THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV2017/0385

BETWEEN:

DARREL MONTROPE

Claimant/Respondent

and

THE PUBLIC SERVICE COMMISSION
THE ATTORNEY GENERAL OF SAINT LUCIA

Defendants/Applicants

APPEARANCES:

Anthony Astaphan SC and Dr. Kenny D. Anthony for the Claimant
Vern Gill for the First Defendant
Garth Patterson QC, Rene Williams and Shervon Pierre for the Second Defendant

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2018: April 27th
May 4th

DECISION

[1] **SMITH J**: This is an application in which the Second Defendant ("the Attorney General") seeks to strike out an originating motion for constitutional relief filed by the Claimant ("Mr. Montrope"). Mr. Montrope contends that his removal by the Governor General acting on the advice of the Public Services Commission ("the PSC") from the post of cabinet secretary and his transfer to the post of permanent secretary was unconstitutional, in excess of jurisdiction and otherwise unlawful on a number of grounds.

[2] The Attorney General, shortly after the filing of the motion, applied to the court under **Civil Procedure Rules** ("CPR") Part 9.7 for a declaration that the court has no jurisdiction to try the claim and for the motion to be struck out either in its entirety or against the Attorney General. At the hearing of the application to strike, the Attorney General took objection to Mr. Montrope's reliance on amendments to his originating motion. This is the decision on that preliminary objection on which full arguments were heard by the court.

[3] Distilled to their essence, Mr. Patterson QC's preliminary objections were that: (1) under CPR 20.1, Mr. Montrope could only amend his statement of case once without leave at any time before the date on which the matter is fixed for case management; (2) since the statement of case was amended after the date fixed for case management, leave to amend was therefore required to amend; (3) no leave was applied for and, in any event, this was not a proper case for the court to exercise its discretion to grant leave to amend; (4) even if the statement of case had not been previously amended and no date for case management had been fixed, once an application to strike out a party's statement of case is before the court, that statement of case cannot be amended without leave of the court; (5) the effect of the Attorney General's application to strike, made pursuant to CPR 9.7, is to stay all proceedings pending the determination of the application and to take precedence over any other application since its determination in favour of the Attorney General could result in the matter being brought to an end; that being the case, any application to for leave to amend the pleadings would have to come after the determination of the application to strike under Part 9.7.

[4] In response, Mr. Astaphan SC submitted that: (1) no date had been fixed for case management of the matter and therefore no leave of the court was required; (2) if leave was required, then the court was being asked to deem the amendments to have been properly made since the relevant factors that the court would have to be satisfied of in determining whether to exercise its discretion to grant leave have been satisfied.

Was a Date Fixed for Case Management?

[5] Whether Mr. Montrope needed leave to amend his pleadings hinges upon the question of whether a date had been fixed for case management of the matter. This in turn depends upon the proper interpretation to be given to the relevant provisions of the CPR that govern the fixing of a date for case management conference.

The Relevant CPR Rules

[6] The provisions of the CPR relevant to the resolution of this issue are as follows:

> "**EC CPR 20.1**
> **20.1 Changes to statement of case**
> 1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.
> 2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.
>
> …..
>
> **EC CPR 27.2**
> **27.2 Fixed date claims – first hearing**
> 1) When a fixed date claim is issued, the court must fix a date for the first hearing of the claim.
> 2) On that hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.
> 3) The court, may however, treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.
> 4) The general rule is that the court must give at least 14 days notice of any first hearing
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> …..
>
> **EC CPR 27.3**
> **27.3 Case management conference**
> 1) The general rule is that the court office must fix a case management conference immediately upon the filing of a defense to a claim other than a fixed date claim."

[7] CPR 20.1 is clear: pleadings may only be amended once before case management without leave of the court, but the court may give leave to amend at the case management conference or at any time on an application being made.

[8] CPR 27.3 is equally clear: it is the court office that fixes case management conferences.

[9] CPR 27.2 is less clear. When the court office fixes the date for first hearing under 27.1 (1) is that the fixing of the date for case management conference or its equivalent? Before wrestling with the hermeneutics of that rule, it is necessary to establish what was filed and when.

What was Filed and When?

[10] Mr. Montrope filed his originating motion for constitutional relief on 14th June 2017. Mr. Patterson QC informed the court that though the motion ought properly to have been a fixed date claim form, he was not objecting to that. On the 31st July 2017, the Attorney General filed a notice of application to strike out Mr. Montrope's motion. On the 12th September 2017, the court office issued a notice of hearing as follows:

> "**Notice of Hearing**
>
> TAKE NOTICE that this matter has been scheduled for Chamber Hearing at the High Court of Justice La Place Carenage, Jeremie Street in the city of Castries on Thursday, the 21st day of September, 2017 at 9 o'clock in the forenoon before Justice Godfrey Smith."

On the 28th November 2017 Mr. Montrope filed an amended originating motion. Apparently the amended originating motion did not highlight, underline or otherwise show what the amendments were and so, on 18th December 2017, a revised amended originating motion was filed which is the subject matter of this preliminary objection.

The Effect of CPR Part 27 read with Part 56.11

[11] Part 27.2 (1) says that when a fixed date claim is issued, the court must fix a date for the first hearing of the claim. It does not expressly say that that first hearing shall be or is the case management conference. However, Part 27.1 (2) provides that in addition to any other powers that the court may have, the court shall have all the powers of a case management conference. Part 27.2 (3) provides that the court may treat the first hearing as a trial of the claim if it has not been defended or if it can be dealt with summarily.

[12] I agree with Mr. Patterson that the effect of those provisions is that a court has two options at a first hearing: either case manage the matter or try it summarily. It therefore seems that the intention of the rule is that the first hearing serves as the case management conference. The invariable court practice is indeed that the first hearing is the case management conference. This is bolstered by Part 56.

[13] Part 56 provides as follows:

> "**EC CPR 56.1**
> **56.1 Scope of this Part**
> **(1)** This Part deals with applications –
> (a) by way of originating motion or otherwise for relief under the Constitution of any Member State or Territory;
> (b) for a declaration in which a party is the State, a court, a tribunal or any other public body;
> (c) for judicial review
> ……
>
> **EC CPR 56.11**
> **56.11 First Hearing**
> **(1)** At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply."

[14] CPR Part 27.2 read with Part 56.11 puts it beyond doubt, I think, that the first hearing is the case management conference for fixed date claims. Blenman J.A.

in delivering the judgment of the Court of Appeal in **Commodo Holdings Limited v Renaissance Ventures Limited and Joseph Katz**[1] held that:

> "CPR 20.1 enables a party to amend its statement of case once before the date that is fixed for the first case management conference. Once the date of the first case management conference arises, there can be no amendment of pleadings without first obtaining the permission of the court. In **George Allert et al v Joshua Matheson et al**[2] this Court held that it is of no moment that the case management conference was adjourned and in fact no directions were given; what triggers the need or otherwise to obtain the permission of the court is the arrival of the date of the first case management conference which in this [sic] had occurred and since Commodo desired to amend its pleadings after that date, it was necessary to first obtain leave of the court to do so."

Notice of Hearing or Notice of First Hearing?

[15] The notice of hearing that was issued by the court office was plainly ambiguous. It did not state whether it was a notice of first hearing or a notice of hearing of the application to strike, which had already been filed in July prior to the issuance of the notice of hearing.

[16] Mr. Patterson pointed out that neither the originating motion nor the application to strike had return dates for hearing written into the body of those documents and as such the notice was ambiguous as to whether it pertained to the motion or the application to strike. His argument, as I understand it, is that notwithstanding such ambiguity, Part 27 requires that once a fixed date claim is issued, the court must fix a date for first hearing, so that that notice of hearing must be construed as a notice of first hearing which, in any event, is the invariable court practice. The notice of hearing must be presumed to have been the notice of first hearing.

[17] Mr. Astaphan submitted that since the notice of hearing issued by the court office failed to state whether it was a notice of first hearing of the motion or a notice of hearing of the application to strike, Mr. Montrope should not be penalized for any such ambiguity.

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[1] Territory of the Virgin Islands, BVIHCMAP 2014/0032

[2] GDAHCVAP 2014/0007 (delivered 24th November 2014, unreported)

[18] This submission has some attractiveness. It is beyond dispute that once a fixed date claim has been issued, the court office must fix a date for first hearing. It is also true that the first notice that emanates from the court office, following the issuance of a fixed date claim, is in fact the notice of first hearing. It might even be that the notices that issue from the court office for first hearing of fixed date claims, as a matter of practice, simply state "notice of hearing". In 99% of cases, nothing would perhaps turn on this lack of specificity. But in this case, a great deal turns on it: the risk that the entire claim can be struck out.

[19] There is an obvious and material difference between a "notice of hearing" and a "notice of first hearing". Given that there was the pending originating motion to which a first hearing would relate as well as an application to strike to which a notice of hearing would relate, was it not reasonable to presume that the notice of hearing related to the application to strike? Mr. Patterson invites the court to find that any ambiguity should be resolved in favour of the Attorney General since the invariable practice is that notice of first hearing is what issues from the court office following the fixed date claim. But why should a litigant be prejudiced because of an omission or failure on the part of the court office to state whether the hearing was a first hearing or other hearing? I think the ambiguity created by the notice of hearing ought, as a matter of justice and fairness, to be resolved in favour of the party who stands to be more greatly prejudiced by an ambiguous court notice.

[20] **St Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited** [3] is admittedly not on all fours with this case. That case involved the question of which of two applications filed should take precedence and what effect an application brought under Part 9.7 of the rules (or a strike out application) had on other subsequent applications or proceedings. Nevertheless, there is dicta from Saunders J.A. that I consider pertinent to the issue of how failures or omissions by the court office ought to be treated. This is what Saunders J.A. said:

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[3] Saint Christopher and Nevis, Civil Appeal No. 6 of 2002.

> "Before examining the learned Judge's reasons it is important to re-emphasize an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court….
> The overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively determined by the vagaries of the court office in determining which of two extant applications should be heard first. Chronologically and logically the bank's application was prior in time and should have been first determined. The failure of the court office to ensure that sequence resulted in denial of justice to the bank."

[21] I hasten to say that the sin, if I may call it that, of the court office in the instant case is nowhere as egregious as that in **Caribbean 6/49**. Still, the point being made by Saunders J.A. is applicable here and I trust I do no violence to it by transposing it to the circumstances of this case and saying: the overriding objective of the rules is not furthered when the course and result of Mr. Montrope's claim can be severely influenced and maybe even definitively determined by the ambiguity in a notice issued by the court office.

[22] I therefore find that the "notice of hearing" was not a notice of first hearing; consequently, no date had been fixed for first hearing/case management conference of this matter. But that is not an end of the matter.

Effect of Strike out Application

[23] Mr. Patterson cited the 2012 Jamaican High Court decision of **Index Communication Network Limited v Capital Solutions Limited and Others**[4] as authority for the proposition that even if no date for case management has been reached, once a strike out application has been filed there can be no amendment to the statement of case without the court's leave, even if there has been no previous amendment to it. Mangatal J stated:

> "WHETHER THERE IS ANY RIGHT TO AMEND WITHOUT THE COURT'S PERMISSION IN THE FACE OF AN APPLICATION TO STRIKE OUT."

[4] Jamaica, Claim NO. 2011 HCV00739

[44] I am of the view that, even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, it is not correct that a party could simply, "pull the rug out" from under the feet of the party applying to strike out on the basis of alleged weaknesses in the pleaded case, or omissions or admissions, by simply turning up with a newly amended statement of case that has been filed without the court's leave. In Jamaican parlance, leaving the applicant to simply "Hug, it (the amendment) up!" or "Love dat!" In my judgment, that would, at the very least, offend the rules of natural justice and the Constitutional right to a fair hearing. Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party's Statement of Case, the Statement of Case cannot be amended without the leave of the Court. As Mr. Robinson stated in his written submissions, the stage at which the case has reached is distinguishable from "whether or not there has been a case management conference". I find that this application is being made at a late stage in the proceedings as the Defendants have argued, and not an early one as advanced by the Attorneys for Index. This is because, if the true position is that, but for the amendment, Index's claim is in danger of being struck out, then that is a stage at which there could be no more proceedings if the application for an amendment should fail. As put by Brooks J. in the first instance judgment, at page 10 of **Pan Caribbean v. Cartade:**

> **"If the application to amend the Particulars of Claim is successful, the claim would have been saved from the fate requested by the Defendants in their respective applications to strike out".** (My emphasis).

I wish to make it clear that I am not here deciding whether the Statement of Case as it stands now would be struck out. As I understand it, that is not my role at this time. It is only if the application for the amendment is refused, that I would then have to revert to dealing with the striking out applications on the basis of the present state of Index's Further Amended Particulars of Claim. I am merely making the point that everything is relative. That the stage of striking out is a late stage since one is examining the question of whether or not a claim as pleaded will cease to exist. In other words, in my judgment, lateness of a stage is not limited to examining its closeness to trial or its timing in relation to case management conference. I am here examining the fact that it could without leave being granted, be struck out.

This is so even though, as stated in paragraph 16 of **Diamantes Diamantides v. JP Morgan Chase Bank et al** (2005) EWCA Civ. 1612, referred to by Brooks J,:

> **"On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again."** (My emphasis).

[24] On this point, **Index** was endorsed entirely by Alleyne J. of the Barbados High Court in **Maria Agard v Mia Mottley and Jerome Walcott**.[5]

[25] The *ratio* of **Index** on the issue of whether there is any right to amend without the court's permission in the face of an application to strike out seems to be this: Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party's statement of case, the statement of case cannot be amended without the leave of the court.

[26] I am troubled by the finding in **Index** that even if a statement of case has not been previously amended, and the case management conference has not yet taken place, once a strike out application has been filed there can be no amendment without the court's leave. CPR Part 20.1 (1) provides that a statement of case may be amended once, without the court's permission, at any time prior to the date fixed for case management conference. I think that the intention behind that rule is to give effect to the recognition that, litigation being what it is, a party might have omitted something important from his pleadings or otherwise filed faulty pleadings and should be allowed a chance to amend without leave provided that no date has been fixed for case management. The reason why no amendments are allowed once the case management date has been fixed is because the philosophy behind the CPR is that all interlocutory applications should be dealt

[5] Claim No 1753 of 2015 (unreported)

with, as far as is practicable, at the case management conference so that thereafter the matter can proceed systematically to trial.

[27] It seems to me that if on every occasion a party files a faulty pleading the other party would be able to file a strike out application thereby preventing that party from amending without leave, this would defeat not only the intention behind rule 20.1 (1) but also the objective of the CPR that all such matters be dealt with at case management. That would encourage the proliferation of applications being taken prior to case management in addition to others that might be taken at case management. This was effectively what Byron CJ was saying in **Dr. Ralph Gonsalves v Ewardo Lynch et al**[6] when he commented:

> "During the argument counsel for the respondent warned against rushing the proceedings and I think that it may be appropriate to use this opportunity to comment on my expectation of management of the process under CPR 2000. These proceedings have been in process since September 2002. Some nine months have elapsed. The proceedings have two appearances before the judges on pleading points, and one appeal on a pleading point. No directions have been given on the essential issues of discovery and related matters necessary for determination of the real issues. My criticism is that, one of the intentions of the case management process was to reduce the incidents of multiple interlocutory applications, which used to be a major factor is causing delay between the initiation and disposition of cases. I would like to encourage the use of the case management conference to address as many issues at the same time as is reasonable. It is quite likely that had these proceedings followed that procedural route, a final resolution would have been reached by now."

[28] **Index** and **Maria Agard** do not emanate from the O.E.C.S. The approach in those cases appear to run counter to the approach endorsed by Chief Justice Byron. With respect, I therefore find myself unable to apply those cases in this jurisdiction.

Effect of CPR 9.7 on Ability to Amend Statement of Case

[29] Mr. Patterson also submitted that since the application to strike was allied to and based on Part 9.7 of the CPR, that application operates as a stay of the

[6] Saint Vincent and the Grenadines, Civil Appeal No. 9 2003

proceedings until the application is heard and determined. He contended that since Mr. Montrope needed leave to amend and since the application to strike preceded any application for leave to amend, which was only now being made orally at the hearing, that the application to strike would have to be heard first. He relied on the **Caribbean 6/49** case in which Georges J.A (Ag) said:

> "[5] "I am therefore fully satisfied that the application effectively stayed the proceedings until it was heard and determined and would have taken precedence over any other application or request since its determination in favour of the appellant/defendant could result in the matter being brought to an end."

[30] **In Caribbean 6/49**, the other application which the Part 9.7 application took precedence over was an application for summary judgement which is different from the instant case in which Mr. Montrope is effectively asking this court for leave to amend, if indeed leave is needed. I remind myself of the statement of Brooks J **in Diamantes Diamantides v JP Morgan et al** that:

> "On an application to strike out particulars of claim on the grounds that they disclose no cause of action the court will normally consider any proposed amendment since, if the existing case can be saved by a legitimate amendment, it is usually better to give permission to amend rather than strike out the claim and leave the claimant to start again. (My emphasis)."

[31] The approach taken in **Diamantes** is consistent with the approach explained by Chief Justice Byron in **Dr. Ralph Gonsalves v Ewardo Lynch**. I am therefore satisfied that it is open to the court to grant leave to amend a statement of case rather than deny it, with the possible effect that the unamended motion might then be struck out leaving Mr. Montrope to start again when this matter can be dealt with more conveniently, less expensively and saving court time if leave to amend is given now. I therefore find that the filing of an application under Part 9.7 does not prevent the court granting leave to amend the originating motion, if leave is required.

[32] If I am wrong and in fact leave is required to amend the statement of case, I will go on to consider whether this is a case in which the court should exercise its

discretion to grant leave to amend. Mr. Astaphan submitted in the alternative that if leave was required Mr. Montrope had satisfied the applicable test for the grant of leave to amend. Mr. Patterson contended that he had not.

Requirements for leave to amend satisfied?

[33] In **George Allert et al v Joshua Allerson et al**, the court of appeal comprehensively examined the principles relevant to the exercise of the court's discretion on an application for leave to amend a statement of case:

> "[49] In exercising its discretion the court should be guided by the general principle that amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing inconvenience to the other party and can be compensated in costs. Indeed, in the exercise of its discretion, where the court's permission is sought, the court, in determining whether or not to grant an amendment, must have regard to the overriding objective and the need to ensure that the real issues in controversy between the parties are determined. The rules must be applied in a manner that is fair to both parties and should not be applied in an inflexible manner that will prevent a litigant from prosecuting its case based on mere technicality.
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> [50] In **Clarapede & Co v Commercial Union Association**[7] Brett MR said:
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> > "However negligent or careless may have been the first omission, and however late the purposed [sic] 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; ....."
>
> [51] In the post-CPR 2000 English case, **Charlesworth v Relay Roads Ltd and others**, [8] Neuberger J approved the above principle and held that it had a universal and timeless validity.
>
> [53] There is public interest in allowing a party to deploy its real case, provided it is not irrelevant and has a real prospect of success.

[7] (1883) 32 WIR 262 as cited by Neuberger J in Cahrlesworth v Relay Roads Ltd and others [2000] 1 WLR 230 at p. 235.
[8] [2000] 1 WLR 230 at p. 235.

> [54] In determining whether to exercise its discretion so as to enable an amendment to be made there are many factors that the court must take into consideration. These include the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally changed at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs; and importantly, whether the amendment will serve any useful purpose."

[34] After considering those principles, Blenman J.A. at paragraph 68 in **George Allert,** applied them to the facts of the appeal and affirmed the amendment of the defense and counterclaim on the grounds that:

1. No trial date had been fixed.
2. The appellants (who opposed the amendment) would suffer no prejudice.
3. The proceedings were at a very early stage.
4. The justice of case required that leave to amend be given in order to ensure that real controversy between the parties is decided.

[35] Similarly, in **Commodo** (supra) the court of appeal stated:

> "It is the law that a court which is asked to grant permission to amend will base its decision on the overriding objective. Generally, disposing of a case justly will mean that amendments should be allowed to enable the real issues to be determined. There is a public interest in allowing a party to deploy its real case, provided it is relevant and has a real prospect of success. The court is competent to refuse to grant leave to amend the pleadings if the proposed amendments will serve no useful purpose or are fanciful."

Leave to Amend: Factors to Consider

[36] From **George Allert** and **Commodo**, I distill the following essential principles which I must have regard to in considering whether leave to amend should be granted:

1. The overriding objective and the need to ensure that the real issues in controversy between the parties are determined.
2. The rules should be applied in a fair and flexible manner so that a litigant is not prevented from prosecuting his case based on mere technicality.

3. These principles are of universal and timeless validity.
4. It is inappropriate to refuse an amendment on the merits if one of the main issues turns on a disputed factual situation because that is a matter to be determined at trial.
5. There is a public interest in allowing a party to deploy its real case, provided it is not irrelevant, will serve a useful purpose, has a real prospect of success and is not fanciful.
6. The amendment must not be a last minute fundamental change to the basis of the case.
7. The stage reached in the proceedings and whether a party will be prejudiced.
8. The adverse effect on other litigants of lost judicial time.
9. The justice to the parties.
10. Whether the other side can adequately be compensated in costs.

[37] I am satisfied that most of these factors weight on the side of granting leave: (1) the amendments appear to raise serious issues which might be the real issues to be determined; (2) resistance to the amendment is partly based on the mere technicality of whether the notice of hearing issued was a notice of first hearing; (3) the proceedings are at a very early stage so the Attorney General will not be prejudiced; (4) there can be no lost judicial time since there has been no case management of the originating motion; (5) the amendment is not a last minute change to the fundamental basis of the case since the originating motion has not yet been case managed; (6) the question of compensation in costs does not arise given the very preliminary stage the proceedings are at.

[38] Mr. Patterson concentrated his arguments primarily on one factor, namely, that the proposed amendments were fanciful and would serve no useful purpose. I accept that if indeed the proposed amendments are fanciful with no real prospect of success then this would be a prevailing factor. If the proposed amendments are fanciful no point would be served in allowing it even if the other factors are in

favour of the grant of leave to amend. We therefore turn to the proposed amendments.

Examination of Proposed Amendments

[39] The revised amended originating motion contained a number of proposed amendments. The more consequential amendments included:

(1) A declaration that the Governor General in acting on the advice of the Public Service Commission failed to ensure that the Public Service Commission acted constitutionally judiciously, and/or fairly including ensuring that the post of permanent secretary was of the same rank, status and reputation as that of secretary to the cabinet before purporting to remove or transfer the Claimant. (paragraph (i) of the motion).

(2) The Claimant was and is entitled to remain in the post of secretary to the cabinet until the age of retirement unless removed for reasonable cause. (paragraph (ii) (a) of the motion).

(3) The post of secretary to the cabinet is a special constitutional post or office and is substantially different in terms of, among other things, status and rank to that of the post of permanent secretary. (paragraph (ii) (b) of the motion).

(4) The Claimant was purportedly and unlawfully transferred to a post of permanent secretary and therefore removed in breach of the provisions of section 87 of the Constitution of Saint Lucia SI 1978 No 1901, principles of fairness and the protection of the law contrary to section 8 (8) of the said Constitution and/or without reasonable cause. (paragraph (ii) (d) of the motion).

(5) A Declaration that the Public Service Commission acted unlawfully and/or in breach of its constitutional duties and obligations under the Constitution when: (b) It acted on the instructions, advice or control of and/or merely "rubberstamped" the instructions, advice or control of the prime minister and/or cabinet contrary to the provisions of sections 85 (12) of the Constitution. (paragraph (iii) (b) of the motion.

(6) The First Defendant failed to provide further particulars, reasons or explanations for its decision including its statement that "after consideration of the programme for Labour Relations and assessment of [the Claimant's] skills, knowledge, and competencies, it is the view that [the Claimant] would be best placed to advance the Government's work programme in the area of labour" and "the Honourable Prime Minister has indicated that members of Cabinet are "more comfortable" working with the Claimant's Successor as Cabinet Secretary; (paragraph (iv) (b) of the motion.

(7) The First Defendant failed to give the Claimant a fair or reasonable opportunity to be heard on these prejudicial and adverse matters in that no particulars or facts were disclosed or provided to him, and additionally the matters relied on were never properly explained or defined by the First Defendant despite the Claimant's requests. (paragraph (iv) (c).

[40] I must now examine each of these proposed amendments to see whether they have any real prospect of success, are fanciful or serve any useful purpose in the prosecution of the litigation. I doing so I ask myself the crucial question: what is to be the scope of that inquiry I must conduct to determine if the amendments have a realistic prospect of success?

[41] The answer to this question is provided in United Kingdom House of Lords judgment in **Three Rivers District Council v Bank of England**[9] in which Lord Hope of Craighead said:

> "94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
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> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal

[9] [2001] UKHL 16.

> processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman,* at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.
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> 96. In ***Wenlock v Moloney*** [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:
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> > "This summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."
>
> Sellers LJ said, at p 1243C-D, 'that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed.'

[42] From that extract, I distill these essential principles which must guide my inquiry:

1. I must not undertake a minute and protracted examination of the documents and facts of the case to see if there is a realistic prospect of success because that would be to usurp the position of the trial judge and produce a trial of the case in chambers.

2. As a matter of law, if Mr. Montrope were to succeed in proving all the facts he offers to prove would he be entitled to the remedy he seeks?
3. Is the factual basis of the claim entirely without substance as to be fanciful?

Amendment Concerning Governor General

[43] Mr. Patterson submitted that the amendment seeking relief against the Governor General[10] is fanciful, serves no useful purpose and has no realistic prospect of success because, other than setting out the relief of a declaration sought, there are no grounds in the motion setting out the basis on which the declaration is sought or any factual allegations whatsoever against the Governor General in any of the affidavits filed in support. Mr. Patterson contended that it is a bare request for a relief for a declaration that is devoid of any basis and that it was included in order to maintain the Attorney General as a party to the claim who, but for the relief sought against the Governor General, would not otherwise be a proper party to the claim.

[44] Paragraph (i) of the amended motion might not have been drafted in the most felicitous language. But the proposed amendment has to be read against the backdrop of the entire motion, including the original unamended portion, to see if what is proposed is fanciful. The motion is expressed to be brought pursuant to sections 16 and 105 of the constitution. Section 16 affords any person who alleges a breach of the fundamental rights and freedoms provisions the right to apply to the court for redress. Section 105 affords any person who alleges that any provision of the constitution (other than fundamental rights and freedoms provisions) has been contravened the right to apply for a declaration and relief if he or she has a relevant interest. Mr. Montrope is therefore invoking the court's constitutional jurisdiction under both available routes.

[45] Section 87 (1) of the constitution governs the process of transfer from certain offices including that of the cabinet secretary. Section 87 (2) states that that

[10] paragraph (ii) of the motion.

power is exercised by the Governor General acting in accordance with the advice of the Public Service Commission. Mr. Montrope (at paragraph ii (d) of the proposed amendment) claims a breach of section 87 of the constitution.

[46] When that is read with paragraph (i) of the amended motion the allegation is that section 87 of the constitution is breached because (a) the Governor General transferred the cabinet secretary who was entitled to remain in the post until retirement or removed for reasonable cause or (b) the Governor General acted on the advice of the PSC without first ensuring that the cabinet secretary was being transferred to a post of equal rank, status and reputation. I do not think that this is a fanciful claim and if Mr. Montrope were to succeed in proving what he offers to prove – that the PSC was merely rubberstamping a decision of the prime minister/cabinet and a cabinet secretary is entitled to remain in post until retirement or removed for cause – then he would be entitled to the relief he seeks.

[47] Mr. Patterson submitted that the allegations of constitutional breach of section 13 (protection from discrimination) and section 8 (8) (right to a fair hearing) are equally fanciful in that a reading of the affidavit evidence will show that Mr. Montrope was fully heard and responded to in the numerous exchanges with the PSC and given every opportunity to present his case. He further contents that the affidavits filed on behalf of Mr. Montrope contain no evidence that he was transferred because of his political affiliation; it merely avers that the prime minister was not comfortable with him, and this could have been due to other factors such as competence and there was no basis for concluding that the uncomfortableness had anything to do with his politics.

Amendment Concerning Denial ofFfairHhearing

[48] In relation to the alleged breach of section 8(8) of the constitution, there is evidence of lengthy exchanges between the PSC and Mr. Montrope regarding his transfer/removal as follows:

(i) 23rd November 2016: PSC writes to Mr. Montrope inviting written representation on his proposed transfer;

(ii) 25th November 2016: Mr. Montrope responds to PSC that there were no reasons indicated for his removal and that he could not constitutionally be transferred to the post of permanent secretary;

(iii) 9th December 2016: PSC provides reasons to Mr. Montrope why the Department of Public Services requested his transfer;

(iv) 9th December 2016: Mr. Montrope among other things requests clarification of the statement that the Cabinet was more comfortable working with Mr. Philip Dalsou;

(v) 4th January 2017: PSC provides further reasons to Mr. Montrope for his transfer and advised that his objections would be considered when the PSC deliberated on the matter;

(vi) 13th January 2017: PSC provides Mr. Montrope with the reasons for its decision to transfer him with effect from 16th January 2016;

(vii) 23rd January 2017: Mr. Montrope writes to PSC complaining that he had never been given all the information he requested including the prime minister's assessment of his performance and skills and informed that he did not accept that the PSC had considered his representations.

[49] What should the court make of that evidence? The Attorney General's position is that those exchanges demonstrate that Mr. Montrope was given a full opportunity to make representations and the fact that he disagreed with the PSC's decision was not a basis to say it had denied him a fair hearing. Mr. Montrope says he was never given all he requested including what the PSC referred to as the prime minister's assessment of his performance and skills and so he was "still largely in the dark as to the true lawful reasons or motives" for his transfer. He therefore concluded that the PSC had not considered his representations. If the reasons given for his transfer/removal were not "true and lawful" there are ways of challenging those, but the preponderance of the evidence is that he was given a full and adequate opportunity to put his case to the PSC.

[50] Having examined the affidavit evidence and exhibits on this point and reached a conclusion, I recognize that I might have done the very thing cautioned against in the authorities cited, that is, conducted a mini trial on this point in chambers. I do not think that the learning on the scope of the inquiry is an exact science but meant more as a guideline. I make the observation that the factual basis of the claim to have been denied a fair hearing is devoid of substance as to be fanciful. This is only an observation which cannot have any consequential effect since I have already concluded that no leave was required. It may be it is still open to the Attorney General to take this point.

Amendment Concerning Discrimination

[51] As regards the basis for the claim that Mr. Montrope was discriminated against, Mr. Patterson's argument is that the only fact relied on by Mr. Montrope is the disclosure by the PSC that the prime minister had indicated that the members of his cabinet are "more comfortable" working with Philip Dalsou as cabinet secretary. As Mr. Patterson put it, this could have meant they were not comfortable with him because of competence or any other reason; it did not inexorably point to any political affiliation. This observation is true.

[52] Mr. Astaphan pointed however to the first affidavit of Mr. Montrope in which he says that the following point to discrimination based on politics: (1) he was required to proceed on leave when five other senior public officers who had accumulated as much or more leave had not been required to proceed on leave; (2) the prime minister had indicated to him that he would be replaced by Mr. Cosmos Richardson who was integral to the development of the party's manifesto; (3) he was denied access to his personal file; (4) the locks had been changed on his office door; (5) the PSC disclosed that the Cabinet was "more comfortable" with someone else.

[53] Mr. Montrope's evidence, at this juncture, might not be enough to establish proof of political discrimination. But I do not think it is devoid of any factual basis as to be fanciful. With the claim of denial of fair hearing, no evidence adduced by Mr. Montrope at a later stage of the proceedings could change the fact that the evidence plainly showed a full and fair hearing of Mr. Montrope's case by the PSC. That cannot be negatived by any new evidence. On this discrimination point however, it may be that, after disclosure and filing of further affidavits pursuant to case management orders, this allegation may or may not be made out. I must not usurp the task of the trial judge who will determine this issue on trial after all the evidence is in. Suffice it to say that the evidence put forward so far, it my view, is sufficient to raise the issue that his transfer constituted discrimination, and so removes it from the realm of the fanciful.

[54] **Disposition**

I therefore make the following orders:

(i) The second defendant's preliminary objection is dismissed.

(ii) The claimant's revised amended originating motion is deemed to have been properly filed.

(iii) The second Defendant is given leave to amend his application to strike out the motion which was based on the unamended originating motion.

(iv) The court office shall fix a date for directions to be given in relation to the hearing of the application to strike.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar