendant ("the Defendant's application") which is seeking orders: to strike out the Claimant since it is not a proper party to the proceedings and to substitute Lauriston Wilson in its place; a declaration that the statements referred to in paragraphs 14 and 16 of the Amended Statement of Claim are not capable of bearing the defamatory meanings attributed to them in paragraphs 17 and 18 of the Amended Statement of Claim; to dismiss the Claim on the basis that it discloses no reasonable cause of action; to grant the Defendant permission to amend its Defence and Counterclaim by deleting the claims set out in paragraphs 6-10 inclusive of the Counterclaim; to extend time for the Defendant to file and exchange its witness statement and to stay the order of Barrow J dated 13th November 2002 pending the determination of the Defendant's application.

[3] The second application filed by the Claimant on the 26th July 2012 ("the Claimant's application") is for further management of the instant matter and for judgment to be entered for the Claimant for damages to be assessed and costs.

The Background

[4] Due to the age and nature of the applications for determination, I will relate the history of this matter which will seem all too familiar with pre-CPR matters. On the 20th November 1991 Lauriston Wilson Jnr registered the name "Wilson & Co." as a business under the Business Names Ordinance Cap 254 of the Revised Laws of Grenada ("the Business Names Ordinance"). The general nature of the business was stated as "accounting, auditing and consulting" with the date of commencement of business as 1st January, 1992. On the 27th December 1991 Robert Kirby, Partner of Pricewaterhouse East Caribbean registered the name "Pricewaterhouse" as a business under the Business Names Ordinance with the general nature of the business and the date of commencement of business being identical to Wilson & Co.

[5] On the 31st December 1991 Lauriston Wilson Jnr and the Defendant executed a Partnership Agreement ("the Partnership Agreement") establishing an accounting, auditing and financial consulting firm under the name "Wilson & Co."[2]. However by memorandum dated 5th March 1993 ("the Termination Notice") the Defendant gave notice to Lauriston Wilson Jnr that it was withdrawing from the partnership effective 9th August 1993. Subsequently, on the 1st November 1994 ("the Letter") the Defendant wrote to Lauriston Wilson Jnr instructing him to desist from using its name whether by letterhead or otherwise. It later published a notice in the Grenadian Voice on the 19th November 1994 ("the Notice") and the Government Gazette informing the public of the termination of its relationship with Wilson & Co.

[6] Being unhappy with this turn of events, the Claimant instituted the instant proceedings on the 22nd November 1994 claiming against the Defendant damages for breach of contract, damages for defamation and an injunction stopping the Defendant from publishing defamatory "articles, advertisements or letterheads" of the Claimant. On the 28th December 1994 the Defendant's attorneys wrote the Claimant pursuant to Order 57 Rule 2 of the then Rules of the Supreme Court requesting the names and places of residence of the partners constituting the Claimant. Order 57 Rule 2 provided that two or more partners can institute an action in the name of a firm of which they are partners at the time when the cause of action arose.

[7] On the same day, the Defendant's attorneys also filed an application seeking an order to set aside the action on the basis that the Claimant did not comply with Order 57 Rule 2, the Defendant's address on the writ of summons was incorrect and misleading and service was irregular and/or void having regard to Order 57 Rule 2. On 6th January 1995 the Claimant responded to the Defendant's request and stated that the partners of the Claimant were Lauriston Wilson Jnr, Peter Wilson and Leo Chow. The Claimant relied on a letter dated 15th February 1994 from Lauriston Wilson Jnr to Gary Beaton, Member Services, Chartered

[2] In letter dated 26th March 1993 from Lauriston Wilson Jnr to Robert Kirby, the former stated "the Partnership Agreement dated December 31, 1991, establishing the firm of Wilson &Co"

Association of Certified Accountants[3] which stated that from 1st January 1992 until 8th August 1993 his partner was Price Waterhouse East Caribbean, and from 9th August 1993 the Claimant had three partners, Lauriston Wilson Jnr, Peter Wilson and Leo Chow. On the 26th January 1995, St. Paul J dismissed the Defendant's application of 28th December 1994 but notably absent in his written reasons is a determination of the Defendant's contention under Order 57 Rule 2. The only reasonable conclusion that can be drawn is that this issue was not canvassed before the Court.

[8] Pleadings were closed by the end of April 1996 and on 4th October 1996 the matter was ordered to proceed to trial. However, in the intervening period the CPR was introduced, together with the new phenomenon of witness statements. On 13th November 2002 directions were given for the filing of witness statements by 14th April 2002. The Claimant filed its witness statement on 8th April 2002 and amended its Statement of Claim on 27th November 2002. The trial was fixed for 12th May 2003. However, on 4th July 2003 the matter was referred to mediation by Benjamin J with "the appropriate order to be made in due course".

The Defendant's application

[9] The grounds of the Defendant's application are:

(a) The Claimant is not permitted to bring or maintain an action against the Defendant since CPR 22.1 requires at least two persons to bring an action in the name of the firm.

(b) The partners in the Claimant were Lauriston Wilson Jnr and the Defendant. The withdrawal of the Defendant from the partnership dissolved the partnership leaving Lauriston Wilson Jnr alone and no subsisting partnership.

(c) The Claimant was not a party to the Partnership Agreement but it came into existence as a result of the agreement. As a result, the Claimant is not

[3] Exhibit Q to the affidavit of Lauriston Wilson Jnr filed on 17th January 1995

competent to bring any action in respect of any alleged breaches of the Partnership Agreement.

(d) The Defendant no longer wishes to pursue its prayers in paragraphs 6-10 inclusive of its Counterclaim since it is now otiose and redundant.

(e) The Defendant's witness requires extra time to enable him to satisfactorily prepare the witness statement due to the history and volume of the documents.

(f) It is just and convenient to extend time for the Defendant to file its witness statement after the determination of the Defendant's application since it impacts substantially on the issues to be tried.

[10] Although the Defendant's application sought several orders I will only address the three issues which it addressed in its written submissions namely:

(a) Is the Claimant a proper party to the action?

(b) Are the statements in paragraphs 14 to 16 of the Amended Statement of Claim capable of bearing the defamatory meaning attributed to them?

(c) Should the Court grant the Defendant an extension of time to file its witness statements?

Is the Claimant a proper party to the action?

[11] CPR 22.1 which replaced Order 57 Rule 1 permits persons who are partners to sue in a firm's name once they carried on business in Grenada when the cause of action arose. Although Order 57 Rule 1 states that it must be two or more persons, CPR 22.1 only refers to "partners", which I interpret to mean two partners can institute such action. According to Lord Denning in Oswald Hickson Collier & Co. v Carter-Ruck[4]: "If a partnership is to exist it must be shown that two or more persons are carrying on the business". According to the Partnership Agreement the two individuals who formed the Partnership Wilson & Co. as at 1st January 1992 were Lauriston Wilson Jnr and Price Waterhouse East Caribbean as listed in Schedule B of the Partnership Agreement dated 31st December 1991.

[4] (1892) 1 AC 720

Robert Stewart Kirby executed the Partnership Agreement on behalf of Price Waterhouse East Caribbean and Lauriston Wilson Jnr on behalf of himself. In my view, before the execution of the Partnership Agreement Wilson and Co. was only registered with a business name, which is different from a partnership since one person can register a business name but it takes at least two parties to form a partnership. Therefore, the partnership of Wilson & Co. was established by the Partnership Agreement.

[12] However, Clause 3.1 of the Partnership Agreement provides for the firm to continue notwithstanding the addition or termination of partners. It is not in dispute that by the 5th March 1993 the Defendant served the Termination Notice. According to Lindley and Banks on Partnerships[5]:

> "What is meant by the "dissolution" of a partnership is often misunderstood not only because the word is used in two distinct senses but also because it has a very different meaning when applied to a company or limited liability partnership. In the case of a partnership, it invariably refers to the moment in time when the ongoing nature of the partnership relation terminates, even though the partners may continue to be associated together in a new partnership or merely for the purpose of winding up the firm's affairs."

[13] The effect of the Termination Notice is the partnership between Lauriston Wilson Jnr and the Defendant was in dissolution but Lauriston Wilson Jnr and the Defendant continued to be the partners of the Claimant. On the 9th August 1993, the Defendant was no longer a partner of the Claimant but on that same day two new partners joined the Claimant.

[14] There are two causes of action in the instant claim which arose at two different times; the claim for damages for breach of contract which arose when the Defendant withdrew from the Partnership Agreement on 9th August 1993, and the claim for defamation which arose on the 1st November 1994 and the 19th November 1994 when the Defendant cause certain publications to be made. At both times there were at least two partners at the Claimant which had continued

[5] 19th ed at para 24-01

pursuant to Clause 3.1 of the Partnership Agreement. I find that the Claimant is a proper party to the proceedings.

Are the statements in paragraphs 14 to 16 of the Amended Statement of Claim capable of bearing the defamatory meaning attributed to them?

[15] CPR 69.4 allows any party to apply to a Judge after service of the Statement of Claim for an order to determine whether or not the words complained of are capable of a meaning or the meanings attributed to them in the Statement of Claim. The Defendant has invoked this provision with respect to the Claimant's claim for damages for defamation.

[16] There are two documents issued by the Defendant which the Claimant has pleaded were defamatory and caused injury to his reputation; the Defendant's letter dated 1st November 1994 ("the November 1994 letter") addressed to the Claimant, and the Notice published on page 16 of the issue of the Grenadian Voice Newspaper dated 19th November 1994 ("the Notice").

[17] The words complained of in the November 1994 letter are:

> "Meanwhile I have received a copy of a letter dated September 30th signed by you on a PW Grenada letterhead addressed to Jauch & Hubener in Germany, as per attached. You never had and do not have any authority or permission to use the Price Waterhouse name, you are well aware that to do so is wilful misrepresentation and in this regard if you do not forthwith desist from using Price Waterhouse's name whether by letterhead or otherwise, I shall have no alternative but to institute legal proceedings or restrain you and to take such other steps as we are advised with respect to any past acts."

[18] The words complained of in the Notice were:

> "<u>NOTICE</u>

> The Public is hereby advised that PRICE WATERHOUSE terminated its relationship with WILSON & CO., an accounting auditing and consulting Firm of Lagoon Road, St. George's, Grenada on 9th August 1993.
>
> TAKE NOTICE also that WILSON & CO. was not at any time liberty to use the name "PRICE WATERHOUSE" save in particular circumstances.
>
> WILSON & CO. has no authority to hold itself out as being associated with PRICE WATERHOUSE in any form, manner or style whatsoever.
>
> GRANT, JOSEPH & CO
> Attorneys-at-law
> For Price Waterhouse"

[19] While the Defendant had admitted to writing the letter in its Defence, it denies that it was falsely or maliciously written or that it was published to anyone other than the Claimant. It claims that it was written in an attempt to ensure compliance with the Partnership Agreement.

[20] Similarly, the Defendant has admitted to the publication of the Notice but has denied that the words had the meaning attributed to them in paragraphs 17 and 18 of the Amended Statement of Claim. It pleaded that the words were true in substance and in fact and relies on qualified privilege. In its Reply and Defence to Counterclaim, the Claimant maintains its position on the allegations of defamation.

[21] Although Counsel for the Defendant has referred to several authorities in its submissions to be considered by the Court in determining whether the words complained of are defamatory, in my view it would be premature at this stage to make such a finding since this is one of the issues to be determined at trial. To do otherwise would be based on speculation in the absence of any evidence.

[22] I therefore find that it is not prudent for the Court to exercise its powers under CPR 69.4 since this is an issue to be determined at trial.

Should the Court grant the Defendant an extension of time to file its witness statements?

[23] CPR 27.8 (3) permits a party to apply to the Court to obtain permission to vary any date in the timetable where it fails to obtain the agreement of the other party before the date it wishes to vary. Mitchell JA in Kyle David v The Attorney General of the Commonwealth of Dominica and ors[6] described the distinction as:

> "An application for an extension of time simpliciter is not an application for relief from sanctions. Extensions of time are dealt with by CPR 27.8 which deals with the variation of the case management timetable."

[24] I therefore do not consider the Defendant's application for an extension of time to file its witness statement as one for relief from sanction since it was made before the sanction was imposed. In my view, the Defendant's application is properly made pursuant to this Rule since it was made some three days before the deadline for filing its witness statement.

[25] The Full Court of Appeal of the ECSC in C.O. Williams Construction (St Lucia) Ltd v Inter-Island Dredging Co Ltd[7] endorsed that the approach the Court is to take with applications for extensions of time as set out in Carleen Pemberton v Mark Brantley[8]. In C.O. Williams Construction (St Lucia) Ltd v Inter-Island Dredging Co Ltd[9] the Court stated:

> "The recognized and established principles which existed prior to CPR 2000 for determining an application for extension of time have not been trumped by the overriding objective in CPR 1.1. Dealing with cases justly when giving effect to the overriding objective requires that applications for extension of time be dealt with in accordance with those recognized principles, subject to any relevant Practice Direction or Rule of the Supreme Court. The preferred approach when considering applications for extension of time for the time being, subject to any

[6] DOMHCVAP2013/0004 delivered on 21st January 2014 , unreported at paragraph 6
[7] HCVAP 2011/017 decision delivered by Edwards JA on 19th March 2012, unreported
[8] HCVAP 2011/009 delivered on 14th October,2011 unreported (a decision of a single Judge Periera JA)
[9] HCVAP 2011/017 decision delivered by Edwards JA on 19th March 2012, unreported at page 32

Practice Direction or Rules of the Supreme Court, is reflected in the decision of Carleen Pemberton v Mark Brantley."

[26] In Carleen Pemberton v Mark Brantley at paragraphs 12 to 14 Pereira JA (as she then was) stated that the discretionary power under CPR 26.9 was "a very broad one". She stated that this discretionary power:

> "[12] … cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well-established principles. Overall, in the exercise of the discretion the Court must seek to give effect to the overriding objective, which is to ensure that justice is done as between the parties.
>
> [13] Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course, the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.
>
> [14] I am mindful that there are a number of decisions by Judges of this Court addressing the various principles to be applied. In fact, one of the earliest decisions on the ushering in of the 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 applications of this type, and applications for extensions of time generally, (where no sanction is specified for failure). [See paragraph 33 above where the statement of Sir Dennis Byron C.J. is quoted]. The Full Court recently applied these principles in relation to an application for extension of time to appeal in the case of Spectrum Galaxy Fund Ltd v Xena Investments[10]."

[10] Territory of the Virgin Islands Civil Appeal No 13 of 2011 (oral judgment delivered on the 27th September 2011).

[27] The main reason set out in the Defendant's affidavit for the extension of time are the facts of the matter occurred between the years 1991 and 1994 and in order to complete his witness statement he would have to rely on voluminous documents to refresh his memory, and due to his extensive professional and personal obligations and the short time he had to prepare the witness statement, it was impossible to prepare his witness statement.

[28] The direction to file the witness statement was given on 13th November 2002 and the Defendant's application was filed some five months after in April 2003. I therefore do not agree that this was a short time within which it had to file its witness statement since I assume it was informed of the order of 13th November 2002 shortly thereafter. However, this is an old matter and the documents referred to in the list of documents filed by the respective parties were extensive. In this regard, I accept that the Defendant's witness had to review these documents to refresh his memory to prepare the witness statement, and with an extensive professional and personal obligations it would have been difficult to meet the obligation to file the witness statement. In my view, this amounts to a good reason.

[29] Mr. Kirby also stated other reasons at paragraphs 9 and 10 of his affidavit[11] concerning intended applications and their effect on his proposed witness statement. However, he failed to set out the nature of the applications and the effect they would have on the substantive matter. This I considered to be vague and unconvincing.

[30] Further, I cannot ignore that it has taken some 11 years for the Defendant's application to be determined in circumstances where most of the delay in its determination lies at the feet of the Court. While I accept that the Registrar did write letters to follow up after the order for mediation in 2003, it appears that this was not adequate where one of the fundamental pillars for the success of the CPR

[11] Affidavit of Robert Kirby filed on 11th April 2003

is that litigation is to be Court driven. Unfortunately, in this jurisdiction, due to various reasons including lack of resources to ensure that this pillar remains steadfast and strong, the Court fell short in driving the litigation forward in this matter. In the circumstances, it would be prejudicial to the Defendant not to be given an opportunity to file his witness statements where it took 11 years for the Court to determine its application for an extension of time.

[31] I grant the Defendant a period of 14 days from the date of this order to file and service its witness statement. In default, it would not be able to call any witnesses at the trial.

The Claimant's application

[32] Having granted the Defendant an extension of time to file its witness statements, the Claimant's application is now otiose. In any event, the Claimant has not filed an application for summary judgment pursuant to CPR 15.2 since it has not demonstrated that the Defendant has no real prospect of successfully defending the claim. The only ground set out in the Claimant's application is the non-compliance of the Order of Benjamin J of 4th July 2003 which referred the matter to Mediation. There was no sanction set out in Benjamin J's order and subsequently the matter proceeded to Mediation on 17th May 2013 pursuant to my order of 26th February, 2013.

[33] In the circumstances, the Claimant's application is dismissed with costs to the Defendant.

Order

[34] The Defendant is granted an extension of 14 days from the date of this order to file and serve its witness statements and in default the Defendant would not be able to call any witnesses at trial. The other relief sought by the Defendant's application is dismissed. The Defendant to pay the Claimant costs of the Defendant's application.

[35] The Claimant's application is dismissed. The Claimant to pay the Defendant costs of the Claimant's application.

[36] I will hear the parties on costs.

Margaret Y. Mohammed
High Court Judge