Gilbert Kodilinye and Vanessa Kodilinye

Commonwealth Caribbean Civil Procedure

Third edition

COMMONWEALTH CARIBBEAN CIVIL PROCEDURE

This new edition of a well-established book is a timely response to the enactment during the past three to five years of new Rules of civil procedure, which are now in force, or are soon coming into force in the vast majority of Caribbean jurisdictions. The third edition has been substantially revised and augmented to take into account the revision of the Rules and covers the new Rules in detail. The book also provides coverage of the recent case-law coming out of Jamaica and the Organisation of Eastern Caribbean States (OECS), under the new Rules of civil procedure.

This book is essential reading for students of Commonwealth Caribbean law as well as anyone wishing to get to grips with the new Rules of civil procedure.

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Routledge·Cavendish
Taylor & Francis Group

LONDON AND NEW YORK

Third edition first published in 2009
by Routledge-Cavendish
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge-Cavendish
270 Madison Avenue, New York, NY 10016

This edition published in the Taylor & Francis e-Library, 2008.

Routledge-Cavendish is an imprint of the Taylor & Francis Group, an informa business

First edition 1999
Second edition 2005

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Kodilinye, Gilbert.
Commonwealth Caribbean civil procedure/Gilbert Kodilinye and Vanessa Kodilinye. – 3rd ed.
p. cm.
1. Civil procedure – West Indies, British. 2. Civil procedure – Caribbean Area. I. Kodilinye, Vanessa. II. Title.
KGL5503.K63 2008
347.729'05 – dc22
2008010886

ISBN 0-203-89115-5 Master e-book ISBN

ISBN 10: 0–415–47231–8 (pbk)
ISBN 10: 0–203–89115–5 (ebk)

ISBN 13: 978–0–415–47231–9 (pbk)
ISBN 13: 978–0–203–89115–5 (ebk)

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PREFACE

Since the publication of the second edition of Commonwealth Caribbean Civil Procedure in 2005, new Civil Procedure Rules modelled on the 'Woolf Rules' in England and Wales have been brought into force in Belize and Trinidad & Tobago, and are about to be enacted in Barbados. This means that the vast majority of Commonwealth Caribbean jurisdictions are now applying Woolf-inspired Rules and it is only a matter of time before the few remaining jurisdictions adopt them, in pursuit of the 'Holy Grail' of uniformity and harmonization.

In this third edition, we have sought to present the new Rules in the light of the many judicial decisions handed down by the courts in Jamaica and the OECS since the new Rules came into force in those jurisdictions. At the time of writing, there were no available decisions from the courts of Trinidad & Tobago, and very few from Belize, but since the new Rules in all the Caribbean territories are almost identical, it is to be expected that cases decided in the Jamaican and OECS courts will be of highly persuasive authority in the courts of Trinidad & Tobago, Belize and Barbados.

The objective of this new edition is the same as for previous editions: that is, to provide a basic text for students of civil procedure in the Caribbean, as well as a vade mecum for those practitioners who may need a guide to the scope and application of the new Rules.

As in the previous editions of this book, we have included a number of specimen pleadings, affidavits, orders and other documents commonly encountered in civil litigation. As before, coverage is confined to the typical common law and equity claims, and does not extend to family matters, nor to public law litigation such as judicial review.

We have prepared the text in the light of materials available to us up to 31 January 2008.

Gilbert Kodilinye
Vanessa Kodilinye
Barbados,
20 June 2008

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CHAPTER 1

INTRODUCTION

The procedure in civil actions in the High Courts (the 'Supreme Court' in Jamaica) and Courts of Appeal in the majority of Commonwealth Caribbean jurisdictions is now governed by the new Civil Procedure Rules (CPR). Almost identical versions of these Rules are in force in the Organisation of Eastern Caribbean States (OECS) jurisdictions (since October 2000), in Jamaica (since January 2003), in Belize (since April 2005), and in Trinidad & Tobago (since September 2006), and are likely to be enacted in Barbados in 2008. In the other jurisdictions (The Bahamas, Guyana, Cayman Islands and Bermuda), the 'old' Rules of the Supreme Court (RSC) remain in force, though The Bahamas has adopted some of the case management features of the CPR. It can thus be seen that the CPR now dominate the procedural landscape virtually throughout the Caribbean.

The Caribbean versions of the CPR are broadly modelled on, but differ in many of their details from the English CPR, which came into force in April 1999. The genesis of the English Rules was *Access to Justice*, the Report of a committee chaired by Lord Woolf, MR, which was published in 1996. The English Rules, which are generally referred to as the 'Woolf Rules', were designed to remedy the perceived defects of the system of civil litigation under the RSC as identified in the Woolf Report, namely, an excessively adversarial environment, excessive and unaffordable costs, undue delay and over-complexity.[1]

The main feature of the CPR is the system of 'case management', which aims to ensure that disputes 'progress as expeditiously and economically as possible to a fair settlement (by negotiation or mediation or some other system of alternative dispute resolution (ADR)) or trial'.[2] Whereas under the RSC regime the progress of an action was very much in the hands of the litigants' attorneys, under the CPR the management of cases is placed firmly in the hands of the judges and masters, whose function it is to set the agenda for interim applications, preparation for trial, and the trial itself.

Now that the CPR have been in operation for several years, it is apparent that the case management system has been largely successful in curing two of the main ills of the old regime, namely undue delay and excessively adversarial environment, as the judges have been commendably active

1 See (1996) 140 Sol Jo 733.

2 (1998) *LS Gazette*, 24 June, p. 15.

and innovative in the application of the new Rules. On the other hand, 'front loading' of costs, brought about by the need for considerably more preparatory work on the part of attorneys, has proved problematic for less financially well-endowed litigants, and is likely to remain a problem for the foreseeable future. In the meantime, there is now a growing body of case law focusing on many aspects of the new Rules, with positive consequences for the development of a distinct and solid jurisprudence in the area of civil procedure in the Caribbean.

THE OVERRIDING OBJECTIVE

Rule 1.1 of the Jamaican Civil Procedure Rules contains the words:

> These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

The reference to a 'new procedural code' is clearly intended to emphasise that the Jamaican CPR replaces the former Judicature (Civil Procedure) Code in its entirety. It may also serve to support the view that, in applying the new Rules, judges should not 'look over their shoulders' to the former Rules and the case law interpreting them, and that cases decided under the old Rules are 'no longer generally relevant' to the CPR, a point that Lord Woolf himself made in *Biguzzi v Rank Leisure plc*[3] when considering the identical wording of the English CPR. It is submitted, however, that the courts in Caribbean jurisdictions need to take a somewhat different approach from that advocated by Lord Woolf and other English judges, for a number of reasons. First, although the Jamaican and other Caribbean Rules are broadly modelled on the English CPR, they differ from the latter in many important respects, and judicial pronouncements on the effect of the English CPR will not necessarily be useful, even as persuasive authorities, in the Caribbean context. Second, the radical approach to civil procedure reform in England and Wales has been driven to some extent by the need to bring the approach to civil justice in the UK into line (in admittedly limited respects) with the inquisitorial method of adjudication employed in the civil law systems of the UK's European Union partners – a factor which is not present in the Commonwealth Caribbean. Third, some of the case law on civil procedure in Caribbean jurisdictions that developed under the old Rules, was concerned with situations that are unique to Caribbean jurisdictions and, in the absence of evidence that those situations have changed in material respects, some of

3 [1999] 1 WLR 1926. It has been held in a recent English case, however (*Omega Engineering Inc v Omega SA* (2003) *The Times*, 29 September), per Pumfrey J, that 'while it is generally impermissible to refer to the Rules of the Supreme Court in construing the Civil Procedure Rules, the court can do so where it appears the power conferred by the latter seems to be narrower than that conferred by the former rules, thus prejudicing the overriding objective of the new rules'.

the decisions of Caribbean courts under the old Rules may well retain their validity under the new CPR regime. Fourth, if, in their wisdom, the Rules Committees in the Caribbean decided to use in a particular new Rule wording that was almost identical to that of the equivalent provision in the old Rules, there would be a strong argument for treating Caribbean case law interpreting the old Rule as being of at least persuasive authority in interpreting the new. Fifth, unlike in England and Wales where dozens of practice directions have been handed down in order to supplement and to give detailed guidance as to the application of the new English Rules, so far there are few practice directions on the Jamaican Rules; accordingly, in the absence of such practice directions, guidance as to the application of the new Rules could be sought from case law decided under the equivalent sections of the old Rules. Lastly, it is worth bearing in mind that many of the most important powers of the court in matters of civil procedure are derived not from the Civil Procedure Rules but from statute, or from the inherent common law or equitable jurisdiction of the Supreme Court. Examples are the power to award security for costs against impecunious corporate claimants under the companies legislation,[4] and the jurisdiction to grant interim,[5] Mareva ('freezing'),[6] and Anton Piller ('search') injunctions,[7] and *Norwich Pharmacal* orders.[8] Moreover, civil procedure is significantly affected by many rules of substantive law developed by the common law courts, such as the doctrine of *forum conveniens*,[9] the 'cheque rule',[10] 'without prejudice' communications,[11] and legal professional privilege.[12] The significance of this in the present context is that case law dealing with any such powers or principles, which are derived from sources other than the CPR is unaffected by the introduction of the new Rules, and decisions that were considered binding or persuasive before the introduction of the new CPR will remain binding or persuasive to the same extent.

Interestingly, in *Quarrie v C&F Jamaica Ltd*,[13] one of the first cases decided under the new Jamaican CPR, Mangatal J expressed the entirely sensible

4 See pp 158–60, below.

5 See pp 91–111, below.

6 See pp 112–28, below.

7 See pp 128–32, below.

8 See pp 142–8, below.

9 See pp 30–1, below.

10 See pp 72–4, below.

11 See pp 140–2, below.

12 See pp 137–40, below.

13 (2003) Supreme Court, Jamaica, no CL 2000/Q-001 (unreported). See also *Caribbean Development Consultants v Gibson* (2004) Supreme Court, Jamaica, no CL 323 of 1996 (unreported), per Sykes J (Ag). Similar views have recently been expressed in the English Court of Appeal. See *Flynn v Scougall* [2004] 3 All ER 609, p 615, per May LJ; *Parsons v George* [2004] 3 All ER 633, p 646, per Dyson LJ.

view that Lord Woolf's statement in the *Biguzzi* case, to the effect that cases decided under the old RSC were no longer generally of any relevance under the CPR:

> . . . does not, and cannot mean that there is a complete abandonment of old authorities . . . the emphasis must be on the word *'generally'* no longer of any relevance. It seems to me that where the provisions being considered are the same or substantially the same, or where the previous authorities deal with certain basic procedural principles that repeat themselves in the CPR, then they may be of some use.

A similar view was expressed in another Jamaican case, *Manning Industries Inc v Jamaica Public Service Co Ltd*,[14] by Brooks J, who admitted that 'some guidance can be gleaned from the old authorities'. This case was of particular significance as it concerned an application for security for costs against a foreign claimant. Brooks J quite rightly noted that little guidance could be gained from recent cases decided under the equivalent provisions of the English CPR, as the UK courts were, under the European Convention on Human Rights, obliged to consider matters that did not concern the Jamaican courts. He therefore held that the principles to be applied in Jamaica were those stated in earlier cases decided under the RSC.[15]

Significantly, the OECS Rules do not contain any reference to a 'new procedural code', their draftsman being content to refer simply to the overriding objective. It may be argued that the omission of any reference to a new code shows a desire not to make a complete break with the past but rather to *modernise* the system of civil procedure, while retaining as much of the extensive Caribbean jurisprudence developed under the old Rules *as would be compatible with the overriding objective*. Indeed, in *Boyea v Eastern Caribbean Flour Mills Ltd*,[16] Pemberton J opined that 'where the pre-CPR authorities mesh with the overriding objective, they can be highly persuasive in arriving at a decision'. Also, as noted above, although several basic concepts in the new Rules in the Caribbean have been copied from the new English Rules (such as the overriding objective itself), there are many important differences between the English and the Caribbean Rules that would justify, and indeed require, taking a different approach to certain issues from that taken in England. So it remains to be seen whether judges in the Caribbean will be prepared to continue the process of building a distinctive Caribbean jurisprudence in matters of civil procedure, or whether they will be tempted to follow the new English decisions without regard for local circumstances or precedents. It is to be hoped that they will prefer the former approach, and indeed recent decisions of the learned judges of the Jamaican Supreme Court show a welcome trend in that direction.[17]

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14 (2003) Supreme Court, Jamaica, no CL 2002/M058 (unreported).

15 See Chapter 16, below.

16 (2002) High Court, St Vincent and the Grenadines, no 211 of 1997 (unreported).

17 See above, notes 13 and 14.

SCOPE OF THE OVERRIDING OBJECTIVE

The overriding objective, as stated in Rule 1.1, is to 'enable the court to deal with cases justly', which includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party;

(d) ensuring that the case is dealt with expeditiously and fairly; and

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

Rule 1.2 enjoins the court to 'seek to give effect to the overriding objective when it

(a) *exercises any power given to it by the Rules*, or

(b) *interprets any rule*'.

The rather convoluted definition of the overriding objective in the Jamaican and the OECS Rules has been copied almost verbatim from the English Rules. The reason for the prominence given to the overriding objective, as explained in the Final Report of the Woolf Committee, is that since the Rules are not designed expressly to answer every question that might arise, the overriding objective serves as ' a compass to guide courts and litigants and legal advisers as to their general course'.[18] It was envisaged that the Rules would be supplemented by practice directions, which would serve to flesh out each rule and provide the necessary details pertaining to their application. In England and Wales there is now a large number of practice directions covering practically every aspect of the Rules, but to date there are very few such practice directions in Jamaica or the OECS.

APPLICATION OF THE OVERRIDING OBJECTIVE

'Dealing with cases justly' is exemplified by the principle that a litigant should not be prevented from pursuing his claim merely because he is technically in breach of a procedural rule. '*Doing justice*' means that the courts ought to decide claims as far as possible on their merits, and not reject them on grounds of procedural default. Thus, for instance, where a party commences with the wrong form, or relies on a wrong statutory provision,[19] or makes

18 *Woolf Report*, Chap 20.

19 *Thurrock Borough Council v Secretary of State for the Environment* (2000) *The Times*, 20 December.

an error in quantifying his claim so that the amount claimed is a serious underestimate of his loss,[20] permission to amend should readily be given, especially where the defendant has not been misled by the errors.

'Ensuring that the parties are on an equal footing' has been held not to justify the court in intervening to prevent a more affluent party from instructing lawyers of his choice, where the other party could not afford such expensive attorneys.[21] It has further been stated that if a party wishes the court to inhibit the activities of another party, with a view to achieving greater equality, the party making the application must show that he is himself conducting proceedings so as to minimise expense.[22]

'*Dealing with cases expeditiously, fairly and saving expense.'* An example of the application of this principle is where the court, having decided that the Pt 8 procedure (the equivalent of fixed date claims in Jamaica and the OECS) commenced by the claimant was inappropriate for the particular claim, decided that it would be more cost-effective to allow the claim to continue as an ordinary Chancery action than to compel the claimant to start again and issue fresh proceedings.[23]

'*Allotting an appropriate share of the court's resources*.' A striking example of the application of this aspect of the overriding objective is a case where the appellant had failed to correct his notice of appeal despite being advised by his opponent that the notice was seriously defective, and where the appellant had also disregarded the directions relating to appeal bundles. The English Court of Appeal spent more than an hour trying, unsuccessfully, to put the papers in order, but decided that to spend further time on this exercise would not be an appropriate use of the court's resources, and dismissed the appeal.[24]

LIMITATIONS OF THE OVERRIDING OBJECTIVE

It was apparent from the beginning that there are serious dangers in undue reliance by the courts on the overriding objective. It has been rightly pointed out[25] that premature and unnecessary recourse to the overriding objective may lead to:

(a) inadequate legal analysis of important procedural issues, with the effect that the proper development of the law may be hindered;

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20 *Chilton v Surrey County Council* [1999] CPLR 525.

21 *Maltesz v Lewis* (1999) *The Times,* 4 May.

22 *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775.

23 *Keene v Martin* (1999) *The Times,* 11 November.

24 *Adoko v Jemal* (1999) *The Times,* 8 July.

25 *White Book,* Vol 1, 2002, para 1.3.2.

(b) radical provisions of the CPR not being consistently applied; and

(c) an erratic 'palm tree justice' approach to interlocutory matters, leading to inconsistent treatment of similar situations.

It may be added that there is also a danger that judges may, wittingly or unwittingly, apply the overriding objective to issues outside its scope, such as to the interpretation of rules derived from statute, to rules of evidence, or even to rules of substantive law. Indeed, there are already examples in the English cases of the application of the overriding objective to matters entirely outside its proper scope.[26]

On the other hand, a sensible approach to the overriding objective will recognise that the courts have always been influenced by the matters listed in the overriding objective, such as doing justice in the individual case, being fair to both parties, avoiding delays and saving costs, and that Rule 1.1 of the CPR has merely highlighted the need for the courts to focus on such factors when applying and interpreting the CPR.

Many judges have recognised that the requirement that the courts should give effect to the overriding objective when exercising any power conferred by the Rules does not affect certain principles well established by earlier authorities. Examples include:

- the proper approach to striking out in defamation actions;[27]
- the principles relating to inadvertent disclosure of documents subject to legal professional privilege;[28]
- the jurisdiction of the court to review and change its mind on a conclusion reached in a judgment at any time before the order has been drawn up;[29]
- the *Ladd v Marshall* guidelines concerning production of fresh evidence in an appellate court;[30] and
- the *Evans v Bartlam* principles relating to the setting aside of regularly obtained default judgments.[31]

26 *Ibid.*

27 *Best v Charter Medical of England Ltd* (2001) *The Times,* 11 November, CA.

28 *Breeze v John Stacey and Sons Ltd* (1999) *The Times,* 8 July, CA.

29 *Kirin Amgen Inc v Transkaryotic Therapies Inc* (2001) *The Times,* 1 June.

30 *R (Amraf Training plc) v Dept of Education* [2001] EWCA Civ 915, para [30].

31 *Malcolm v Metropolitan Management Transport Holdings Ltd* (2003) Supreme Court, Jamaica, no CL 2002/M225 (unreported).

CHAPTER 2

COMMENCEMENT OF PROCEEDINGS

Before commencing proceedings, the claimant should give the defendant warning of his intentions by sending to the defendant a 'letter before action'. In a recent English case, *Phoenix Finance Ltd v Federation International de l'Automobile*,[1] it was held that such a letter was essential under the new CPR, and a claimant who failed to give warning of proceedings, which he later lost, would be penalised in costs. Sir Andrew Morritt VC pointed out that 'even before the CPR . . . letters before action were required in all but exceptional cases', and 'the whole thrust of the CPR and, in particular, the overriding objective makes it plain that a letter before action is at least as necessary under the new rules as under the old'.

Proceedings under the CPR are commenced by issuing a 'claim form'[2] (Form 1 in the Jamaican and OECS Rules) or, in those matters within Rule 8.1(4) – corresponding with the originating summons procedure under the RSC – by issuing a 'fixed date claim form' (Form 2). The filing of a claim form involves the court sealing the form with its official seal. The effect of issuing a claim form is that time stops running for limitation purposes, and starts running for the purpose of service.

THE CLAIM FORM

The claimant's attorney is responsible for preparing the claim form before issue. A completed claim form should:[3]

(a) contain a short description of the nature of the claim;

(b) specify any remedy sought by the claimant;

(c) give the claimant's normal place of residence or business, and an address for service in accordance with Rule 3.11; and

(d) if the claimant is an individual, state his occupation.

In addition:

(e) a claimant who seeks aggravated or exemplary damages must say so in the claim form;[4]

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1 (2002) *The Times,* 27 June.

2 Rule 8.1. A claim form (Form 1) is used for common law actions, including personal injuries claims, breach of contract and breach of statutory duty, and claims involving allegations of fraud.

3 Rule 8.7(1) (Jan); Rule 8.6(1) (OECS and Bel); Rule 8.4(1) (B'dos); Rule 8.5(1) (T&T).

4 Rule 8.7(2) (Jan); Rule 8.6(3) (OECS and Bel); Rule 8.4(2) (B'dos); Rule 8.5(2) (T&T).

(f) likewise, if he seeks interest, he must say so;[5]

(g) a claimant who seeks recovery of goods must state the value of the goods;[6] and

(h) a claimant who claims in a representative capacity or sues a defendant in a representative capacity must state what that capacity is.[7]

Examples of brief details of a claim to be included in the claim form

(a) The claimant's claim is for damages for personal injury and loss caused by the defendant's negligence in a motor accident at Temple Avenue in the Parish of Clarendon on 10 October 2003.

(b) The claimant's claim is for the sum of $89,577, being the amount outstanding on invoices delivered in respect of goods supplied to the defendant between June and September 2003.

PARTICULARS OF CLAIM

The particulars of claim are a formal written statement setting out the material facts supporting the claimant's case, together with the relief or remedy sought from the defendant. Rule 8.9 of the Jamaican CPR specifically provides that the claimant must include in the particulars of claim (or in the claim form) a statement of all the facts on which he relies, and such statement must be as short as is practicable. Further, copies of any documents necessary to support the claimant's case must be identified or annexed.

The particulars of claim must include a certificate of truth.

Unlike in England and Wales, where the particulars of claim may be served separately from the claim form (within 14 days after service of the claim form), in Caribbean jurisdictions the particulars of claim *must be served with the claim form* unless either:

(a) the claimant has included in the claim form all the information that would ordinarily be contained in the particulars; or

(b) the court gives permission for it to be served separately.

The first exception, (a), will apply to very simple debt actions where the details of the claim can be set out in a few lines on the claim form. The second, (b), is directed in particular to cases where the claimant's attorney

5 Rule 8.7(3) (Jam); Rule 8.6(4) (OECS and Bel); Rule 8.4(3) (B'dos); Rule 8.5(3) (T&T).

6 Rule 8.7(4) (Jam).

7 Rule 8.7(6) (Jam); Rule 8.6(6) (OECS and Bel); Rule 8.4(5) (B'dos); Rule 8.5(4) (T&T).

has received instructions just before the expiration of the relevant limitation period, and he would not have sufficient time to draft the particulars of claim for service with the claim form. In such a case, the court must be satisfied (a) that a relevant limitation period is about to expire and the claimant has obtained legal advice about the claim for the first time within the 28 days prior to the proposed filing date, and (b) that the claim form must be issued as a matter of urgency and it is not practicable for the claimant to prepare the particulars of claim in time.

An application for permission to serve the claim form without particulars of claim may be made without notice, but must be supported by evidence on affidavit as to the reasons why it is not practicable to serve particulars with the claim form.

PERSONAL INJURIES CLAIMS

In personal injuries claims, additional requirements are as follows:

(a) the claimant's date of birth or age must be stated in the claim form or particulars of claim;
(b) where the claimant intends to rely at trial on the evidence of a medical practitioner, he must attach to the claim form a report from such medical practitioner relating to the injuries alleged; and
(c) a schedule of any special damages claimed must be included in or attached to the claim form or particulars of claim.

FIXED DATE CLAIMS

Fixed date claims (for which Form 2 must be used) are equivalent to the originating summons type of claim under the RSC and to 'Pt 8 claims' under the English CPR. Rule 8.1 provides that the following types of claim must be commenced by the Form 2 procedure:

(a) mortgage claims (Jamaica only);
(b) claims for possession of land;
(c) hire purchase claims;
(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (Jamaica only);
(e) whenever its use is required by a rule or practice direction; and
(f) where, by any enactment, proceedings are required to be commenced by originating summons or motion.

Among the commonest types of fixed date claim are cases where trustees or executors seek the court's ruling on the construction of a clause in a trust

Figure 1
Example of particulars of claim in personal injury action

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO T-026/2003

BETWEEN

JANICE TUDOR CLAIMANT

AND

BERNARD ABRAHAMS DEFENDANT

PARTICULARS OF CLAIM

(1) On or about the 12th of October 2003 the Claimant was a passenger in the Defendant's motor car registration number 5537 AF which was being driven by the Defendant along Temple Avenue, Frankfield in the Parish of Clarendon when the said car left the road, mounted the sidewalk and collided with a concrete wall.

(2) The collision was caused by the negligence of the Defendant.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that he:

(a) drove too fast;

(b) failed to keep any, or any adequate, lookout;

(c) drove the car, or allowed the same to travel off the carriageway of the road on to the sidewalk adjacent thereto and into collision with the wall;

(d) drove when his ability to do so was impaired by the consumption of alcohol;

(e) failed to slow down, brake, steer or otherwise manoeuvre his vehicle so as to avoid the collision which by the exercise of proper driving skill and care he could have avoided.

(3) The Claimant will rely on the happening of the accident as evidence in itself of the negligence of the Defendant.

(4) By reason of the accident the Claimant, whose date of birth is the 15th of July 1961, sustained pain, injury, loss and damage.

PARTICULARS OF INJURY

The Claimant sustained a comminuted fracture of the left femur, a comminuted and compound fracture of the left forearm with severe soft tissue damage, and a brachial plexus injury involving damage to

the cervical spine and resulting in a paralysed left arm. Full particulars are set out in the medical report of Dr Sean Fields dated the 10th of January 2004 served herewith.

By reason of the personal injuries, the Claimant suffers severe and permanent pain. She was employed as a physical education teacher in a secondary school at the time of the accident. She returned to work at her school in April 2004, but her injuries were a great handicap in discharging her duties. She also suffers from depression. The Claimant's chances of advancement in her profession have been severely curtailed. She has been seriously disabled in the labour market and will always be at risk in this respect.

A schedule of past and future losses is attached.

And the claimant claims:

(1) Damages exceeding $350,000.
(2) Interest.
(3) Costs.

I believe the facts stated in the particulars of claim are true.

Janice Tudor

Filed the 30th September 2004 by Jefferson Peake & Co of 28 Orchid Court, Frankfield, on behalf of the Claimant.

deed or will, and in such cases there should be no dispute as to the facts. There are also other types of claim, not involving a substantial dispute of fact, where the claimant may have the option of proceeding under the usual Form 1 or under Form 2 and, in making the choice of procedure, one of the considerations for the client may be expense. Under the fixed date procedure, the client will need to be prepared to spend more money 'up front' than in the usual Form 1 procedure, mainly because any evidence needed in support of the claim must be filed and served with the claim form, and the gathering, drafting, preparing and serving of evidence is time-consuming and costly. Another disadvantage of the Form 2 procedure is that judgment in default is not available, and the claimant must wait for the hearing date given when he issues his claim form. However, there are tactical advantages to using the Form 2 procedure, in that 'the flush of evidence will put [the] opponent on the back foot', and this procedure 'is an ideal way of putting pressure from the start and of giving your client the best chance of obtaining quick closure'.[8]

8 Michaelson, J, 'Quick closure in litigation' [2002] 152 *New Law Journal* 24.

Figure 2
Example of particulars of claim in action for breach of contract

ST VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE
CLAIM NO 0429 OF 2007

BETWEEN JD GRASPER LIMITED CLAIMANT

AND CANARY DEVELOPMENTS LIMITED DEFENDANT

PARTICULARS OF CLAIM

(1) By an agreement contained in three letters dated the 5th and 13th of February 2007, the Claimant and the Defendant entered into an agreement for the purchase by the Claimant from the Defendant of premises situate at 23–45 Temple Avenue, Kingstown, and known as the Canary International Plaza.

(2) By the said agreement it was (inter alia) agreed that the purchase should be completed and possession given to the Claimant on the 14th of May 2007 (except for a small warehouse possession of which was given to the Claimant earlier).

(3) In breach of the said agreement, the Defendant failed to complete the agreement until on or about the 17th of September 2007, although the Claimant was ready and willing to complete the purchase on the 14th May 2007.

(4) Further and /or alternatively, in breach of the said agreement the Defendant failed and/or refused to deliver up possession of the said premises on the 14th May 2007, and did not do so until the 17th of September 2007.

(5) Notwithstanding that the Defendant continued in use and occupation of the premises from the 14th of May 2007 to the 17th of September 2007, the Defendant paid no rent for same.

(6) By reason of the said breaches, the Claimant was deprived of the use of the said premises and suffered loss and damage thereby.

(7) At all material times the rental value of the said premises was $125,000 per month.

The claimant claims:

(1) $525,000 for use and occupation of the said premises from the 14th of May to the 17th of September 2007.

(2) Further or alternatively damages for breach of contract.

(3) Interest.

(4) Costs.

(5) Further and other relief.

I believe the facts stated in the Particulars of Claim are true.

_____

JD Grasper Limited

Filed the 12th October 2007 by Gavel, Dean & Mountbay, Attorneys-at-Law of 5A Midland Court, Kingstown, on behalf of the Claimant.

Where Form 2 is used, the claim form must state:

(a) the question that the claimant wishes the court to decide;

(b) the remedy that the claimant is seeking and the legal basis for the claim to that remedy;

(c) where the claim is being made under an enactment, what that enactment is; and

(d) where the claimant is claiming in a representative capacity, or is suing a defendant in a representative capacity, what that capacity is.

ISSUING THE CLAIM FORM

The claimant's attorneys should make sufficient copies of the claim form for themselves, the court and each defendant. They will retain one copy and give the others to their clerk to take to the registry. The registry issues the claim by sealing the claim forms, and entering the details of the claim in its records. When it issues the claim, the registry allocates a claim number to the case, which is endorsed on the claim forms.

SERVICE

Under Rule 8.12 (OECS), a claim form must be served within six months after the date of issue (12 months in the case of Admiralty claims and claim forms served out of the jurisdiction). Under Rule 8.14 (Jam), the period is 12 months in all cases. After these periods the claim becomes invalid.[9]

9 Cf Rule 8.12 (OECS and Bel); Rule 8.10 (B'dos); Rule 8.13 (T&T).

When a claim form is served on a defendant, it must be accompanied by:

(a) a form of acknowledgment of service and of defence;

(b) the prescribed notes for defendants; and

(c) where the claim is for money and the defendant is an individual, a form of application to pay by instalments.

Each form must contain the address of the registry to which the defendant is to return the forms, and the title and reference number of the claim.[10]

EXTENSION OF TIME FOR SERVICE

A claimant may apply for an order extending the period within which the claim form may be served (by up to six months on any one application). Such application must be made within the original period for service or any subsequent extension permitted by the court,[11] and must be supported by evidence on affidavit. The court may make an order for extension only if satisfied that:

(a) the claimant has taken all reasonable steps to trace the defendant and to serve the claim form, but has been unable to do so; or

(b) there is some other special reason for extending the period.[12]

A sealed copy of the order for extension must be served with the claim form.

No more than two extensions may be allowed unless the court is satisfied that the defendant is deliberately evading service, or there is some other compelling reason for allowing a further extension.[13]

Since one of the primary objectives of the CPR is to enable parties to achieve speedy results in litigation, the restrictions imposed on applications for extension of time to serve claim forms are clearly of critical importance and are in line with the general case management approach. It is therefore likely that the courts will enforce these restrictions fairly strictly.

In *Rickets v Ewers*[14], Sinclair-Haynes J held that in an affidavit in support of an application for an order of extension of a claim form it was not sufficient

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10 Rule 8.16 (Jam).

11 This requirement is mandatory. If the application to extend is made out of time, the court has no jurisdiction to allow an extension under its case management powers or by invoking the overriding objective: *Kelly v Minott* (2007) Supreme Court, Jamaica, no 2004 HCV 03036 (unreported), per Morrison J (Ag) ; *Keating v Williams* (2007) Supreme Court, Jamaica, no 2003 HCV 02205 (unreported), per Brooks J.

12 See Rule 8.15 (Jam).

13 Rule 8.15(6) (Jam).

14 (2004) Supreme Court, Jamaica, no CL2001/R216 (unreported).

for the applicant to make a 'bald statement' that attempts to serve the defendant had been futile. Rather it was necessary to present to the court an outline of the efforts to serve, including dates and times, and an affidavit from the process server himself. It was also held by Sinclair-Haynes J that, in the absence of any guidance on the point in the CPR, where a claimant applies under Rule 8.15 for an extension after expiry of the original claim form and the limitation period, the court should follow the principle laid down by Waite and Morrit LJJ in *Lewis v Harewood*,[15] to the effect that a judge exercising the discretion to extend time should conduct the inquiry in two stages: (i) he must be satisfied that there is good reason to extend time, and also that the claimant has given a satisfactory explanation for his failure to apply before the validity of the proceedings expired; and (ii) he must consider all the circumstances including the balance of prejudice or hardship. It may be noted, however, that in an earlier Bahamian case, *Williams v Stubbs-Rahming*,[16] Thorne J (Ag) had held, following *Battersby v Anglo-American Oil Co Ltd*,[17] that the court should not exercise its discretion in favour of renewing proceedings if the effect of so doing would be to deprive a defendant of a right of limitation which had already accrued. In *Ricketts*, Sinclair-Haynes J agreed that:

> . . . some consideration must be given to the fact that a defendant, after some reasonable time has passed, must be able to rely on the defence of limitation. The claimant failed to proceed with the matter with any vigour, having waited 6 months to apply. She has not even proffered a reason, more so a satisfactory reason for not having applied within the specified period. In balancing the scales of hardship and prejudice, I am of the view that the scales must be tipped in favour of the defendant.

METHOD OF SERVICE

A claim form must, as a general rule, be served *personally* on each defendant.[18] Personal service on an individual involves handing the claim form to that person or leaving it with him. Personal service is proved by an affidavit sworn by the server stating:

(a) the date and time of service;

(b) the precise place or address where it was served;

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15 [1997] PIQR P 58, CA.

16 (1989) Supreme Court, The Bahamas, no 1429 of 1987 (unreported).

17 [1945] KB 23.

18 Rule 5.1(1).

(c) the precise manner by which the person on whom the claim form was served was identified; and

(d) precisely how it was served.[19]

A claim form may be served on the proposed defendant's attorney if (a) he is authorised to accept service and (b) he has notified the claimant or his attorney in writing of the authorisation.[20]

Where it is not possible to effect personal service, an alternative method of service may be used under Rule 5.13, which contains detailed provisions. By Rule 5.13(2), where the claimant chooses an alternative method of service and the court is asked to take any step on the basis that the claim form has been served, the claimant must file affidavit evidence proving that the method used was sufficient to enable the defendant to ascertain the contents of the claim form. The Registrar must immediately refer any affidavit so filed to a judge, master or registrar who must consider the evidence and endorse on the affidavit whether it satisfactorily proves service. If the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, it may make an order under Rule 5.14 (1) directing that service effected by a method specified in the court's order be deemed to be good service. By Rule 5.14 92) an application for an order to serve by a specified method may be made without notice, but must be supported by evidence on affidavit showing that the proposed method is likely to enable the defendant to ascertain the contents of the claim form and particulars of claim.[21]

Service on a limited company is effected either by leaving the claim form at the registered office of the company, or by sending it by telex, fax or prepaid post to the registered office. Alternatively, the claim form may be served personally on an officer or manager of the company at any place of business of the company, where that place of business has a real connection with the claim, or by serving it on any director, receiver or liquidator of the company.[22]

Service on a firm or partnership is effected by serving the claim form personally on a manager of the firm at any place of business of the firm, where that place of business has a real connection with the claim, or by serving it personally on a partner of the firm.[23]

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19 Rule 5.5.

20 Rule 5.6.

21 See *Rickets v Ewers*, fn 14, above.

22 Rule 5.7 [Rule 5.6 (T&T)].

23 Rule 5.8 [Rule 5.7 (T&T)].

Figure 3
Affidavit of service

Trinidad & Tobago

IN THE HIGH COURT OF JUSTICE
(Sub-Registry, SAN FERNANDO)

No S-2505 of 2007

Claimant: W Rampaul
Deponent: G Barnes

BETWEEN WENDY RAMPAUL CLAIMANT

AND BRANDY BILLS LIMITED DEFENDANT

AFFIDAVIT OF SERVICE

I, Grenville Barnes, of 25 Coffee Street, San Fernando, clerk, MAKE OATH AND SAY as follows:

(1) That I did at 10.30 am on Monday the 8th day of October 2007 at Calverley Court, Flora Street, Princes Town, the registered office of the Defendant, personally serve Sandra Epson, the Secretary of the Defendant, with the Claim Form and Particulars of Claim in these proceedings which appeared to me to have been regularly issued out of the Sub-Registry, San Fernando, against the above named Defendant at the suit of the above-named Claimant, and which was dated the 1st day of October 2007, by handing the same to and leaving the same with her at the aforesaid registered office.

(2) That at the time of the said service the said Claim Form and Particulars of Claim were subscribed and endorsed in the manner and form prescribed by the Civil Proceedings Rules.

SWORN at the Sub-Registry, San Fernando
the 17th day of October 2007
by the said Grenville Barnes.
Before me:

_____
Grenville Barnes

_____
Registrar

This affidavit is filed on behalf of the Claimant on 18th October 2007.

ALTERNATIVE METHODS OF SERVICE

By Rule 5.13 [Rule 5.10 (T&T)], instead of personal service a party may choose an alternative method of service such as using the mail, advertising in a newspaper, or service at an address which the defendant is known to attend regularly. A party who choose an alternative method of service does not require the court's permission to do so; however, if the court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file affidavit evidence proving that the method adopted was sufficient to enable the defendant to ascertain the contents of the claim form.

By Rule 5.14 [Rule 5.12 (T&T)], a claimant may make an application for an order for service by a 'specified method', without notice and supported by an affidavit (a) specifying the method of service proposed and (b) showing that the method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim.

CHAPTER 3

RESPONDING TO A CLAIM

A defendant who intends to (a) dispute the claim, or (b) dispute the court's jurisdiction, must file at the registry at which the claim form was issued an *acknowledgment of service* (in Form 3 or 4) containing a *notice of intention to defend* and send a copy of the acknowledgment of service to the claimant or his attorneys.[1]

The completed form of acknowledgment of service should be handed in at, or sent by post or fax to the relevant registry.[2] This must be done within 14 days of service of the claim form, except where the claim form is served out of the jurisdiction (where the periods vary according to the jurisdiction). Where the court gives permission for the particulars of claim to be served separately from the claim form, the acknowledgment of service must be filed within 14 days of service of the particulars of claim.[3]

Alternatively, the defendant may file and serve a *defence* on the claimant or his attorney within the requisite 14 day period, in which case an acknowledgment of service is not necessary.

If the defendant fails to file an acknowledgment of service or defence, judgment in default may be entered against him. However, until a request for judgment in default has been received at the registry, the defendant is entitled to file a 'late' acknowledgment of service, notwithstanding expiry of the period.[4]

DISPUTING A COURT'S JURISDICTION

If the defendant disputes a court's jurisdiction to hear the claim, or contends that a court should not exercise its jurisdiction, he may apply to the court for a declaration to that effect, but he must first file an acknowledgment of service. The application for a declaration must be made within the period for filing a defence, and must be supported by evidence on affidavit.[5] Thus, as Rawlins J pointed out in *Conrich v Van der Elst*,[6] a defendant who files

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1 Rule 9.2(1).

2 Rule 9.2(2).

3 Rule 9.3(1), (2), (3).

4 Rule 9.3(4).

5 Rule 9.7 [Rule 9.6 (Jam)].

6 (2003) High Court, Anguilla, no AXA HCV 2001/2002 (unreported)

an acknowledgment of service and does not apply to challenge the jurisdiction of the court within the time limited, is treated as having accepted the jurisdiction. On the other hand, provided the *application for the declaration* is filed in time, it is immaterial that the acknowledgment of service was filed out of time, as a late acknowledgment of service is not a nullity and the court under Rule 26.9(3) can rectify the procedural error.[7]

THE DEFENCE

If the defendant intends to defend all or part of a claim, he must file a defence and serve copies on every other party within 42 days of the date of service of the claim form (or within 42 days of service of the particulars of claim, where the court has given permission for the particulars to be served separately). However, the parties may agree to extend the period for filing a defence.[8] Also, under Rule 10.3(9) the defendant may apply to the court for an extension of time for filing and serving the defence.[9] It has been held in Jamaica that, in the absence of any criteria in Rule 10.3(9) to guide the court, there was a general discretion as to what, if any, time to allow, and the court should consider whether the defendant had a properly arguable defence, however tardy he may be in making his application for further time.[10] There is no requirement that affidavit evidence be given in support of the application.[11]

If the defence is short and uncomplicated, Form 5 may be used, but a complex defence is unlikely to fit into the restricted space provided on Form 5, in which case it may be drafted in whatever format the defendant's attorney chooses.

As with all statements of case, a defence must contain a certificate of truth.[12]

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7 *Marble Point Energy Ltd v Multiperils International Inc* (2006) High Court, BVI, no 238 of 2006 (unreported), per Joseph-Olivetti J, who expressed the view that although litigants are expected to comply with the CPR, the Rules aim to achieve substantial justice, and a mere inequality in procedure does not automatically invalidate the proceedings. Rule 1.3 requires the parties to assist the court in furthering the overriding objective.

8 See Rules 10.2 and 10.3.

9 Rule 26.1(2)(c) permits the court to extend or shorten the time for compliance with any rule, even if the application for extension is made after the time for compliance has passed. See *Carr v Burgess* (2006) Supreme Court, Jamaica, no CL 130/1997 (unreported).

10 *Ellis v Compass* (2005) Supreme Court, Jamaica, no E201 of 1999 (unreported), per McDonald J (Ag).

11 *Lyle v Lyle* (2005) Supreme Court, Jamaica, no HCV 02246/2004 (unreported), per Sinclair-Haynes J.

12 In *Dixon v Jackson* (2005) Supreme Court, Jamaica, no CLD 042/2002 (unreported), Beswick J held that the defendant's failure to verify the defence by a certificate of truth was 'not fatal to the defence' as, by Rule 26.9(2), an error of procedure does not invalidate any step taken in the proceedings unless the court so orders.

CONTENTS OF THE DEFENCE

The defendant must set out all the facts on which he relies to dispute the claim, in as short a form as is practicable. In particular, by Rule 10.5 the defence must state:

(a) which, if any, of the claimant's allegations are *admitted,* in which event they will no longer be in issue;

(b) which, if any, are *denied*, in which event the defendant must state reasons for the denial, and must state any alternative version of the facts asserted by him; and

(c) which, if any, are *neither admitted nor denied*, because the defendant does not know whether they are true, in which event the claimant will be required to prove those facts (for example, 'It is not admitted that the claimant sustained injuries or was put to loss as alleged in paragraph 4 of the particulars of claim or at all').

The requirement that a defendant must state reasons for his denial of the claimant's allegations and state any alternative version of the facts that he asserts was designed to do away with the practice of unparticularised 'bare denials', which are the hallmark of the so-called 'holding defences' much used under the RSC regime. The 'holding defence' is a tactic whereby the defendant makes a number of bare denials in his pleading, in the hope that his opponent might decide to settle before he (the defendant) commits himself to a positive case. Such cynical, time-wasting tactics were anathema to the framers of the CPR and, if the provisions of Rule 10.5 are rigorously applied, this will certainly further the overriding objective of dealing with cases expeditiously and fairly, and the case management objective of identifying the issues at an early stage of the proceedings.

Another important innovation in the CPR is the provision, in Rule 10.5(5), that where a defendant neither admits nor denies an allegation, he is stating, in effect, that he does not know whether or not the allegation is true. Bearing in mind that, by Rule 3.12, every statement of case must be verified by a certificate of truth, a defendant who, for tactical reasons, seeks to avoid committing himself to a positive case by neither admitting nor denying an allegation will be in contempt of court if he certifies the truth of his pleading in circumstances where it is clear that he *did* know whether the claimant's allegation was true or not.

It is, in any event, a good policy for the defendant to admit facts that are not in issue, or facts which he cannot disprove, so as to avoid being penalised in costs incurred by the claimant in proving those facts at trial.

The defendant may not rely on any allegation or factual argument that is not set out in the defence, but which could have been set out there, unless

the court gives permission.[13] Such permission may be given at the case management conference; it will not be given after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances that became known after the conference.[14]

PERSONAL INJURIES CLAIMS

In personal injuries claims, where the claimant has attached to the claim form or particulars of claim a medical practitioner 's report on the alleged injuries, the defendant must state in the defence:

(a) whether all or any part of the medical report is agreed; and

(b) if any part of the report is disputed, the nature of the dispute.[15]

Where the defendant intends to rely on a medical practitioner's report to dispute any part of the claimant's claim, the defendant must attach that report to the defence.[16]

COUNTERCLAIM

Where the defendant has a cause of action against the claimant, this can be litigated either by bringing separate proceedings or by means of a counterclaim to the existing action.

A counterclaim is regarded as a separate cause of action or a cross-action[17] which is independent of the claimant's claim and can stand on its own even if the defence is dismissed, discontinued, or stayed. A counterclaim need not relate to, nor be in any way connected with, the claimant's claim, nor need it arise out of the same transaction. It is sufficient if the defendant's counterclaim can be conveniently tried by the same court and at the same time as the claimant's claim.

The proper title for a statement of case containing a counterclaim is 'DEFENCE AND COUNTERCLAIM'. The defence is set out first, then the counterclaim in paragraphs which follow on from the numbering of the defence.

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13 Rule 10.7(1) [Rule 10.6(1) (T&T)].

14 Rule 10.7(2), (3).

15 Rule 10.6(2) [Rule 10.8(2) (B'dos and T&T)].

16 Rule 10.6(3) [Rule 10.8(3) (B'dos and T&T)].

17 *Attorney General v Desnoes and Geddes Ltd* (1970) 12 JLR 3, Court of Appeal, Jamaica.

Figure 4
Example of defence in personal injuries action

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO T-026/2006

BETWEEN

JANICE TUDOR CLAIMANT

AND

BERNARD ABRAHAMS DEFENDANT

DEFENCE

(1) Paragraph 1 of the Particulars of Claim is admitted.

(2) The Defendant makes no further admissions as to any of the allegations contained in the Particulars of Claim and in particular denies that he was negligent, either as alleged or at all.

(3) The Defendant does not admit the extent of the claimed injury, loss or damage or the cause of any such injury, loss or damage. The Defendant has obtained his own medical evidence and the report of Dr Marcus Wint dated the 22nd of February 2003 is served herewith.

(4) The accident in question was not due to any negligence on the part of the Defendant, but was caused by the sudden and unexpected failure of the steering mechanism of the motor car, which resulted in the Defendant being deprived of his ability to control the vehicle properly.

(5) Moreover, any injury which the Claimant sustained in consequence of the accident was caused wholly or in part by her own negligence in failing to wear or make any proper use of the seat belt with which the vehicle was equipped.

I certify that all the facts set out in this defence are true.

_____

Bernard Abrahams

Filed the 15th of March 2003 by Tatum, Peterson & Co of Candy Court, Neptune Street, Kingston 6, on behalf of the Defendant.

Figure 5
Example of defence to claim for breach of contract

ST VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE
CLAIM NO 0429 OF 2007

BETWEEN JD GRASPER LIMITED CLAIMANT

AND CANARY DEVELOPMENTS LIMITED DEFENDANT

DEFENCE

(1) The Defendant contends that the Particulars of Claim disclose no or no reasonable cause of action.

(2) Without prejudice to the aforementioned, the Defendant will rely on the facts hereinafter set out.

(3) Paragraphs 1 and 2 of the Particulars of Claim are admitted.

(4) The Defendant denies paragraph 3 and contends that the Claimant, by the 14th of May 2007, was not ready and willing to complete the said transaction in that the Claimant:

  (a) failed to tender the remainder of the purchase price;

  (b) failed to perform any acts indicative of its willingness and readiness to fulfil obligations on the said date.

(5) The said contract was completed on or about the 14th of August 2007 and the Claimant took possession of the said premises on or about the month of August 2007.

(6) Further and/or in the alternative, the Claimant by its conduct led the Defendant to believe that the time for performance would be waived and its said rights would not be enforced.

(7) Paragraphs 6 and 7 of the Particulars of Claim are not admitted.

The Defendant believes that the facts stated in the Defence are true.

_____

Canary Developments Limited

Dated this 20th day of November 2007.

Haley, Johnson and Stebbings
Attorneys-at-Law for the Defendant.

Where the defendant has counterclaimed, the claimant must file and serve a DEFENCE TO COUNTERCLAIM; otherwise, judgment in default of defence may be given against the claimant.

REPLY

Where the claimant intends to deal with fresh matters raised in the defence, this is done by a reply. If the defendant has counterclaimed, the claimant may answer the counterclaim in the defence to counterclaim, which may be amalgamated into a 'REPLY AND DEFENCE TO COUNTERCLAIM'.

Under Rule 10.9 of the OECS CPR, a claimant may file and serve a reply at any time not less than 14 days before the case management conference, or with the permission of the court given at the conference. Rule 10.9 of the Jamaican CPR (as amended) provides simply that a claimant may file a reply within 14 days of service of the defence.[18]

A reply must contain a certificate of truth.

18 Cf Rule 10.10 (B'dos) and Rule 10.10 (T&T).

CHAPTER 4

SERVICE OUT OF THE JURISDICTION

Since the court claims jurisdiction over any person *present* within the jurisdiction (even if such presence is temporary), proceedings may be served on any such person without the permission of the court. However, the court will not assume jurisdiction over any person *outside the jurisdiction* unless:

(a) jurisdiction is given by a particular statute;

(b) the defendant voluntarily submits to the jurisdiction by, for example, instructing a local attorney to accept service on his behalf, or by failure to dispute the jurisdiction after acknowledging service;[1] or

(c) the court assumes jurisdiction under the CPR and gives the claimant permission to serve proceedings outside the jurisdiction.

APPLICATION FOR PERMISSION

An application for permission to serve a claim form out of the jurisdiction may be made without notice but must be supported by evidence on affidavit stating:

(a) the grounds on which the application is being made and which paragraph(s) of Rule 7.3 are being relied on;

(b) that in the deponent's belief the claimant has a claim with a realistic prospect of success; and

(c) in what place and within what country the defendant may probably be found.

REQUIREMENTS FOR GRANTING OF PERMISSION

It was held by the House of Lords, in *Seaconsar Far East Ltd v Bank Markazi*[2] (as altered by the CPR), that to obtain permission to serve proceedings outside the jurisdiction, a claimant must show:

(a) a good arguable case that the court has jurisdiction within one or more of the grounds specified in CPR Rule 7.3;

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1 A defendant wishing to dispute the court's jurisdiction must acknowledge service and then apply to discharge the order giving permission.

2 [1994] 1 AC 438.

(b) that there is a reasonable prospect of success on the merits; and

(c) that the local jurisdiction is the proper place in which to bring the claim (under the principles of *forum conveniens*).

GROUNDS SPECIFIED IN CPR RULE 7.3

The kinds of case in respect of which claim forms can, with permission, be served out of the jurisdiction are as follows:

(a) where a remedy is sought against a person domiciled or ordinarily resident within the jurisdiction;

(b) a claim for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction;

(c) where a defendant has been or will be served within the jurisdiction and the claimant wishes to serve the claim form on an additional person who is a necessary and proper party to the claim, and where a defendant wishes to serve an ancillary claim (such as one for contribution or indemnity) on a person who is a necessary and proper party to the claim against the defendant;

(d) a claim to enforce, rescind or dissolve a contract or to obtain any other remedy for breach of a contract (i) made within the jurisdiction or made through an agent trading or residing within the jurisdiction, or (ii) to be wholly or partly performed within the jurisdiction, or (iii) by its terms or by implication governed by the law of [Jamaica], or containing a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract;

(e) a claim in respect of a breach of contract committed within the jurisdiction;

(f) a claim in respect of a tort[3] where the damage was sustained within the jurisdiction, or where the damage sustained resulted from an act committed within the jurisdiction;

(g) a claim to enforce a judgment or arbitral award made within the jurisdiction;

(h) where the whole subject matter of the proceedings is land located within the jurisdiction, including (i) a claim to rectify, set aside or enforce a document, obligation or liability affecting such land, (ii) a claim for a debt secured on land, (iii) a claim to assert, declare or determine rights over land, or (iv) a claim to obtain authority to dispose of land;

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3 In *Fidelity and Guarantee International Ltd v Hakemian* [1992–93] CILR N 6, Grand Court, Cayman Islands, Schofield J held that where the claimant, a Cayman company, had sustained loss within the jurisdiction as a result of the defendant's tort, leave to serve the writ outside the jurisdiction had been properly granted.

(i) a claim against a trustee for a remedy in proceedings to execute the trusts of a written instrument, and a claim against a constructive trustee in respect of acts committed within the jurisdiction;

(j) a claim for a remedy in administration of estates or probate proceedings relating to a person who died domiciled within the jurisdiction;

(k) a claim for restitution where the alleged liability arises out of acts committed within the jurisdiction;

(l) a claim brought under a statute enabling service out of the jurisdiction; and

(m) admiralty proceedings, except for admiralty claims *in rem.*

CLAIMS FOR CONTRIBUTION

In *Petroleo Brasiliero SA v Mellitus Shipping Inc*,[4] the English Court of Appeal held that, when exercising its discretion to permit service out of the jurisdiction under the CPR, the court was entitled to take into account the special factor that the law of the other available jurisdiction (Saudi Arabia) allowed no remedy of contribution. Thus, although the circumstances of the instant case would not otherwise have warranted granting permission to serve a 'Pt 20 claim' (Pt 18 under the Jamaican and OECS rules) for contribution outside the jurisdiction, the defendant would be granted permission to join a foreign defendant for contribution purposes, as otherwise the defendant would be unable to enforce its claim. Potter LJ emphasised that, because of the very nature and wording of Rules 6.20 and 6.21 (7.3 and 7.5 in the Jamaican and OECS Rules), the argument of litigational convenience could be advanced by every claimant in every case where permission was sought in relation to Pt 20 proceedings, and although the wording of Rules 6.20 and 6.21 of the CPR differed from that of the former Ord 11, Rule 1(1) and 4 of the RSC, 'the principles expounded in former authorities relating to Order 11 remain applicable. This is a case where plainly Fortum was acting reasonably in seeking to issue contribution proceedings against Saudi Aramco in proceedings in which Fortum have themselves been sued and require to protect their position'.

MULTIPLE DEFENDANTS

Under the RSC, it is an established practice that where there are multiple defendants, some of whom are within and others outside the jurisdiction, one defendant must be served within the jurisdiction before there can be

4 (2001) *The Times*, 29 March.

an application for permission to serve another or others outside the jurisdiction.[5] It seems that this restriction may not apply under the CPR, as Rule 7.3(2)(ii) provides that permission to serve an additional defendant out of the jurisdiction may be granted where the original defendant *has been or will be* served, and the person proposed to be served out of the jurisdiction is a necessary and proper party to that claim. The words 'or will be served' clearly contemplate the granting of permission to serve a claim form on an additional defendant out of the jurisdiction notwithstanding that the original defendant has not been served within the jurisdiction, so long as there is an intention to do so at some time in the future. It remains to be seen, however, whether the courts under the CPR regime will interpret Rule 7.3(2)(ii) in this way, as the RSC practice would seem to be an eminently sensible one.

FORUM CONVENIENS

The CPR specifically preserve the rule of *forum conveniens*, which is that the court must be satisfied that the local jurisdiction is the most appropriate one for the trial of the action in the interests of the parties and the furtherance of justice. Rule 7.5(3) of the Jamaican Rules, for instance, states that 'the court may not give permission [to serve proceedings out of the jurisdiction] unless satisfied that Jamaica is the proper place in which to bring the claim'. The court has an inherent power to stay proceedings on the ground of *forum non conveniens* or to dismiss the claim altogether.[6]

Factors which the court may take into account in determining this question include the places where the parties reside or carry on business, the availability of witnesses, the law governing the particular transaction, and comparative convenience and cost. In *Spiliada Maritime Corp v Cansulex Ltd*,[7] Lord Templeman stated that 'the factors which the court is entitled to

5 See *Tassell v Hallen* [1892] 1 QB 321; *Girten v Andreu* (1998) Supreme Court, The Bahamas, no 692 of 1997 (unreported). Cf *Kuwait Oil Tanker Co v Al Bader* [1997] 1 WLR 1410.

6 *Addari v Addari (No 2)* (2005) OECS Court of Appeal, Civ App no 21 of 2005 (unreported), per Rawlins JA.

7 [1986] 3 All ER 843, p 846. Followed in *Nam Tai Electronics Inc v Haque* (2004) High Court, BVI, no BVIHCV 2002/0167 (unreported) where, in a tort claim within CPR (OECS) Rule 7.3(4), d'Auvergne J refused an application under Rules 7.7 and 9.7 to set aside an order for service of the claim form out of the jurisdiction on defendants in Hong Kong, holding that the case should be tried in the BVI in the interests of all the parties and the ends of justice. The OECS Court of Appeal subsequently upheld the ruling of d'Auvergne J: (2006) Civ App no 20 of 2004 (unreported), per Gordon JA. *Spiliada* was also followed by Rawlins J in *Conrich v Van der Elst* (2003) High Court, Anguilla, no AXA HCV 2001/2002 (unreported); by Matthew J (Ag) in *Bermuda Trust Hong Kong Ltd v Plannix Holdings Ltd* (2002) High Court, BVI, no HCBVI 133 of 2001 (unreported); and by Barrow JA (Ag) in *Astian Group Ltd v TNK Industrial Holdings Ltd* (2005) OECS Court of Appeal (BVI), Civ App no 11 of 2004 (unreported).

take into account in considering whether one *forum* is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case'.

A Bermudian case in which the doctrine was applied is *Esso AG v Holborn Oil Trading Ltd*.[8] Here, an arbitration clause in a refinery acquisition agreement provided that any dispute between the parties concerning environmental liabilities should be decided according to German law, and the courts of Hamburg were given exclusive jurisdiction, though other aspects of the agreement between the parties were, by its terms, to be governed by Bermudian law. A dispute arose concerning environmental liabilities. The Bermudian Court of Appeal held that an order granting permission to serve process on Esso AG, a German company, outside the jurisdiction should be set aside since, in the words of Kempster JA:

> It would . . . be improper to bring before the courts of Bermuda a foreign corporation owing no allegiance here merely because an action has been brought in relation to an agreement which in all other respects is governed by the law of Bermuda. The reasoning behind the terms of the material rule must be that it is appropriate and in the interests of justice for the courts of Bermuda to determine questions of Bermudian law. Here, were we to allow the service of process on Esso to stand, our courts would find themselves striving to determine the dispute between the parties by applying the law of Germany in reliance on the testimony of expert witnesses. This would surely be a violation of 'the spirit of the rule' to which Lord Dunedin referred in *Johnson v Taylor Bros and Co Ltd*.[9] The dispute between the parties should go to Hamburg, the obvious *forum conveniens,* for resolution in accordance with the bargain concluded between Esso and the assignors.

SERVICE OF OTHER DOCUMENTS

An application, order or notice issued in proceedings in which permission to serve the claim form out of the jurisdiction has been given, may be served out of the jurisdiction without the court's permission.[10]

PERIODS FOR ACKNOWLEDGING SERVICE AND FILING DEFENCE

An order granting permission to serve the claim form out of the jurisdiction must state the periods after service within which the defendant must (a)

8 (1996) Court of Appeal, Bermuda, Civ App no 30A of 1995 (unreported).

9 [1920] AC 144, p 154.

10 Rule 7.14.

file an acknowledgment of service and (b) file a defence; the claim form must itself be amended to state these periods. The CPR contains a table of periods applicable to the different jurisdictions; for example, under the Jamaican CPR, where a claim form is to be served in the United States, Canada or Caribbean states, time for acknowledgment of service is 28 days and time for filing a defence is 56 days.[11] It is also provides that the court may direct that some other periods be substituted.

METHODS OF SERVICE ABROAD

There are five methods of service out of the jurisdiction, as follows:

(a) personal service effected by the claimant or his agent;

(b) service in accordance with the procedure required by the laws of the foreign country in which service is to be effected;

(c) service under a Civil Procedure Convention authorising service through the judicial authorities of the foreign country or through the consulate of the country of the court exercising jurisdiction;

(d) service through the government of the foreign country; and

(e) service on a state (where that state is a defendant).[12]

SETTING ASIDE SERVICE OF CLAIM FORM

On the application of any person on whom a claim form has been served out of the jurisdiction, the court may set aside service on any of the following grounds:[13]

(a) where service out of the jurisdiction was not permitted by the CPR;

(b) where the case is not a proper one for the court's jurisdiction; or

(c) where the claimant does not have a reasonable prospect of success.

11 Rule 7.5(4).

12 See Rule 7.10.

13 See Rule 7.7.

Figure 6
Affidavit in support of application for permission to serve claim form out of the jurisdiction

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO 2008 HCV S 2551

Claimant: Antillean Bank of Commerce
Deponent: MD Meade

BETWEEN ANTILLEAN BANK OF COMMERCE CLAIMANT

AND (1) PATRICIA SMITH
(2) JOHN GOPAUL DEFENDANTS

HARRY BEST (INTENDED) THIRD DEFENDANT

AFFIDAVIT

I, MARK DESMOND MEADE of 5th Avenue, Anthill Gardens, Kingston 7, bank manager, hereby MAKE OATH AND SAY as follows:

(1) I am employed by Antillean Bank of Commerce the Claimant herein as Manager of its Loans Administration Department and depose to the following facts of my own knowledge acquired as such Loans Administration Manager as aforesaid and in acting in the administration of the said department on behalf of the Claimant.

(2) I am informed by the Claimant and verily believe that the claim of the Claimant against all the defendants jointly and severally is for the sum of $1,819,409.00 as at 30th May 2007 pursuant to a contract of Guarantee dated the 14th day of February 2007 made between all the defendants of the one part and the Claimant of the other part, the said Guarantee being a security for certain monies advanced by the Claimant to Harry Best Inc, a Company, which said monies the said Harry Best has failed, refused or neglected to repay.

(3) The (Intended) Third Defendant is not ordinarily resident within the jurisdiction and the proceedings begun by issue of a claim form is an action to recover the sum of $1,819,409.00 together with interest in respect of the breach of contract of Guarantee made on the 14th day of February 2007 between the Defendants jointly and severally of the one part and the Claimant of the other part, such contract having been made in Jamaica and by its terms or implications governed by the Laws of Jamaica pursuant to Rule 7.3(d) of the Civil Procedure Rules 2002.

(4) To the best of my knowledge, information and belief, the (Intended) Third Defendant is employed as an accountant with the firm of Jackson and Robbins of 31 Prime Street, Bridgetown, Barbados and may be found at the said location.

(5) I am advised and verily believe that the Claimant has a good cause of action against the (Intended) Third Defendant and all other Defendants in respect of the matters set out in paragraphs (2) and (3) hereof.

(6) In the circumstances, I respectfully seek permission to issue a Claim Form and Particulars of Claim out of the jurisdiction against the said (Intended) Third Defendant.

SWORN BY the said Deponent
MARK DESMOND MEADE
at Kingston, Jamaica, this
6th day of June 2007
before me:

_____
Mark Desmond Meade

_____
Registrar
Filed the 7th June 2007

CHAPTER 5

PARTIES AND JOINDER

MINORS

A minor (formerly 'infant') is a person who is under the age of 18, and is at common law under disability. A minor must generally have a person called a 'next friend' to conduct proceedings on his behalf,[1] although there is provision in the CPR for the court to permit the minor to conduct proceedings himself.[2] Where next friends are appointed, the titles of the actions should read:

JOYCE EDAM (a minor by NADIA EDAM her next friend)	CLAIMANT
or	
BRIAN RICHARDS (a minor by ERNEST RICHARDS his next friend)	DEFENDANT

A claimant who intends to bring an action against a minor should name the next friend on the claim form and serve the claim form on the next friend; for example, where in a running down action in which the defendant is a minor, the defendant's insurance company has become involved in the negotiations and has appointed a next friend to conduct the defence. If no next friend has been appointed, a claimant may still issue proceedings against the minor, but may take no step beyond issuing and serving a claim form.[3] The claimant must immediately apply to the court for the appointment of a next friend before the claim can be pursued further.

Appointment without a court order[4]

A person who comes forward to act as next friend without a court order must file a *certificate of suitability* stating:

(a) that he consents to act;

(b) that he knows or believes that the claimant or defendant is a minor;

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1 Rule 23.2(1).

2 Rule 23.2(2).

3 Rule 23.3(2)(b)(ii).

4 See Rule 23.7.

(c) that he can fairly and competently conduct proceedings on behalf of the minor, and has no interest adverse to the minor; and

(d) where the minor is a claimant, that he (the proposed next friend) will pay any costs which the minor may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the minor.

Appointment under an order of the court[5]

An application for a court order appointing a next friend may be made by any person who wishes to be a next friend or by any other party to the litigation. The application must be supported by affidavit evidence of the same matters required in a certificate of suitability, namely that the proposed next friend consents to act, can fairly and competently conduct proceedings on behalf of the minor, has no interest adverse to that of the minor and, where the minor is claimant, undertakes to pay any costs which the minor may be ordered to pay in the proceedings.

Most often, the person appointed next friend will be a close relative of the minor, such as the minor's father or mother, but there is no invariable rule to that effect. Thus, if no suitable relative is available, or the circumstances dictate that a non-relative be appointed, such appointment will not be revoked by the court. In the Cayman case of *Re Cotorro Trust*,[6] where the court had appointed an attorney-at-law as *guardian ad litem* (the equivalent of next friend) of a minor beneficiary under a trust, Smellie J held that the appointment was good; because of family dissension, there was no impartial relative who could be relied upon to guide and advise the actions to be taken on behalf of the minor; furthermore:

> in this jurisdiction, which depends so greatly on its offshore financial industry . . . a growing number of cases involve the element of foreign [minor] defendants who must be represented by [next friends] who are themselves amenable to the jurisdiction of the court and to its process . . . It is therefore to be regarded as being in the public interest that the court should be able to appoint a suitable local attorney to act.

Settlements

Any settlement of a claim brought by a minor, or any compromise, payment or acceptance of money paid into court must be approved by the court.[7] The approval of the court is required for two reasons: (a) to protect the minor from disadvantageous settlements; and (b) to provide a defendant

5 See Rule 23.8.

6 [1996] CILR 227.

7 Rule 23.12(1).

with a valid discharge for any money paid in settlement. The latter objective may be exemplified by the common situation of a personal injuries claim brought on behalf of a minor, which the parties wish to compromise before trial. Unless the defendant ensures that an application is made for the court's approval, the minor will be able to exercise his common law right to reopen the compromise at any time before he attains his majority, or within three years after.

The procedure for seeking the court's approval varies according to whether the settlement is reached before or after the claim has commenced. If the claim has not yet started, the application is made by the fixed date claim procedure.[8] If it has already started, then an application notice must be filed requesting the court to approve the settlement or compromise. Documents usually required are the application notice, claim form and statements of case (if any), any police reports and witness statements, medical reports, schedule of special damages, counsel's opinion on liability and quantum, minor's birth certificate and the appropriate office forms. The judge or Master will assess the minor's prospects of success and decide whether the proposed settlement is a reasonable one and beneficial to the minor. If satisfied that the settlement or compromise is beneficial, he may sanction it. If not, the matter will be adjourned in order to give the parties an opportunity to renegotiate. Where a settlement is approved, directions will be given as to how the money is to be applied.[9]

Minor coming of age

By virtue of Rule 23.11(1), when a minor reaches the age of majority during the proceedings the appointment of the next friend ceases.

Rule 23.11(4) provides that the minor must serve notice on the other parties (a) stating that the appointment of the next friend has ceased, (b) giving an address for service, and (c) stating whether or not he chooses to carry on the proceedings.[10] The liability of a next friend for costs continues until either he or the minor has served notice of the cessation of his appointment on the other parties.[11]

Persons of unsound mind

Persons certified as being of unsound mind within the Mental Health Act, who are called 'patients' under the CPR, are under disability and, as in the case of minors, must sue or be defended by a next friend. The provisions

8 Rule 23.12(2).

9 Rule 23.13.

10 Rule 23.11(4).

11 Rule 23.11(6).

of the CPR governing the appointment and responsibilities of a next friend apply equally to minors and patients, except that:

(a) unlike the case of a minor, a person of unsound mind cannot apply to the court for permission to conduct the proceedings himself;

(b) a patient's next friend may be appointed under the Mental Health Act; and

(c) whereas the appointment of a minor's next friend ceases on the minor's coming of age, the appointment of a patient's next friend does not cease on the patient's ceasing to be of unsound mind, and can be brought to an end only by a court order.[12]

Personal representatives

Except in defamation actions, the death of a claimant or a defendant does not halt the proceedings. Where a claimant dies during the action, his personal representatives may obtain an order of the court to be substituted as claimants;[13] if they do not do so, the defendant may apply for the claim to be struck out.[14] The application by the personal representatives may be made without notice but must be supported by affidavit evidence,[15] and a copy of the order for substitution must be served on the defendant or his attorney, and on all other parties to the proceedings.[16]

Where a defendant dies during the proceedings, and there are no personal representatives, the claimant may not take any step in the proceedings until the court has appointed someone to represent the deceased in the action.[17]

Rule 21.7(2) sets out the criteria that must be met before a person can be appointed as a personal representative, namely, that (a) he/she can fairly and competently conduct proceedings on behalf of the deceased's estate and (b) he/she has no interest adverse to that of the estate of the deceased.

Trustees

Trustees and personal representatives should act jointly, and all should be named in any proceedings concerning trust property.[18] Actions in respect of trust property may be brought by or against the trustees without joining

12 Rule 23.11(2).

13 Under Rule 19.3 [Rule 19.5 (T&T)].

14 Rule 21.9(1).

15 Rule 19.3(3) [Rule 19.5(3) (T&T)].

16 Rule 19.3(5).

17 Rule 21.7(4).

18 See *Latch v Latch* (1875) LR 10 Ch 464.

the beneficiaries, and any judgment will bind the beneficiaries unless the court orders otherwise.[19]

Trustees are also the appropriate parties where the court is called upon to interpret trust documents. Where a question arises as to the charitable status of a body to which a bequest has been given, the Attorney General must be joined.[20]

Companies

A company must sue and be sued in its full registered name. If the true legal description of a company is not revealed by its name, the title of the action should state the description, for example, 'company limited by guarantee'. A duly authorised director or other officer of a company may conduct proceedings on its behalf,[21] but in any hearing in open court it must be represented by an attorney-at-law unless the court gives permission for it to be represented by a director or other officer.[22]

Service of a claim form or other document on a company is effected by leaving it at, or sending it by telex, fax, prepaid registered post, courier delivery or cable addressed to the company's registered office. Alternatively, a claim form may be served personally on any director, officer or manager of the company.[23]

Partnerships

A partnership may sue and be sued in the firm's name, provided that, at the time when the claim arose, the partners carried on business in that name within the jurisdiction;[24] alternatively, an action may be brought or defended in the names of the individual partners.[25] In the case of the former, the words 'a firm' should appear on the title to the action.

A duly authorised employee of a partnership may conduct proceedings on behalf of the firm and, with the court's permission, represent it in court.[26]

Service of a claim form may be effected by:

(a) personal service on any partner; or

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19 Rule 21.6(2), (4).

20 See *Attorney General of The Bahamas v Royal Trust Co* [1986] 3 All ER 423.

21 Rule 22.3(1).

22 Rule 22.3(2).

23 Rule 5.7.

24 Rule 22.1(1).

25 See Banks R, *Lindley and Banks on Partnership*, 18th edn, 2002 (London: Sweet & Maxwell), paras 14–69.

26 Rule 22.1(7).

(b) personal service on a manager at any place of business of the firm having a real connection with the claim; or

(c) sending the document by post to the firm's principal place of business within the jurisdiction.[27]

Unincorporated associations

Since an unincorporated association has no separate legal personality, the general rule is that it will be unable to sue in its own name. However, a distinction is drawn between a proprietary club and a members' club. The former type may be construed as a partnership, in which case it can be sued and be sued in accordance with the rules applicable to partnerships. In the case of the latter, if all the members have the same interest in the dispute, one or more of them may sue on behalf of them all in representative proceedings.[28]

Representative proceedings

Where there is a large number of potential litigants in an action, and it would be inconvenient to join all, the usual practice is for one or more individuals to represent the entire group.[29] The test for the appropriateness of representative proceedings is whether the individuals have 'a common interest and a common grievance', and 'the relief sought is in its nature beneficial to all whom the [claimant] proposes to represent'.[30] A fairly recent example of such an action is *Charlton v Air Jamaica*,[31] where four ex-employees and members of Air Jamaica's staff pension scheme brought representative proceedings claiming certain benefits on behalf of themselves and other members of the scheme (a total of 1,159 members).

CPR Rule 21.1 provides that where five or more persons, whether claimants or defendants, have the same or a similar interest in the proceedings, the court may appoint (a) one or more of those persons or (b) a body having a sufficient interest in the proceedings, to represent all or some of the persons with the same or a similar interest. By Rule 21.3(1), where there is a representative claimant or defendant, a judgment or order binds everyone whom that party represents.

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27 Rule 5.8(1) [Rule 5.7(1) (T&T)].

28 See Rule 21.1.

29 *Ibid.*

30 *Duke of Bedford v Ellis* [1901] AC 1, p 8, per Lord McNaghten, where it was held that six fruit growers were entitled to represent all other fruit growers claiming rights over certain stands at the defendant's market.

31 [1999] 1 WLR 1399 (PC).

JOINDER OF PARTIES

The broad policy of the law is that where there are multiple claims there should be as few actions and as few parties as possible; the ends of justice will be better served and the court's resources more efficiently utilised if all the parties to a dispute are before the court so that its decision will bind all of them. Accordingly, the CPR contain a broad provision for a new party to be added to proceedings *without the need for an application to the court* where this is 'desirable', so that the court can 'resolve all the matters in dispute in the proceedings'.[32] Preferably, of course, a claimant should at the outset, when he prepares his claim form, decide which persons to join as defendants, as there are no restrictions in the CPR on the number of claimants or defendants who can be joined as parties; there will, however, be occasions where the need to join an additional party only surfaces after the proceedings have commenced, in which case the provisions of the CPR allowing joinder of parties can be relied upon. A new person may also be added as *claimant,* provided that person's written consent is filed with the registry.[33] It is further provided that the court may, on its own initiative, add, remove or substitute a party at the case management conference,[34] but no party may be added *after* the conference (except by substitution) unless the court is satisfied that the addition is necessary because of some change in circumstances becoming known after the case management conference.[35]

Examples of situations where joinder of defendants might be appropriate are cases of vicarious liability, where the claimant wishes to sue both employee and employer, and cases of joint tenants under a lease being sued for breach of covenant. Joinder of claimants may be appropriate where, for instance, two or more persons wish to bring an action against the Attorney General for assault and false imprisonment at the hands of the police.

Intervention

A person who was not a party to the claim as originally constituted (the 'intervener') may be ordered to be added as a party if either:

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.[36]

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32 See Rule 19.2(3)(a).

33 Rule 19.3(4) [Rule 19.5(4) (T&T)].

34 Rule 19.2(6) [Rule 19.3(5) (Jam)].

35 Rule 19.2(7).

36 Rule 19.2(3). See *Prophecy Group LC v Seabreeze Co Ltd* (2006) Supreme Court, Belize, no 185 of 2001 (unreported).

It has been held by the English Court of Appeal, in *United Film Distribution Ltd v Chabria*,[37] that the circumstances under which a court may exercise its power to add or substitute a party under CPR Rule 19.2(2) (Rule 19.2(3) of the Jamaican and OECS Rules) are no less wide than under the equivalent provisions of the RSC.

In order to establish that his presence is desirable, the intervener should show an arguable claim against an existing party to the suit, though the court retains a complete discretion whether or not to permit the proposed joinder. Intervention may be allowed against the wishes of the claimant.

In *Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd*,[38] the claimant sought an injunction to restrain the defendant from erecting a building on land in breach of a restrictive covenant. The mortgagee of the land applied to be added as a defendant on the ground that its rights and interest in the premises would be affected by the outcome of the litigation. The Jamaican Court of Appeal ordered that the intervener be added as a defendant. Carey P (Ag) explained that the modern cases under the equivalent English rule had established that the court should give a wide interpretation to the power to allow intervention. In particular, the court should be mindful that 'one of the purposes of joinder of parties is to ensure that there is not a multiplicity of actions', and although it had been held that a mere commercial interest in the outcome of the action, such as that of a creditor, was not sufficient to entitle such person to intervene, in the present case:

> . . . the mortgagee has a far more substantial interest in the outcome of the action. Indeed, [counsel] said that if the action succeeded, the [mortgagee] would be obliged to foreclose the mortgage and file suit. The value of the mortgaged property would plainly depreciate. This . . . suggests that not only are the financial interests of the mortgagee affected, but so would its legal rights.

In another Jamaican case, *Mutual Security Merchant Bank and Trust Co Ltd v Marley*,[39] it was held that intervention should be permitted only where there is a dispute and the proceedings are likely to determine the issues between the parties. Here, the appellants sought the approval of the court for the sale of certain assets of the estate of the late Bob Marley. Members of Marley's band, 'The Wailers', sought to be joined as defendants in the matter. Their affidavit in support deposed that they had filed an action against the appellants for, inter alia, a declaration that they were entitled to 50 per cent of the royalties and other income earned by them in partnership

37 (2001) *The Times*, 5 April.

38 (1991) 28 JLR 415. This case was decided under s 100 of the Judicature (Civil Procedure Code) Law, the provisions of which were similar to Rule 19.2(3) of the Jamaican and OECS CPR. See also *Donell v JGM Bank Ltd* [1986] CILR 1 (Grand Court, Cayman Islands), per Douglas J (Ag).

39 (1991) 28 JLR 670, p 673, Court of Appeal, Jamaica.

with the deceased, and an injunction restraining the appellants from disposing of those assets. The judge allowed the applicants to be joined, on the ground that they had 'an interest in the outcome of what will be determined in that action as regards record royalties'. They were accordingly entitled to assist 'in determining what the royalties will be'. The Court of Appeal held, however, that the judge had acted on a wrong principle. Carey P (Ag) considered the nature of the proceedings in the light of observations by Lord Oliver in the Privy Council[40] to the effect that:

> . . . it should be borne in mind that, in exercising its jurisdiction to give directions on a trustee's application, the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation.

Carey P (Ag) took the view that the judge had

> failed to appreciate the nature of the proceedings in which joinder was sought, and focused entirely on the applicants' alleged interest, that is, the best price, which could not settle the very important question of their entitlement to the assets, the best price for which was the sole question before the court . . . I think . . . that there is merit in the appellants' submission that the applicants' intervention could be futile as it would not put an end to their claim.

JOINDER OF CAUSES OF ACTION

The other aspect of the objective of avoiding multiplicity of legal proceedings is the question of joinder of causes of action. CPR Rule 8.3 (Jam and B'dos) and Rule 8.4 (other jurisdictions) provide that a claimant may use a single claim form to include any other claims which can be conveniently disposed of in the same proceedings. Thus, for instance, to take an extreme example, a sole trader who sues a company for the price of goods sold and delivered to the company may join in the same proceedings a claim for negligence against the company, if it should happen that he was knocked down and injured by one of the company's vehicles. The litigant thus has a general freedom of joinder of causes of action, however varied those causes of action might be. However, the court retains the power to separate the claims if it considers the joinder to be inconvenient; where, for instance, the joinder makes the claim unnecessarily complicated, or causes additional costs or delay which could be avoided if the claims had been brought separately.

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40 *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, p 201. Carey P's approach was applied by Conteh CJ in *Prophecy Group LC v Seabreeze Co Ltd* (2006) Supreme Court, Belize, no 185 of 2001 (unreported).

This is an aspect of the court's wide case management powers, which include directing separate trials, deciding on the order in which issues are to be tried, and striking out any part of a claim that is likely to obstruct the just disposal of the proceedings.

INTERPLEADER

Where a stakeholder with no personal interest in property he is holding receives rival claims to such property from two or more other persons, he may seek relief by way of interpleader; that is, the rival claimants will be made to argue their claims against each other before the court.

Common examples of interpleader situations are as follows:

(a) X Ltd, a garage, has possession of Y's car for the purpose of carrying out repairs. Z Ltd, a finance company, claims possession of the car under a hire purchase agreement. X Ltd has no interest in the car, other than for charges and costs incurred. In such a case, X Ltd may commence interpleader proceedings, requiring Y and Z Ltd to establish their rival claims.

(b) A bailiff (or marshal) has seized or intends to seize goods from a judgment debtor in execution of a judgment, and a third party, such as a finance company or a member of the judgment debtor's family, claims the goods. In such a case, the bailiff will notify the judgment creditor of the claim, then start interpleader proceedings.

Procedure

A person interpleads by filing in the registry an application 'for relief by way of interpleader'. An application, other than one by a bailiff, sheriff or marshal, must be supported by evidence on affidavit that the applicant:[41]

(a) claims no interests in the property other than for charges and costs;

(b) is not acting in collusion with either claimant; and

(c) is ready and willing to hand over the property as directed by the court.

An application by a bailiff must be served on the judgment creditor and on the person claiming the property.[42] An application by any other person must be served on all persons making a claim to the property.[43] In both cases, the application must be served not less than 14 days before the date fixed for hearing the application.[44]

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41 Rule 54.3(3).

42 Rule 54.4(1).

43 Rule 54.4(2).

44 Rule 54.4(3).

Powers of the court

Where (a) the application is by a bailiff and (b) all the claimants consent or any one requests, or the facts are not in dispute and the question in issue is solely one of law, the court may summarily determine the issue between the parties.[45] On any other application, the court may:

(a) order that the person claiming the property be made a defendant in addition to or in substitution for the stakeholder; or

(b) order that the issue between the parties be tried, with a direction as to who should be claimant and defendant; or

(c) if a claimant fails to attend, order that he be debarred permanently from prosecuting his claim against the stakeholder.[46]

45 Rule 54.5(1).

46 Rule 54.5(2).

CHAPTER 6

ANCILLARY CLAIMS

An ancillary claim, which corresponds to third party proceedings under the RSC, is defined in the CPR[1] as 'any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence' and includes:

(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;

(b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity; and

(c) a claim by an ancillary defendant against any other person, whether or not already a party.

SCOPE OF ANCILLARY PROCEEDINGS

One of the major areas in which ancillary proceedings are appropriate is that of contribution and indemnity. Where a defendant in a tort action alleges that another person is in fact responsible for the harm of which the claimant complains, one course open to him is to plead in his defence that the claimant has brought proceedings against the wrong person, for example, where D is sued as the driver of a vehicle which has run the claimant down, D may allege that E, and not D, was driving the vehicle at the material time. In such a case, D should plead the matter in his defence and, if D's allegation is sound, the claimant should discontinue proceedings against D and start fresh proceedings against E, in which case there will be no question of ancillary proceedings.

On the other hand, where the defendant alleges that, should he be found liable to the claimant in the action, another person is to indemnify him (that is, pay the whole amount of the damages awarded to the claimant),[2] the defendant should use the ancillary proceedings procedure to bring into the action the person who he claims is bound to indemnify him; for example, where an attorney is sued for negligence by a client, he may contend that

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1 Rule 18.1(2). In the English CPR, they are known as 'Pt 20 claims'.

2 It was pointed out by Ellis J in *Abrahams v The Gleaner Co Ltd* (1994) 31 JLR 562, p 564, Supreme Court, Jamaica, that a party may claim to be indemnified by the terms of an express contract, or by statute, or by implication of law or equity.

his insurers are bound to indemnify him under his professional indemnity insurance policy, and where an agent is sued upon a contract which he made on behalf of an undisclosed principal, he may claim an indemnity from the principal.

Similarly, where a defendant claims not a full indemnity but a contribution[3] from a third party (a typical example being a road accident case where a driver who has been sued for negligence wishes to claim a contribution from another driver involved in the accident), he should file a notice in order to bring into the proceedings the person against whom he claims the contribution. Another example is where D is liable to C for breach of contract, and D claims that his breach was brought about by T's breach of an agreement with him (D).

Another type of ancillary claim is where a defendant wishes to have a question or issue arising out of the claimant's claim resolved not only as between claimant and defendant but also as between both of them and a third party. For instance, D, a contractor, agrees to construct a building for T. C seeks an injunction to restrain D from building. D fears that, if he stops the construction work, T will sue him for beach of contract. D may file a notice against T in order to have the matter resolved between all three parties.

In most cases of indemnity and contribution, the defendant will have the option of either filing an ancillary claim notice or bringing a fresh claim against the third party. The advantages of an ancillary claim are:

(a) speedier determination of the claim or issue against the third party;

(b) avoidance of the costs of a second hearing; and

(c) avoidance of the risk of conflicting decisions from different judges on essentially similar issues.

The CPR[4] specifically provide that an ancillary claim is to be treated as if it were a separate action in that:

(a) the ancillary defendant (the third party) may counterclaim against the defendant; he may also bring in a fourth party, called a 'second ancillary defendant';

(b) the claimant in the main action cannot obtain judgment against the ancillary defendant, nor can the ancillary defendant counterclaim against the claimant; and

(c) ancillary proceedings may continue even after the main action has been settled, dismissed, or struck out.

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3 'A right of contribution may arise as between joint debtors, joint contractors, or joint tortfeasors': *Abrahams v The Gleaner Co Ltd, ibid*, per Ellis J.

4 See Rule 18.1 and Rule 18.6 [Rule 18.7 (Jam)].

If the defendant is seeking a contribution or indemnity, the ancillary claim is dependent on the main claim in the sense that the defendant is seeking to pass on to a third party the liability to the claimant, and if the claimant's claim fails, there is no liability to pass on. Accordingly, in cases of contribution and indemnity, a distinction must be drawn between:

(a) cases where the claimant's claim is *settled*, the effect of which is that the ancillary proceedings will continue despite the settlement, because there will still be a live issue as to whether the third party should contribute to the settlement; and

(b) cases where the claimant's claim is *dismissed or struck out*, the effect of which is that there is nothing left to litigate between the defendant and the third party, other than costs.

PROCEDURE

(a) A defendant may make a counterclaim against the claimant without the court's permission, provided he files the counterclaim with his defence. Thereafter, permission will be required.[5]

(b) If the counterclaim is against a person other than the claimant, permission is required.

(c) A defendant may make a claim for contribution or indemnity *against a co-defendant* without permission, at any stage, by filing a notice containing a statement of the nature and grounds of the claim and serving a copy on the other defendant.[6]

(d) All other ancillary claims can be made without permission if filed before or at the same time the defence is filed, but will otherwise require permission.

Permission

Where permission is required for ancillary proceedings, the application may be made without notice, unless the court directs otherwise.[7] The applicant must attach to the application a draft of the proposed ancillary claim form and ancillary particulars of claim.[8] Permission may be given at the first case management conference; thereafter, permission may not be given unless there has been a significant change of circumstances which became known after the case management conference.[9] In considering

5 Rule 18.4(1) [Rule 18.5(1) (Jam)].

6 Rule 18.3.

7 Rule 18.4(3) [Rule 18.5(3) (Jam)].

8 Rule 18.4(4) [Rule 18.5(4) (Jam)].

9 Rule 18.4(6). This provision no longer applies under Jamaican CPR.

whether to grant permission, the court must have regard to all the circumstances of the case, including the connection between the ancillary claim and the main claim, whether the facts in the ancillary claim are substantially the same as those of the main claim, and whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings not only between the existing parties but also between existing parties and the proposed ancillary claim defendant.[10]

Service of ancillary claim form

An ancillary claim filed without the court's permission must be served on the ancillary defendant within 14 days after filing of the defence in the main claim. Forms for defending the ancillary claim and acknowledgment of service must be served with the ancillary claim form.

Where the court gives permission to make an ancillary claim, it must at the same time give directions as to the service of the ancillary claim form.

A copy of the ancillary claim form and ancillary particulars of claim (if any) must be served on all the other parties.[11]

Defence to ancillary claim

A person served with an ancillary claim who wishes to defend must file a defence within 42 days after service of the ancillary claim. An ancillary defence must include an address for service and a certificate of truth.[12]

If the ancillary defendant fails to file a defence within the permitted time, he will be deemed to admit the ancillary claim and will be bound by any judgment in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim.[13]

An ancillary claimant against whom a default judgment has been entered may apply to enter judgment against the ancillary defendant in respect of the ancillary claim, but he requires the permission of the court to enter judgment against the ancillary defendant if (a) the ancillary claimant has not satisfied the default judgment or (b) he wishes to obtain judgment for any remedy other than contribution or indemnity, or for a sum greater than that for which judgment has been entered against the ancillary claimant.[14]

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10 Rule 18.10(2) [Rule 18.9(2) (Jam); Rule 18.11(2) (T&T)].

11 Rule 18.5 [Rule 18.6 (Jam)].

12 Rule 18.9 [Rule 18.8 (Jam)].

13 Rule 18.12(2)(a) [Rule 18.11(1), (2) (Jam)].

14 Rule 18.12(2)(5) [Rule 18.11(3), (4) (Jam)].

Case management where there is a defence

Where a defence to an ancillary claim is filed, the court must consider the future conduct of the proceedings and give appropriate directions. It must fix a case management conference for all parties, unless satisfied that the directions can be given in written form. In giving directions, the court must ensure that, so far as is practicable, the ancillary claim and the main claim are managed together.[15] The various interim remedies available as between claimant and defendant are equally available as between the defendant (in his capacity as ancillary claimant) and the ancillary defendant. Thus, for instance, the ancillary claimant may apply for summary judgment against the ancillary defendant.

15 Rule 18.14 [Rule 18.13 (Jam)].

CHAPTER 7

DEFAULT JUDGMENTS

Where a defendant, having been served with the particulars of claim:

(a) *fails to file an acknowledgment of service giving notice of his intention to defend* within the time limit prescribed by the Rules,[1] or

(b) *fails to file a defence* within the time limit prescribed by the Rules,[2]

judgment in default may be obtained against him.[3]

Under the CPR, default judgments are *not* obtainable in:

(a) fixed date claims;

(b) admiralty claims *in rem*; or

(c) claims in probate proceedings.[4]

There are two types of procedure for obtaining a default judgment. The procedure to be used depends on whether the claim is (a) for money, or (b) for some other remedy (for example, an injunction).

Money claims

Where the claim is to recover money, whether for a specified sum (as in the case of a debt) or for unquantified damages (as in the case of an action with respect to damage to a vehicle in a traffic accident), a default judgment is available simply by filing a standard form request,[5] and handing in or mailing the forms to the registry, where an official will enter the judgment. A default judgment in a money claim is thus a purely administrative matter and there is no hearing before the court.

Other claims

Where the claim is for some remedy other than damages, such as a claim for a declaration or an injunction or for the delivery of goods *simpliciter*, a formal application to the court supported by evidence on affidavit will be

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1 Which is 14 days from the date of service of the claim form (Rule 9.3(1)).

2 Which is 28 days from the date of service of the claim form (Rule 10.3(1)).

3 The Registry should refuse to enter a default judgment where the defendant has already applied to strike out the claimant's case: *St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd* (2003) OECS Court of Appeal, Civ App no 6 of 2002 (unreported).

4 Rule 12.2.

5 Rule 12.7.

required. The court will then give such judgment 'as the court considers the claimant to be entitled to on the particulars of claim'.[6] The court will accordingly consider the merits of the claim after hearing evidence, and decide, for example, the type of injunction to be granted, its duration, and what conditions should be attached.

The application

Whether the request for default judgment is 'over the counter' or made in court, the following requirements must be satisfied:

(a) the claimant must prove service of the claim form and particulars of claim on the defendant;[7]
(b) the period for filing an acknowledgment of service or defence, as the case may be, has expired;
(c) the defendant has not satisfied the claim in full; and
(d) where the claim is for a specified sum of money, the defendant has not filed an admission of liability together with a request for time to pay it.[8]

Form of the judgment

There are two main types of default judgment. The first, sometimes called a 'final judgment', is given where there is a claim for a specified sum of money, such as a debt or rent owed. A final judgment will normally give the defendant a short time to pay, such as 14 days, failing which enforcement proceedings may be taken by the claimant. The second, sometimes called an 'interlocutory judgment', applies where liability has been established and the issue will not be reopened, but all issues relating to the amount of damages or interest, or the value of goods, have yet to be decided. In such a case, the court will give whatever directions it considers appropriate.[9] On the other hand, claims relating to the possession of land must be brought by way of fixed date claim, to which the default judgment procedure does not apply.

Defendant's rights following judgment

Unless the defendant applies for and obtains an order setting the judgment aside, the only matters on which a defendant may be heard after a default judgment has been entered against him are:

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6 Rule 12.10(4), (5) [Rule12.7 (T&T)].
7 An affidavit of service will be necessary.
8 Rule 12.5. Where there is an application for judgment in default of either acknowledgment of service or a defence, the particulars of claim are deemed to be admitted as to the issue of liability: *National Commercial Bank Jamaica Ltd v Foote* (2006) Supreme Court, Jamaica, no 2000 CLN 145 (unreported) per Brooks J, following *Young v Thomas* [1892] 2 Ch 134 and *Marshall v Contemporary Homes Ltd* (1990) 27 JLR 17.
9 See Rules 12.8 and 12.10 [Rules 12.6 and 12.7 (T&T)].

Figure 7
Courtesy letter before judgment

31st October 2007
Ricardo Bulmer, Attorney-at-Law
114 Trent Boulevard
Kingston 7, Jamaica.

Dear Sir,

Re: Supreme Court of Judicature Claim no HCVN 01389 of 2007

We are in receipt of the acknowledgment of service filed by yourself on the 27th September 2007, but to date there has been no Defence entered.

We should appreciate your filing same within seven (7) days of the 31st October 2007, failing which we shall have Judgment in Default entered against your client.

Yours faithfully,

_____
Armstrong, Strongbow and Co.
Attorneys-at-Law for the Claimant.

(a) costs;

(b) the time for payment of any judgment debt;

(c) enforcement of the judgment; and

(d) an application by the claimant for specific delivery of goods.[10]

SETTING ASIDE DEFAULT JUDGMENTS

The entering of a default judgment is in most cases an administrative process, without any investigation of the merits of the claim, and this could potentially cause injustice. Accordingly, the court retains wide powers 'on such terms as it thinks just, to set aside or vary any such judgment'. Further, it was

10 Rule 12.13 [Rule 12.14 (B'dos); Rule 12.11 (T&T)].

established by the Jamaican Court of Appeal in *Gordon v Vickers*[11] that it is open to a defendant against whom a default judgment has been entered to make more than one application to set it aside. This principle has been confirmed in the post-CPR case of *Quarrie v C&F Jamaica Ltd*,[12] where Mangatal J (Ag) pointed out that 'it seems clear that a defendant, in the interests of justice, can make more than one application . . . provided the application is based on new grounds and is not an abuse of the court's process'.

The court may exercise its power to set aside a default judgment either on an application by the defendant or of its own motion.

Setting aside may be (a) as of right, or (b) at the discretion of the court.

Setting aside as of right

A default judgment will be set aside as of right where it was 'wrongly entered', a term which is defined restrictively in CPR Rule 13.2(1) and limited to:

(a) cases where the essential conditions about failing to acknowledge service or to defend, or the relevant time having elapsed, were not satisfied; or

(b) the whole of the claim was satisfied before judgment was entered.

In *Kingston Telecom Ltd v Dahari*,[13] Campbell J emphasised that the duty placed on the court to set aside an irregularly obtained judgment was 'mandatory: the court must set it aside. This accords with the pre-CPR principles, which allowed no judicial discretion where the judgment was irregularly obtained. In *Anlaby v Praetorious*,[14] the court held that . . . the defendant is entitled *ex debito justitiae* to have it set aside . . . The accompanying affidavits would also be required to state the basis for the allegation of irregularity.'

In *Graham v Dillon*,[15] interlocutory judgment had been entered against the defendant in a negligence action, and subsequently damages were

11 (1990) 27 JLR 60.

12 (2003) Supreme Court, Jamaica, no CL 2000/Q–001 (unreported).

13 (2006) Supreme Court, Jamaica, no HCV 2003/2433 (unreported). See also *IBM Canada Ltd v Rancal Information Systems Ltd* (1996) High Court, BVI, no 110 of 1995 (unreported), and *Hanschell Innis Ltd v Bowen* (1983) High Court, Barbados, no 476 of 1983 (unreported), where judgment in default of defence was entered one day before expiry of the time limited for serving a defence.

14 (1888) 20 QBD 764.

15 (2004) Supreme Court, Jamaica, no CLG 027/2002 (unreported). See also *Fraser v Rodney* (2002) High Court, St Vincent and the Grenadines, no SVGHCV153/2001 (unreported), where Alleyne J held that it was mandatory that a default judgment be set aside where the conditions in Rule 12.5(b) and (c)(i) had not been complied with; and *Poseley v Mariner International Bank Ltd* (2001) High Court, St Vincent and the Grenadines, no 300 of 2001 (unreported), also per Alleyne J, where there was a failure to include a certificate of truth in the statement of claim. The certificate of truth was 'not a mere formality but a vital element in the process of the claim, and must not be treated lightly'.

assessed and final judgment entered. The defendant applied under the CPR for judgment to be set aside on the ground that, inter alia, he had never been served with any writ (claim form) or particulars of claim. The claimant was unable to establish to the satisfaction of the court that the process server had in fact served the relevant documents on the defendant. Sinclair-Haynes J held that CPR Rule 13.2(1) applied. The default judgment had been 'wrongly entered', since there had been a failure to satisfy one of the conditions in Rule 12.4 [12.3 (T&T)], which was that the claimant had to prove service of the claim form and particulars of claim. It was clear that judgment had been entered against the defendant on account of the claimant's having 'ostensibly satisfied the Registrar that the claim form and particulars of claim were served, when in fact they were not . . . The Registrar was misled into believing that Rule 12.4 was satisfied'. The default judgment was set aside.

Setting aside in other cases

By virtue of the Jamaican Rule 13.3, where a judgment was not wrongly entered, the court may set it aside or vary it *if the defendant has a real prospect of successfully defending the claim*, and in considering whether to set aside or vary a judgment under this Rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;
(b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be.

Further, under Rule 26.1 the court may attach conditions to any order.

The rationale for the jurisdiction to set aside 'regularly obtained' default judgments was established in the leading case of *Evans v Bartlam*,[16] where Lord Atkin stated that:

> the principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

In *Malcolm v Metropolitan Transport Holdings Ltd*,[17] Mangatal J (Ag) accepted that the general principle in *Evans v Bartlam* 'continued to hold true' under the CPR regime, as, to quote Sir Roger Ormrod, the rule was 'not really a rule of law, but of common sense'.

The current wording of Rule 13.3 was introduced by the Civil Procedure

16 [1937] AC 473.

17 *Malcolm v Metropolitan Management Transport Holdings Ltd* (2003) Supreme Court, Jamaica, no CL 2002/M225 (unreported). See also *Massicote v Tarris Hill Associates Ltd* (2003) High Court, BVI, No 89/2001 (unreported), per d'Auvergne J.

(Amendment) Rules, 2006. In the original wording of the rule, the applicant to set aside a default judgment was required (i) to apply to the court as soon as reasonably practicable after finding out the judgment had been entered, (ii) to give a good explanation for his failure to file an acknowledgment of service or defence, and (iii) to have a real prospect of successfully defending the claim. In its original form (which still applies in the Caribbean jurisdiction other than Jamaica), Rule 13.3 was interpreted as enjoining the court under the CPR regime to attach less importance to the question of whether there was a realistic defence and more importance to the requirement of promptitude in applying to set aside the judgment. In *Ken Sales & Marketing Ltd v James & Co (A Firm)*,[18] Harrison P, after stating that the requirements of prompt application to the court, explanation for failure to file acknowledgment of service or defence, and real prospect of successful defence must be considered by the court cumulatively,[19] went on to suggest that whereas under the old rules the prime emphasis was placed on the defendant having a good defence, so that 'even if the explanation for the failure to file the acknowledgment was not prompt or the explanation was unsatisfactory, the good defence would predominate', under the CPR 'the provisions are required to be interpreted more strictly'.

In its amended form, Rule 13.3 of the Jamaican CPR places 'real prospect of successful defence[20] in pole position in subsection (1), with the other two requirements in subsection (2), thereby confirming the primacy of the requirement of a good defence as established in *Evans v Bartlam*. In *Saunders v Green*,[21] Sykes J explained that the amendment to Rule 13.3 was in response to complaints that the original version of Rule 13.3 was being interpreted too stringently and that there was a risk of injustice to some deserving litigants. The learned judge nevertheless lamented that the new, more liberal version of Rule 13.3 might give 'the lethargic litigant . . . new vigour to continue his old ways', and he emphasised that 'a claimant who has properly secured a judgment has something of great value', and this value in Jamaica was

> enhanced by the certain knowledge that a successful application to set aside judgment translates into a 24 to 48 month wait for the trial to take place. In that time the claimant bears the risk of losing witnesses and evidence might

18 (2005) Court of Appeal, Jamaica, Civ App no 3/05 (unreported).

19 [1937] AC 473.

20 'Real prospect of successful defence' has the same meaning as in applications for summary judgment; see pp 64 et seq, below. In *Harris v Fyffe* (2007) Supreme Court, Jamaica, no 2005/HCV 2562 (unreported), Brooks J held that Rule 13.3 allows for a defence to the claimant's claim solely on the question of the quantum of damages. See also the judgment of Smith JA in the Jamaican Court of Appeal in *Blagrove v Metropolitan Management Transport Holdings Ltd* (2006) Court of Appeal, Jamaica, SCCA 111/2005 (unreported), which Brooks J described as a 'watershed case' in terms of the procedure to be adopted at hearings for assessment of damages under the CPR.

21 (2007) Supreme Court, Jamaica, no 2005 HCV 2868 (unreported).

> not be available at the date of trial. During that time he has to incur the costs of retaining counsel. There is the stress and anxiety of waiting for the trial.

Sykes J also pointed out that, by virtue of Rule 13.3(2), 'in the absence of some explanation for the failure to file the acknowledgment of service or the defence, the prospect of successfully setting aside a properly obtained judgment should diminish somewhat. Similarly, if the application is quite late, then that would have a negative impact on successfully setting aside the judgment'.

Real prospect of success

In *Thorn plc v MacDonald*,[22] it was stated that, in deciding whether to set aside a default judgment, the primary considerations for the court were whether there was a defence with a real prospect of success, and that justice should be done. The 'real prospect of success' test, which is the same as that applicable to summary judgment under the CPR, prima facie makes the setting aside of a default judgment more difficult for a defendant under the CPR than for a defendant under the RSC, where in most cases the defendant is only required to show an 'arguable case', or some 'triable issue'.[23] However, even before the CPR, there was authority in the Caribbean for applying the 'real prospect of success' test to the setting aside of a default judgment. In the pre-CPR case of *Smith v Medrington*,[24] Moore J, in the BVI Supreme Court, had emphasised that it was not sufficient for the defendant to show a merely 'arguable' defence; it was essential for him to convince the court that he had a *real prospect of success*, a principle originally established in the case of *The Saudi Eagle*.[25] He said:

> The court is invested with the discretionary power [to set aside a default judgment] in order to avoid injustice to either the [claimant] or the defendant. In considering the exercise of its discretion, the court must determine whether the defendant has merit to which the court should pay heed, not as a rule of law but as a matter of common sense. The court will also take into consideration . . . any explanation as to how it came about that the defendant found himself bound by a judgment . . . to which he could have set up some serious defence in proper time. The . . . applicant . . . must do more than show that he has an 'arguable case' . . . [He] must, by potentially credible affidavit evidence, demonstrate a real likelihood that he will succeed.

In *Saunders v Green*,[26] Sykes J further explained that 'real prospect is not blind or misguided exuberance. It is open to the court, where available, to

22 [1999] CPLR 660, CA.

23 *Evans v Bartlam* [1937] AC 473.

24 (1997) Supreme Court, BVI, no 103 of 1995 (unreported).

25 [1986] 2 Lloyd's Rep 221.

26 Above, fn 20.

look at contemporaneous documents and other material to see if the prospect is real. [In *ED&F Man Liquid Products v Patel*],[27] the court pointed out that while a mini-trial was not to be conducted that did not mean that a defendant was free to make any assertion and the judge must accept it'.

The affidavit of merit

It had been stated, on innumerable occasions in Commonwealth Caribbean courts under the RSC regime, that the absence of an affidavit of merit in support of an application to set aside a default judgment would normally be fatal to such application, and the practice of providing an affidavit of merit would be departed from only in rare cases.[28] In view of the need under the CPR for the defendant to show not merely an arguable case but a *real prospect of success*, it seems that the affidavit of merit should be even more essential under the CPR regime. Indeed, Rule 13.4 specifically provides that an application to set aside a default judgment 'must be supported by evidence on affidavit', and the affidavit must exhibit a draft of the proposed defence.

However, service of a defence alone is not sufficient, as a statement of case 'is not evidence'. As for the content of the affidavit of merit, in the leading case of *Ramkissoon v Olds Discount Ltd*,[29] the defendant argued that the affidavit of his solicitor together with the defence signed by counsel and attached thereto was a sufficient disclosure of merit and dispensed with the need for an affidavit from the defendant personally. McShine CJ (Ag), in the Court of Appeal of Trinidad & Tobago, rejected this contention. He said:[30]

> The appellant seeks to have this court hold that the statement of defence exhibited is a sufficient substitute for an affidavit of merit by the defendant. In the first place, such a statement is itself not on oath and it is open to the court to suspect that the object of the defendant, in the absence of an affidavit, is to set up some mere technical case, or to cause delay.
>
> The case of *Farden v Ritcher*[31] is sufficient authority for holding that before a judgment which had been regularly obtained and properly signed could be set aside, an affidavit of merit was required as an almost inflexible rule and, when such an application to set aside the judgment is not thus supported, it ought not to be granted except for some very sufficient reason.
>
> No reason is advanced for the absence of such an affidavit from the defendant, and we do not agree that because the statement of defence is attached to an

27 (2003) *The Times*, 18 April.

28 *Johnson v Arawak Homes Ltd* [1989–90] 1 LRB 37. See p 103, above.

29 (1961) 4 WIR 73.

30 *Ibid.*, p 74.

31 (1889) 23 QBD 124.

> affidavit of the solicitor it should itself be treated in the nature of an affidavit, where the solicitor is unable to testify to the facts . . .
>
> In the absence of an affidavit showing that he has a good defence on the merits, the judgment against [the defendant] ought not to be set aside . . . The defendant may, in a separate affidavit or conjointly with his solicitor, show such merit as would enable a court or judge to set aside the judgment, and in the same affidavit disclose such excuse as may be advanced for his failure to follow any of the rules of procedure.
>
> In his affidavit, the solicitor does not purport to testify to the facts set out in the defence, nor does he swear of his personal knowledge as to the matters going to constitute the excuse for the failure, and so this does not amount to an affidavit stating facts showing a substantial ground of defence.
>
> Since the facts related in the statement of defence have not been sworn by anyone, there was not, in our view, any affidavit of merits before the judge, nor before us.

Delay

A defendant who wishes to apply to set aside a default judgment should act reasonably promptly, and if there is a delay in making the application, he should explain in his affidavit of merit the reasons for such delay. If it appears that there was an inexcusable or inordinate delay, the court may in its discretion reject the application. Under the CPR regime, it is to be expected that the courts will be even less tolerant of delay than they are under the RSC, and indeed Rule 13.3 specifically provides that the court must consider whether the defendant has applied to the court as soon as reasonably practicable after finding out that judgment has been entered.

Further confirmation of the factors to be taken into account under the CPR was given by the English Court of Appeal in *Thorn plc v MacDonald*,[32] where the Court approved the following principles:

(a) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
(b) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but it is not always a reason to refuse to set the judgment aside;
(c) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
(d) prejudice (or the absence of it) to the claimant should also be taken into account.

The ruling of the Privy Council in *Dipcon Engineering Services Ltd v Bowen*,[33] an appeal from the OECS Court of Appeal (Grenada), suggests that the

32 [1999] CPLR 660, CA.

33 (2004) Privy Council Appeal, no 79 of 2002.

principles concerning the setting aside of regularly obtained default judgments under the CPR are very similar to those applicable under the RSC. In this case, the action had been commenced and a default judgment for damages to be assessed had been entered in favour of Dipcon, at a time when the RSC were in force in Grenada and the other OECS jurisdictions. The hearing for assessment of damages, however, took place on 31 July 2001, by which time the case had become subject to the new OECS CPR, and indeed Alleyne J expressly assessed costs in accordance with Appendix B of Pt 65 of those Rules. Subsequently, the OECS Court of Appeal set aside the orders of Alleyne J, and Dipcon appealed to the Privy Council. Here, Lord Brown, citing *dicta* of Lord Atkin in *Evans v Bartlam*, stated:

> of course, the merits of the proposed defence are of importance, often perhaps of decisive importance, upon any application to set aside a default judgment. But it should not be thought that it is *only* the merits of the proposed defence which are important. The defendants' explanation as to how a regular default judgment came to be entered against them . . . will also be material. That is not to say that there must necessarily be a reasonable explanation for this . . . Important, too, will be any delay in applying to set aside the default judgment and any explanation for this also.

Lord Brown considered that it was worth noting that Rule 13.3(2) of the English CPR provided that 'in considering whether to set aside . . . a judgment . . . the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly'. It is significant that neither Alleyne J nor the OECS Court of Appeal nor the Privy Council drew any distinction between the RSC and the CPR with respect to the principles on which a court may set aside a default judgment, and this confirms the trend of previous cases.

Conditions imposed by the court

It is also significant that the CPR provide that the court may attach conditions to any order setting aside a default judgment. This is an aspect of the principle, common to both the RSC and CPR systems, that the court must take into account any prejudice which the claimant would suffer by the setting aside of a default judgment. Thus, for instance, as a condition for setting a judgment aside, the court may order the defendant to pay the claimant's costs thrown away, or to pay into court all or part of the money that is the subject matter of the claim. However, the court should not impose a financial condition on the defendant if it is clear that he will not be able to meet it, as that would effectively give judgment to the claimant.[34] The defendant has the burden of proving any inability to meet the condition.

34 *MV Yorke Motors v Edwards* [1982] 1 WLR 444 (a case decided on the rules relating to summary judgment under the RSC, but applicable by analogy).

Figure 8
Affidavit of merit

ANGUILLA
IN THE HIGH COURT OF JUSTICE
Claim No AXA HCV 2007/0088

Defendant: Pimroy Limited
Deponent: P Gravelly

BETWEEN	ASTRA LATVILLE	CLAIMANT
AND	PIMROY LIMITED	DEFENDANT

AFFIDAVIT

I, PARNELL GRAVELLY, of 34 Crane Villas, Turtle Beach, chartered accountant, MAKE OATH AND SAY as follows:

(1) I am the Managing Director of the Defendant in this claim and I am authorised to make this affidavit and do so from knowledge acquired by me in this capacity.

(2) The Claimant commenced an action against the Defendant and on the 3rd of April 2007 served the claim form and particulars of claim on the Defendant for the relief claimed herein.

(3) On receipt of the particulars of claim, the Defendant's attorneys-at-law, Courtney Wigg & Co, were consulted and given instructions to enter a Defence to the Claimant's claim.

(4) I am informed by the Defendant's attorneys-at-law that an acknowledgment of service was filed on the Defendant's behalf indicating an intention to defend.

(5) Through inadvertence on the Defendant's part there was a failure to provide the necessary funds to file a Defence to the claim before the Claimant entered Judgment.

(6) The Defendant is in receipt of a letter from the Claimant's attorneys-at-law dated the 22nd of June 2007 and informing that Judgment was entered against the Defendant on the 15th of June 2007.

(7) I am advised by the Defendant's attorneys-at-law and I verily believe that the Defendant has a good defence on the merits to the Claimant's claim in this action, namely:

   (a) the Claimant was guilty of misconduct in his employment by wilfully disobeying the lawful and reasonable orders of the Defendant and by being habitually neglectful in the performance of his duties, which justified the Defendant in terminating his contract of employment;

(b) further, and in the alternative, by a letter dated the 8th of March 2007, the Defendant made the Claimant redundant, terminated his employment and paid him the sum of $45,231.87 to which he was entitled according to the Laws of Anguilla.

[A copy of a draft Defence is annexed hereto and marked 'PG']

(8) In the premises I respectfully request that the said Judgment may be set aside and that the Defendant may be permitted to serve a Defence in this action.

SWORN by the deponent the said
PARNELL GRAVELLY
this 5th day of July 2007 at
Before me:

_____
Parnell Gravelly

_____
Registar
This affidavit is filed on behalf of the Defendant on 6th July 2007.

In addition, an important provision in Rule 13.5 is that the order setting aside a default judgment must be made conditional on the defendant filing and serving a defence by a certain date. In *Quarrie v C&F Jamaica Ltd*,[35] Mangatal J (Ag) took Rule 13.5 to mean that 'even where the court decides to exercise its discretion to set aside a regularly obtained default judgment, the defendant is not then given a general licence or *carte blanche* to do as he or she pleases. If the condition as to filing the defence by a certain date is not fulfilled . . . the judgment stands'.

If the court does set aside the default judgment, it must treat the hearing as a case management conference, unless it is not possible to deal with the matter justly at that time, in which case the court must fix a date, time and place for such a conference and give notice to the parties.[36]

35 (2003) Supreme Court, Jamaica, no CL 2000/Q-100 (unreported).

36 Rule 13.6.

CHAPTER 8

SUMMARY JUDGMENT

Under CPR Rule 15.2, the court may give summary judgment on the claim or on a particular issue if it considers that:

(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue.

By Rule 15.4, an application for summary judgment by a claimant may not be made before the defendant has filed an acknowledgment of service.

In addition, there are separate provisions in Rule 26.3 [Rule 26.2 (T&T)] giving the court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim.[1] The main distinction between striking out and summary judgment is that the former is aimed at weakness in the manner in which the issues are set out in the statements of case, whereas the latter is used in cases or defences that are weak on the facts and, since summary judgment is defined as 'a procedure by which the court may decide a claim or a particular issue without a trial',[2] it is clear that it applies also to cases or defences based on misconceived points of law.

Where the defendant has filed an acknowledgment of service but no defence within the time limited, the claimant can seek either summary judgment or judgment in default of defence.[3]

PURPOSE OF SUMMARY JUDGMENT PROCEEDINGS

The purpose of summary judgment proceedings brought by claimants is to provide early judgment in cases in which the defendant has no realistic

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1 See, eg, *Husbands v Cable and Wireless* (2003) High Court, St Lucia, no SLUHCV2002/1193 (unreported). It seems that the court may treat an application under Rule 26.3 as if it were an application for summary judgment under Rule 15.2: *Taylor v Midland Bank Trust Co Ltd* (Court of Appeal, Civil Division, July 21, 1999).

2 See *Martinez v Elijio* (2006) Supreme Court, Belize, no 97 of 2005 (unreported), per Conteh CJ.

3 *Dotting v Clifford* (2007) Supreme Court, Jamaica, no 2006 HCV0338 (unreported).

prospect of success, and any defence raised will merely have the effect of delaying judgment. Summary judgment is given mainly in straightforward debt actions where there is clearly no defence, and where an unscrupulous defendant would otherwise be able to prolong proceedings until a full trial, with the attendant waste of time and costs. On the other hand, summary judgment will not normally be appropriate for negligence and personal injuries claims where the facts are more likely to be disputed. In *Lyle v Lyle*,[4] Sinclair-Haynes J emphasised that summary judgment is inappropriate where there are important disputes of fact, and that accordingly on an application for summary judgment the claimant must satisfy the court of the following:

(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.

(b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.

It is noteworthy that, whereas under the RSC summary judgment is available only against defendants, under the CPR it is available equally against claimants, as a means of disposing of weak claims at an early stage of the proceedings. Further, summary judgment can be given by the court on its own initiative, in performance of the important case management function of stopping weak cases from proceeding. It may also be used to obtain summary determination of one or more issues in contention, thereby reducing the complexity of any ultimate trial.

Under the RSC, summary judgment will be granted only if it is shown that the defendant has 'no arguable defence'. So long as there is a 'triable issue', summary judgment will not be given. This means that, under the RSC, it is comparatively easy for a defendant to resist summary judgment since, however weak his defence may be, it might still be held to be 'arguable'. On the other hand, the policy of the CPR is to knock out weak cases at an early stage of the proceedings, whether the weakness is on the defendant's or the claimant's side. It was felt by the framers of the CPR that it was not in the interests of litigants to pursue cases or to put up defences that were doomed to fail, and the result of which would be unnecessary costs burdens. As far as summary judgment against defendants is concerned, the test under the CPR is accordingly not whether there is an 'arguable defence' or a 'triable issue' but whether the defence has a 'real prospect of succeeding',[5]

4 (2005) Supreme Court, Jamaica, no HCV 02246/2004 (unreported). See also *Dixon v Jackson* (2005) Supreme Court, Jamaica, no CLD 042/2002 (unreported), per Beswick J; *S v Gloucestershire County Council* (2000) *The Independent*, 24 March (CA).

5 A test established in *Alpine Bulk Transport Company Inc v Saudi Eagle Shipping Company Inc* (*The Saudi Eagle*) [1986] 2 Lloyd's Rep 221, CA, and approved in several post-CPR Caribbean

and it will be more difficult for a defendant to resist summary judgment under this test.

In *Swain v Hillman*,[6] Lord Woolf MR said that the expression 'real prospect of success' did not need any amplification, as the words spoke for themselves. The word 'real' meant that the question for the court was whether there was a realistic, as opposed to a fanciful, prospect of success. A claim will be fanciful where, for example, it is clear that a statement of case is contradicted by all the documentary evidence or other material on which it is based; where the defence put forward is clearly a 'sham'; and where in previous litigation the defendant has advanced similar defences which have been shown to be false.

In *ED&F Man Liquid Products Ltd v Patel*,[7] Potter LJ regarded the distinction between a realistic and a fanciful prospect of success as reflecting the observation in the well-known *Saudi Eagle* case (decided under the equivalent Ord XIV of the RSC), that the defence sought to be argued 'had to carry some degree of conviction'.

A straightforward example of a successful application for summary judgment under the Jamaican CPR is *Jamaica Creditors Investigation & Consultant Bureau Ltd v Michmont Trading Ltd*.[8] Here, the claimant brought an action claiming a sum of money owed in respect of goods shipped to the defendant. The defendant had entered an appearance but filed no defence; nor did he make any attempt to apply for leave to file a defence out of time. The claimant applied for summary judgment, and although the action had been commenced under the old Civil Procedure Code (CPC) of Jamaica, it was accepted that the matter was governed by the new CPR. Jones J (Ag) cited the following passage from Lord Woolf's judgment in *Swain v Hillman*:[9]

> It is important that judges in appropriate cases should make use of the power contained in CPR Pt 24 [to grant summary judgment]. In doing so, they will give effect to the overriding objectives . . . It saves expense, achieves

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cases, eg, in *Clough v Mignott* (2007) Supreme Court, Jamaica, no HCV 2913/2004 (unreported), per Hibbert J; *Abrikian v Wright* (2004) Supreme Court, Jamaica, no 1994/A083 (unreported), per Mangatal J; *Ellis v Compass* (2005) Supreme Court, Jamaica, no E201 of 1999 (unreported), per McDonald J(Ag); *Leslie v Davis* (2006) High Court, St Vincent and the Grenadines, no 47 of 1998 (unreported), per Thom J.

6 [2001] 1 All ER 91.

7 (2003) *The Times*, 18 April. It was also held in this case that the onus rests on the applicant for summary judgment to show that the respondent's case has no prospect of success. This proposition was approved by Anderson J in *Franklin v Cowan* (2005) Supreme Court, Jamaica, no CLF006/2002 (unreported).

8 (2003) Supreme Court, Jamaica, no CLJ-015 of 2002 (unreported). See also *Desulme v Downer* (2005) Supreme Court, Jamaica, no 2004 HCV 1445 (unreported), per Jones J; *Henry v Ken Ann Management Co Ltd* (2004) Supreme Court, Jamaica, no CLH 131 of 2001 (unreported), per Sinclair-Haynes J.

9 [2001] 1 All ER 91, p 94.

> expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interests of justice. If a claimant has a case which is bound to fail, it is in his interest to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible . . . Useful though the power is, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial . . . The proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial; that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

Applying these principles, Jones J (Ag) held that:

> Once it is accepted that the defendant filed no defence to the claim, and gave no evidence to answer the claimant's application for summary judgment, it seems to me that there is no issue of fact and of interpretation to be resolved by trial in this matter. So then, in giving effect to the overriding objectives in CPR Pt 1 of enabling the court to deal with cases justly, saving expense, achieving expedition, and ensuring that the court's resources are not used up on cases which are unmeritorious, this court cannot resist the inevitable conclusion that the claimant is entitled to summary judgment on its claim.

The identification of the appropriate test for summary judgment applications has recently been discussed in the Jamaican Court of Appeal in *Stewart v Samuels*.[10] In this case the respondent sustained serious injuries while in the sea in the vicinity of a hotel owned by B Ltd (the third appellant), allegedly caused by the negligent operation of a ski boat by R (the second appellant), an employee of B Ltd. While in hospital recovering from his injuries, the respondent signed a 'Release' acknowledging the receipt of medical and financial assistance from B Ltd and further agreeing not to seek any additional compensation. Nonetheless, the respondent subsequently instituted a claim against the appellants seeking damages for negligence. The appellants applied for summary judgment against the respondent, stating that, on the basis of the 'Release', the respondent had no real prospect of succeeding in his claim. The trial judge, Sykes J (Ag), dismissed the appellants' application for summary judgment on the ground that the respondent, described as 'an obviously poor and uneducated person, in poor health because of his injuries, and dependent on the benevolence of B Ltd', had raised a strong arguable

10 (2005) Civ App no 2 of 2005 (unreported). Cf *Franklin v Cowan* (2005) Supreme Court, Jamaica, no CLF 006/2002 (unreported), where Anderson J approved the proposition in Sime, *A Practical Approach to Civil Procedure*, 8th edn, p 215, to the effect that on an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one or more of the following: (i) a substantive defence, eg, *volenti non fit injuria*, frustration or illegality; (ii) a point of law destroying the claimant's cause of action; (iii) a denial of facts supporting the claimant's cause of action; (iv) further facts answering the claimant's cause of action, such as an exclusion clause or that the defendant was an agent rather than a principal.

case of undue influence which, if established, would nullify the 'Release' and open up the possibility of establishing negligence.

The Jamaican Court of Appeal agreed with and ultimately upheld the decision of Sykes J (Ag), but there was a difference of opinion between P Harrison JA and Panton JA as to whether the trial judge, in refusing the appellants' application for summary judgment, had used the correct test. Sykes J had expressed the view that the definition of the test 'real prospect of success' in *Swain v Hillman*[11] was 'not particularly enlightening', and he further opined that *Swain* 'does suggest that the criterion for establishing that a case has a real prospect of success is perhaps not far above that required for an injunction, namely, a serious triable issue' and that 'the threshold to satisfy the test of "real prospect of success" is very, very low.' P Harrison JA took the view that the 'mere arguability test' adopted by the learned trial judge was incorrect and that he had fallen into error in rationalising the test of 'real prospect of success' as requiring a 'low threshold' of proof.[12] Panton JA, on the other hand, was not sure that it was correct to say that the trial judge had used the wrong test in dealing with the matter at hand, for in *Sinclair v Chief Constable of West Yorkshire*[13] Otton LJ had stated that 'in order to defeat the application for summary judgment it is sufficient for the respondent to show "a prospect", i.e. some chance of success. However, the prospect must be "real". The court must disregard prospects which are merely fanciful, imaginary, unreal or intrinsically unrealistic'.

It is respectfully submitted that, from a commonsense point of view, there is much to commend the view that all that should be required to defeat an application for summary judgment is a serious triable issue since it would seem that, in order to achieve a greater degree of certainty that the claim or the defence, as the case may be, would succeed, it would be necessary to examine the evidence and the legal issues in much more depth. This would virtually amount to a mini-trial, a situation which, as Mangatal J pointed out in *Eureka Medical Ltd v Life of Jamaica Ltd*,[14] should be avoided. The learned judge said in that case:

> The judge ought not to conduct a mini-trial. Summary judgment is really designed to deal with cases that do not merit trial at all. In the *Stewart* case,

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11 [2001] 1 All ER 91.

12 See also *Hague v Nam Tai Electronics Inc* (2006) OECS Court of Appeal (BVI) Civ App no 20 of 2004 (unreported), per Gordon JA.

13 [2000] All ER (D) 2240.

14 (2005) Supreme Court, Jamaica, no HCV 1268/2003 (unreported). Cf *Miles v ITV Networks Ltd* (2003) LTL 8/12/03, where, in dismissing an allegation that the master had conducted a mini-trial, Laddie J stated that the consideration of somewhat voluminous evidence was necessary for him in order to understand the facts that were in issue. See also *Clough v Mignott* (2007) Supreme Court, Jamaica, no HCV 2913/2004 (unreported), where Hibbert J commented that in that case an examination of several documents was required in order to understand the real issues and to make a determination as to whether there was a real prospect of defending the claim.

> the circumstances clearly showed that there were serious issues that needed to be investigated at trial.

In *Bennett v Pearson*[15] Sykes J found that there was the possibility of an equity by way of estoppel arising in favour of the claimants and for that reason the claimants' case was not hopeless. He continued:

> I am not saying that success is guaranteed but neither can I say that failure is assured. My task at this stage is simply to determine whether the claimants' case is such that it has *no real prospect of succeeding*. I am not permitted to conduct a mini-trial of the issues . . . Some of the points of law cannot be dealt with unless there is a full exploration at the trial of all the relevant facts and circumstances. The summary judgment procedure is not a substitute for a trial. It is designed to cast out the most hopeless of cases. There are cases that, even on the most benevolent view of the allegations, the party relying on them simply cannot succeed.

Smikle v Nunes[16] is a good example of summary judgment being available against a claimant having no reasonable prospect of success in his claim against a particular defendant. Here the claimant had sustained injuries in a road accident. He brought claims against four defendants, including X, the driver of the vehicle which, as had been agreed at case management, had been pushed across the road by a vehicle driven by the first defendant into the path of the vehicle in which the claimant was a passenger. Sykes J held that, had counsel for the claimant not agreed to discontinue the action against X, summary judgment would have been given against the claimant with respect to that action. There was quite clearly no prospect of success against X. After stating that Rule 15.2 (summary judgment) was more appropriate in the instant case than Rule 26.3(1)(c) (striking out a statement of case), Sykes J continued: 'If, after taking into account the pleaded case and the possibility of gaining further information, the judge concludes that there is no real prospect of success, then the judge should act accordingly and give summary judgment for the other party.'

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15 (2004) Supreme Court, Jamaica, no CL 1994/B446 (unreported).

16 (2007) Supreme Court, Jamaica, no CL S178 of 2002 (unreported). See also *Foote-Doonquah v Jamaica Citadel Insurance Brokers Ltd* (2006) Supreme Court, Jamaica, no 2005 HCV 01078 (unreported), where Sykes J explained that Rule 26.3(1)(c) 'is the modern equivalent of what used to be called a demurrer where no evidence was admissible. The court simply looks at the pleadings or, to use the modern language, the particulars of claim or defence, as the case may be, and makes a determination whether the claim or defence is vague, incoherent or does not amount to a legally recognised claim or defence. No evidence is admissible on this application. Evidence, on the other hand, is admissible when the striking out is based on the frivolous and vexatious ground'. Since, in the instant case, it could not be said that the claim was vague, incoherent or did not amount to a legally recognised claim, it was not appropriate to proceed under Rule 26.3(1)(c), and the proper application should have been one for summary judgment under Rule 15.2. 'All the parties have fully pleaded their respective cases supported by affidavit evidence. I now have before me all the evidence that is going to be adduced at trial. There is hardly any factual dispute between the parties.'

QUESTIONS OF LAW

Where questions of law are raised on a summary judgment application, the position would appear to be as follows:

(a) if the claimant's case or the defendant's defence is based solely on a point of law and the court can see at once that the point is misconceived, summary judgment may be given;

(b) if at first sight the point appears to be arguable, but with a relatively short argument can be shown to be plainly unsustainable, summary judgment may be given; or

(c) if the point of law relied upon by either party raises difficult questions of law which call for detailed argument and mature consideration, summary judgment is inappropriate.[17]

TYPES OF PROCEEDINGS FOR WHICH SUMMARY JUDGMENT IS UNAVAILABLE

Rule 15.3 provides that summary judgment cannot be obtained in the following types of action:

(a) proceedings for redress under the constitution;

(b) proceedings against the Crown;

(c) proceedings by way of fixed date claim;[18]

(d) proceedings for false imprisonment, malicious prosecution and defamation;

(e) Admiralty proceedings *in rem*; and

(f) probate proceedings (other than substitution and removal of personal representatives).

PROCEDURE

(a) An application for summary judgment in Jamaica may not be made by a *claimant* until an acknowledgment of service has been filed by the defendant[19] (where a defendant files neither an acknowledgment of service nor a defence, then the claimant should enter a default judgment). However, there is nothing in the Rules preventing a *defendant* from seeking summary judgment on the claimant's claim even before he has filed an acknowledgment of service. Where the defendant makes such an

17 *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1989] 3 All ER 74.

18 But a fixed date claim may be dealt with summarily under the court's case management and powers (Rules 26.1(2)(j) and 27.2(8)), *Strachan v Jamaican Redevelopment Foundation Inc* (2007) Supreme Court, Jamaica, no HCV 3381 of 2006 (unreported).

19 There is no such restriction under the OECS or Belize Rules.

application, the effect is to stay the action until the hearing of the application, as a default judgment cannot be entered when an application for summary judgment has been made.

(b) In Jamaica, if a claimant applies for summary judgment before the defendant has filed a defence, the defendant's time for filing a defence is extended until 14 days after the hearing of the application.[20]

(c) Notice of the application, identifying the issues which the court is being asked to deal with at the hearing, must be served on the other party not less than 14 days before the date fixed for the hearing.

(d) The court may of its own initiative raise the issue of summary judgment, in which case it will give the parties an opportunity to be heard before it enters judgment.

EVIDENCE

An applicant for summary judgment must file affidavit evidence in support and serve copies on the other party not less than 14 days before the date fixed for the hearing of the application.[21]

A respondent resisting the application should file affidavit evidence and serve copies on the applicant not less than seven days before the hearing.[22]

POWERS OF THE COURT

On hearing the application the court may make any of the following orders:

(a) summary judgment on the claim, whether in favour of the claimant or the defendant. The court may stay execution of the judgment until after the trial of any ancillary claim made by a defendant against whom summary judgment is given;

(b) summary judgment on any issue of fact or law;

(c) striking out or dismissal of the claim in whole or in part;

(d) dismissal of the application;

(e) a conditional order, that is, one requiring a party to pay money into court, to give security for costs, or to take some other step, the penalty for failure to do so being dismissal of the claim or striking out of the party's statement of case. Conditional orders are appropriate for cases falling in the 'grey area' between granting judgment and dismissing the application; or

(f) any other order as may seem fit.[23]

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20 There is no such restriction under the OECS or Belize Rules.

21 Rule 15.5(1).

22 Rule 15.5(2).

23 Rule 15.6(1) (Jamaica). In the OECS and Belize, such orders can be made under the court's case management powers.

STAY OF EXECUTION

Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant. 'Ancillary claim' is defined to include, inter alia, a counterclaim by the defendant against the claimant and a claim by the defendant against any person (whether or not already a party) for contribution or indemnity.[24] It is specifically provided that the term 'ancillary claim' does not include a set off;[25] however, since a set off is normally treated as a counterclaim, it may be assumed that it would trigger a stay of execution in the same way as an 'ancillary claim' properly so called.[26]

CONDITIONAL ORDER

Conditional orders under the CPR are the equivalent of orders for 'conditional leave to defend' under the RSC. They are a kind of 'half way house' between granting summary judgment and dismissing the application, and are appropriate in those cases where the court considers a defence or a claim to be 'shadowy'[27] or insubstantial, or where it has doubts about the *bona fides* of the party. The effect of a conditional order is that the party in whose favour the order is made will be required to pay a sum of money into court, or to take some specified step in relation to his claim or defence, and if he fails to comply, his claim will be dismissed or his statement of case struck out.[28]

Cross-claims

(a) Where there is a cross-claim unconnected with the claim (for example, where the landlord's claim is for arrears of rent and the tenant counterclaims for defamation), summary judgment on the claim should be entered.

(b) Where there is a counterclaim linked to the claim, the RSC provide that the appropriate order is summary judgment on the claim subject to a stay of execution pending trial of the counterclaim. The CPR, however, are silent on this point, and it is therefore arguable that, under the CPR, counterclaims linked to the claim are to be treated in the same way as totally unconnected cross-claims.

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24 Rule 18.1(2).

25 *Ibid.*

26 Rule 15.6(2).

27 *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1968] 3 WLR 1141, p 1146.

28 See *Anglo Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198.

(c) Where the cross-claim amounts to a set-off in law, it will be a defence to the claim and any summary judgment application should be dismissed, provided the value of the set off is at least equal to the value of the claim; if, on the other hand, the set off is lower than the value of the claim, the appropriate order is summary judgment for the undisputed balance. Set offs arise primarily in the following situations: where there are mutual debts; under the Sale of Goods Acts, where the buyer may set off counterclaims for breach of the statutory conditions as to merchantable quality, fitness for purpose and correspondence to description against a claim by the seller for the price of the goods; and where a tenant, sued by his landlord for arrears of rent, counterclaims for damages in respect of breaches of covenant by the landlord (an instance of 'equitable set off').[29]

THE 'CHEQUE RULE'

Where goods or services are paid for by a cheque or bill of exchange, which is subsequently dishonoured, the payee is entitled to summary judgment *on the cheque* and the defendant is precluded from setting off against that claim any counterclaim for damages based on, for example, an allegation that the goods are defective and that the supplier is in breach of warranty. The defendant is not even entitled to a stay of execution pending resolution of the cross-claim. The rule is one of commercial convenience; cheques are regarded as equivalent to cash, and 'any erosion of the certainties of the application by our courts of the law merchant relating to bills of exchange is likely to work to the detriment of this country, which depends on international trade to a degree that needs no emphasis'.[30] Thus, in effect, where goods or services are paid for by cheque, there are two contracts – the underlying contract of sale, and the independent contract on the cheque itself. The only possible defences allowed in cheque actions are: (a) fraud; (b) invalidity; (c) illegality; (d) duress; and (e) total failure of consideration.

The rule has recently been extended to include letters of credit,[31] performance bonds[32] and payments by direct debit.[33]

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29 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137. See, generally, Sime, S, *A Practical Approach to Civil Procedure*, 6th edn, 2003, Oxford: Oxford University Press.

30 *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271, p 278, per Sir Eric Sachs.

31 *SAFA v Banque de Caire* [2000] 2 All ER (Comm) 567.

32 *Solo Industries v Canara Bank* [2001] 2 All ER (Comm) 217.

33 *Esso Petroleum Co Ltd v Milton* [1997] 1 WLR 938.

Figure 9
Affidavit in support of application for summary judgment

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

CLAIM NO. 2005 HCV P 0655 Claimant: Popular Finance Limited
Deponent: R Smith

BETWEEN POPULAR FINANCE LIMITED CLAIMANT

AND JOHNSON PIERRE DEFENDANT

AFFIDAVIT

I, RAJMUTON SMITH, of 19 Spring Avenue, Frankfield, Accountant, MAKE OATH AND SAY as follows:

(1) That I am employed by the Claimant as its Chief Accountant.
(2) That I have been authorised to make this Affidavit on behalf of the Claimant.
(3) That the Defendant, Johnson Pierre, is and was at the commencement of this suit justly and truly indebted to the Claimant in the sum of $317,445 together with interest at the rate of 10 per cent per annum on the said sum of $317,445 from the 3rd day of February 2006 until payment.
(4) That the particulars of the claim of the Claimant as against the Defendant are as stated in the Particulars of Claim and filed in this suit or action.
(5) That I am familiar with the books, accounts and records of the Claimant and it is within my personal knowledge that the said debt was incurred by the Defendant and is still due and owing as aforesaid.
(6) That I verily believe that that there is no defence to the Claimant's claim.
(7) That I make this affidavit in support of an application by the Claimant for Summary Judgment in terms of the said Particulars of Claim filed herein.

SWORN by the deponent the said
RAJMUTON SMITH
this 30th day of March 2007
Before me:

_____
Rajmuton Smith

_____
Justice of the Peace

_____
Notary Public.
This affidavit is filed on behalf of the Claimant on 31st March 2007.

The rule was applied (under the RSC, where the same rule applies) in a Barbadian case, *AH and L Kissoon Ltd v Slumber Foam (Barbados) Ltd*,[34] where the plaintiff had sold a machine to the defendant, which had paid for it by a bill of exchange. The bill was dishonoured and, in answer to the plaintiff's claim for the amount of the bill, the defendant counterclaimed for breach of warranty and for loss of profits on the machine. Williams J held, inter alia, that since the plaintiff 's action was on a dishonoured bill of exchange which the law treated as cash, the plaintiff was entitled to summary judgment.

34 (1988) High Court, Barbados, no 1058 of 1985 (unreported).

CHAPTER 9

CASE MANAGEMENT

OBJECTIVES OF CASE MANAGEMENT

The aims of case management are to ensure:

(a) that proceedings are disposed of expeditiously with the minimum necessary commitment of resources by the court and by the litigants themselves;

(b) that cases which can be disposed of by some means other than trial should be identified as early as possible;

(c) that cases going to trial are adequately prepared, with the minimum commitment of resources necessary to achieve a fair decision; and

(d) that there is an appropriate and effective allocation of the limited resources available to the court.

Accordingly, the CPR expressly provide that the court has a duty to *actively manage cases*, which may involve, inter alia:[1]

(a) encouraging and assisting the parties to settle their dispute on terms which are fair to both;

(a) identifying the issues at an early stage, deciding which issues need full investigation and trial, and disposing summarily of the others;

(b) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(c) encouraging the parties to use mediation and other forms of alternative dispute resolution (ADR);

(d) dealing with as many aspects of the case as is practicable on the same occasion;

(e) considering whether any aspects of the matter can be dealt with without the parties having to attend court;[2]

(f) considering whether the likely benefits of taking a particular step will justify the cost of taking it;

(g) controlling the progress of the case, such as by adjourning a hearing, consolidating proceedings, fixing timetables, and giving directions to ensure that the trial of the case proceeds quickly and efficiently;

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1 See Rule 25.1.

2 Cf *Martinez v Elijio* (2006) Supreme Court, Belize, no 97 of 2005 (unreported).

(h) imposing sanctions and granting relief from sanctions, where necessary; and

(i) making appropriate use of modern technology.

THE CASE MANAGEMENT CONFERENCE

In the scheme of the CPR the use of the word 'conference' is deliberate. It signifies that the case management conference is intended not to be a hearing in the formal sense but rather a 'round the table' conference, chaired by the procedural judge,[3] at which the parties, their attorneys, and possibly also those funding the litigation, are present, and where the emphasis is on a co-operative effort to consider the needs of all the stakeholders in the litigation.

The CPR of both Jamaica and the OECS seem to envisage only one case management conference being necessary in the majority of cases, as the rules invariably speak of '*the* case management conference'. As for the time when the conference should take place, probably the ideal time is when the attorneys for all the parties have a clear idea of the bases of their respective clients' cases and how they intend to prove them, but before they have expended undue sums of money. Each attorney needs to know the legal requirements of his client's case and the evidence of his client that deals with those requirements, including any expert evidence which supports the case.

It has been suggested[4] that the case management conference should be held between one month and six weeks after the defence has been filed, but that it should be open to either attorney to ask for the date of the conference to be fixed when the claim is issued or, in the case of a defendant, shortly after service of the claim but before the defence has been filed. Accordingly, Rule 27.3(1) and (3) provides that the general rule is that the registry must fix a case management conference immediately upon the filing of the defence, and the conference must take place not less than four weeks and not more than eight weeks after the defence is filed, though by Rule 27.3(4) a party may apply to the court to fix a conference before the defence is filed. The registry must give all parties not less than 14 days'

3 Rule 2.5(1) [Rule 2.4(1) (B'dos and T&T)] provides that except where any enactment, rule or practice direction provides otherwise, the functions of the High Court may be exercised by a single judge, a master or a registrar. See *Martinez v Elijio* (2006) Supreme Court, Belize, no 97 of 2005 (unreported); *Forde v Owners of MV 'The Saint'* (2002) High Court, St Vincent and the Grenadines, no SVG HAD 5/2002 (unreported).

4 Greenslade, D, *Summary of the Report on the Review of Civil Procedure* (Trinidad & Tobago), p 76.

notice of the date, time and place of the case management conference,[5] and normally such notice will be served by the Registrar on the attorneys for the defendant and the claimant.[6]

At the case management conference the judge will fix a date for the trial; he will also fix a date for a listing questionnaire to be sent to the parties. If a pre-trial review is considered necessary, a date will also be fixed for that.

The aims of the case management conference are, accordingly, as follows:

(a) to identify, define and limit the issues between the parties;

(b) to identify in relation to each issue the nature of the evidence to be adduced, the expert evidence needed, and the classes of documents needed to be disclosed in order to ensure a fair trial;

(c) to summarily dispose of hopelessly weak cases;

(d) to seek to narrow the area of dispute on any one or more issues;

(e) to consider whether the issues can be resolved by any form of ADR;

(f) to achieve transparency and control of costs, so that the parties understand the costs, consequences and risks of the claim; and

(g) to prepare a timetable supported by directions that will ensure trial at the earliest date practicable, and to fix a 'trial window' for the hearing.

The CPR also envisage that the case management conference will be the proper forum for *all procedural applications*, and that applications at other times should be severely restricted and, if allowed, be accompanied by costs sanctions against the applicant unless he can show good grounds for not having made the application at the case management conference.

5 Rule 27.3(6). However, the court may, with or without an application, direct that shorter notice be given, if the parties agree or the case is urgent (Rule 27.3(7)).

6 See, eg, *Findlay v Francis* (2005) Supreme Court, Jamaica, no F045 of 1994 (unreported).

CHAPTER 10

AMENDMENTS TO STATEMENTS OF CASE

The provisions concerning amendments to statements of case under the original CPR of Jamaica and the OECS differed from those in the English CPR in that the opportunities to amend in the Caribbean jurisdictions were more limited. By Rule 20.1 of the Jamaican and OECS Rules, a party may amend a statement of case at any time *before the case management conference* without an application to the court;[1] thereafter, the court's permission to amend is required, and under Rule 20.4 of the Jamaican and OECS Rules, as originally worded, the court could give permission to amend a statement of case at the case management conference but not afterwards,[2] unless the party wishing to amend could satisfy the court that the amendment was necessary because of some change in the circumstances that became known after the date of the conference. This restrictive provision is still in force in the OECS, but in Jamaica, as Sykes J explained in *Simpson v Island Resources Ltd*,[3] the Rules Committee was of the view that the provision was too inflexible and that a judge should have a wider discretion to deal with amendments after the case management conference. Accordingly, the Civil Procedure (Amendment) Act, 2006, altered the wording of Rule 20.4, which now reads:

(1) An application for permission to amend a statement of case may be made at the case management conference.

(2) Statements of case may only be amended after a case management conference with the permission of the court.

Where, on the other hand, the amendment involves a change of parties or changes to a statement of case outside the relevant limitation period, special rules apply (see pp. 84–88).

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1 See eg, *Gayle v Desnoes and Geddes Ltd* (2005) Court of Appeal, Jamaica, Civ App 69/2005 (unreported), where it was held that 'statement of case' included a fixed date claim form. In *Anderson v Dodd* (2006) Supreme Court, Jamaica, no CL 2002/A 001 (unreported), Sykes J held that whenever a party exercises the power in Rule 20.1 to amend his statement of case, without the court's permission, before the case management conference, 'that exercise of power is not final and conclusive . . . at best his amendment is provisional and only becomes final and conclusive when the court allows it to stand or the other party does not challenge it or challenges the amendment and fails'.

2 See also *Salmon v Master Blend Feeds Ltd* (2007) Supreme Court, Jamaica, no CL 1991/5 163 (unreported); *Boyea v Williams* (2004) High Court, St Vincent and the Grenadines, no 211 of 1997 (unreported).

3 (2007) Supreme Court, Jamaica, no HCV 01012 of 2005 (unreported).

The party amending must file at the registry (or court office) the amended statement of case endorsed with a certificate of service and a certificate of truth, and serve a copy on all other parties.[4]

LATE AMENDMENTS

It may be noted that Rule 20.4 simply states that the court can give permission to amend a statement of case, without specifying how the court's discretion is to be exercised. Accordingly, the court should base its decision on the overriding objective, and generally disposing of a case justly will mean allowing a party to present his case, even at a very late stage in the proceedings, so that the matters in issue can be determined, provided that the applicant pays his opponent's costs caused by the amendment.

An issue which arose in a recent Jamaican case, *Collins v Bretton*,[5] was whether, under the CPR, the court should, in the circumstances, exercise its discretion to allow a party to reopen his case after the hearing had ended but prior to judgment being delivered. The facts were that on 6 May 2003, C and B had come before the court on a Vendor and Purchaser Summons requesting a number of declarations. C appeared in person without his attorney. The court allowed C time to ascertain the reason for the attorney's absence, but none was forthcoming. In addition, C filed no affidavit in response as was required. The court took the view that there was no good reason for an adjournment and requested C to proceed on his own behalf. At the end of B's arguments C chose not to produce an affidavit or to give oral evidence and, in effect, closed his case. Judgment was reserved for a date to be announced. The following day, 7 May, C filed a notice of a change of attorney and an application under Pt 11 of the CPR for court orders requesting permission to present a response before the court, on the ground that C's failure to be ready on 6 May was due to impecuniosity and inability to pay the fees of his previous attorney, which circumstances were entirely outside his control. C also filed an affidavit in response to the Vendor and Purchaser Summons. He was accordingly now ready to proceed.

Jones J (Ag) regarded the issue as being analogous to an application to amend pleadings (statements of case) prior to the making of a final order, as had occurred in the recent English case of *Charlesworth v Relay Roads Ltd*.[6] In that case, Neuberger J cited a number of well-known, pre-CPR cases,

4 Rule 20.5 (Jam), Rule 20.1 (4) (OECS).

5 (2003) Supreme Court, Jamaica, no E227 of 2002 (unreported). See also *Boyea v Williams* (2004) High Court, St Vincent and The Grenadines, no 211 of 1997 (unreported), per Blenman J.

6 [2001] 1 WLR 230.

such as *Clarapede & Co v Commercial Union Association*,[7] *Ketteman v Hansel Properties Ltd*[8] and *Ladd v Marshall*,[9] saying that he did not believe the principles established in those cases 'can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary . . . they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity'.[10]

Jones J (Ag) pointed out that Neuberger J, in the *Relay Roads* case, had emphasised that where a party applies to amend a statement of case or to call evidence for which permission is needed, the justice of the case involves two competing factors. The first is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired, since a party prevented from advancing evidence or an argument on a point will understandably feel he has suffered an injustice, at least if he ultimately loses the action. If the opponent can be compensated in costs for any damage suffered on account of the late application, there will be a powerful case for allowing the amendment. The second factor to consider is that, as Jones J (Ag) stated, where an application to amend statements of case or to introduce new evidence succeeds, it can be unjust where it interferes with the administration of justice and the interests of other litigants whose cases are waiting to be heard. Bearing in mind the overriding objectives of enabling cases to be dealt with justly, and balancing the interests of the parties themselves and the administration of justice broadly, Jones J (Ag) concluded that it was in the interest of justice to allow C in this case to present his response and to make submissions prior to the judgment of the court, on condition that C paid the costs caused by his application, though he came to this decision 'with a considerable lack of enthusiasm'.

In *Simpson v Island Resources Ltd*,[11] the claimant, a lessee of commercial premises, alleged a breach by the lessor of an implied term that the premises would be watertight. The lessee alleged in his statement of claim that, after heavy rains in May 2002, the breach had resulted in damage to property and loss of profit, but there was no quantification of the loss. Accordingly, in February 2007 the claimant's attorney applied to amend the particulars of claim by adding the words and figure 'in the sum of $7,500,000.00'. After citing with approval the dicta of Neuberger J in the *Relay Roads* case,[12] Sykes J continued:

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7 (1883) 32 WR 262.

8 [1987] AC 189.

9 [1954] 1 WLR 1489.

10 [2000] 1 WLR 230, p 235.

11 (2007) Supreme Court, Jamaica, no HCV 01012 of 2005 (unreported).

12 [2001] 1 WLR 230.

> His Lordship did note that considerations such as the unfair strain of litigation, the legitimate expectation of litigants, the efficient conduct of the case and the interest of other litigants whose cases are waiting to be heard are valid concerns if the application to amend succeeds . . . I should note that these considerations have found expression in Part 1 of the CPR. Neuberger J did not indicate in his analysis whether these considerations identified in the twentieth century cases were sufficient in any given case to lead to deny the amendment. There are some passages . . . cited by Neuberger J which, in my view, do indicate that despite the two principles identified by him, there are cases where a denial of the amendment is the just decision.

Sykes J then cited two passages from the judgments of Peter Gibson and Waller LJJ in *Worldwide Corporation Ltd v GPT Ltd*[13] and continued:

> These passages . . . were pre-CPR cases but they nonetheless capture important considerations that have now been given pride of place in the CPR. If these considerations were rising to prominence before the CPR, then they should be given even greater weight now that the CPR has expressly stated that allocation of resources, saving expense and dealing with cases expeditiously and fairly are important. Fairness cannot mean only what one sides wants. The courts are under an explicit mandate to consider the allocation of the court's resources to the particular case before the court and other cases pending before the courts.

Emphasising that the amendment of the rules introduced in 2006 was 'not a licence for negligence or extreme carelessness', Sykes J examined the factors present in the case under consideration, such as that there had been non-compliance with disclosure orders and, in effect, the trial dates had become case management dates because neither side was ready to proceed. In these circumstances, Sykes J did not see any injustice to the defendant if the claimant were allowed to amend the particulars of claim in the manner sought.

Another example of the application of the revised Rule 20.4 is *National Housing Development Corporation v Danwill Construction Ltd*,[14] where there was an application to amend the defence in order to add details of certain contractual provisions material to the proceedings. The affidavit in support of the application deposed that the defendant had been obliged to prepare and file its statement of defence within a time limit which did not allow for all the relevant documentation to be located. Later, numerous additional documents providing more precise details for the defence had come to light and it was only after the first case management conference that the defendant was in a position to amend. It was suggested that the claimant would not suffer any prejudice as a result of the proposed amendments. Brooks J allowed the amendments on the ground that they would 'assist the court

13 (1998) Civil Division Trnascript no 1835 of 1998 (unreported).

14 (2007) Supreme Court, Jamaica, no 2004 HCV 000361 (unreported).

in determining the real questions of controversy between the parties'. The case would not come up for trial for another 17 months and so the application could not be said to be late; a plausible explanation had been given for the failure to plead the details initially; and it had not been alleged that the amendment would cause any embarrassment to the claimant. The learned judge discussed the principles regarding amendments to statements of case thus:

> The extensive amendments made in 2006 to the Civil Procedure Rules have resulted in a welcome change to the provisions concerning applications to amend a party's statement of case after the first case management conference . . . Apart from the overriding objective, there is no guidance provided in the rules in respect of the principles governing the grant or refusal of permission to amend. The relevant rule which existed prior to the amendment of the CPR was quire restrictive, as it provided that the court could not give permission unless the applicant could show some change in circumstances since the date of the case management conference. That restriction produced some hardship and even some curious results. The amended rule gives the court far more latitude, but of course there should be some guiding principles which will allow for parties and their legal representatives to proceed with a degree of assurance as to the likely outcome of such applications.
>
> The purpose of statements of case is essentially to determine what each party says about the case. In his work, *A Practical Approach to Civil Procedure*, 7th edn, p 134, Stuart Sime outlines the functions of statements of case to include:
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> (a) Informing the other parties of the case they will have to meet. This helps to ensure neither party is taken by surprise at trial.
> (b) Defining the issues that need to be decided. This helps to save costs by limiting the investigations that need to be made and the evidence that needs to be prepared for the trial, and also helps to reduce the length of trials.
> (c) Providing the judges dealing with the case (both for case management purposes and at trial) with a concise statement of what the case is about.
>
> The UK Rule 17.1 and our own Rule 20.4 give the court flexibility, in exercising its discretion, whether or not to grant permission to amend, of examining the stage at which the case has reached, the effect on the opposing party and the extent to which costs will be an adequate remedy. These factors were all hallmarks of the exercise of the discretion under the pre-CPR regime, and continue to be applicable in the UK. In *Charlesworth v Relay Roads Ltd*[15] Neuberger J held that the court, in administering justice, must take into account that the system is not immune from error. He went on to say that 'when a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings

15 [2001] 1 WLR 230.

so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted'.

Amendment and withdrawal of admissions

In another recent Jamaican case, *Watson v Officer*,[16] Anderson J considered the principles which should be applied by the court in deciding whether to permit a party to resile from his earlier admissions by amending his statement of case. He considered that the applicable principles were those laid down by Ralph Gibson LJ in *Bird v Birds Eye Walls Ltd*,[17] and followed by a majority of the English Court of Appeal in *Gale v Superdrug Stores*,[18] both pre-CPR cases. In a post-CPR case, *Sollit v Brady*,[19] the Court of Appeal had pointed out that *Gale* had been decided before pre-action protocols and pre-disclosure, and before the effect of the CPR had made litigation more certain. The court preferred the dissenting judgment of Thorpe LJ in the *Gale* case, but how did the approach of Thorpe LJ differ from that of the majority in *Gale*? The majority had stressed that the discretion to allow amendment of pleadings was a general one in which all the circumstances had to be taken into account and a balance struck between the *prejudice likely to be suffered by each side* if the admission were allowed to be withdrawn or made to stand, as the case may be. Thorpe LJ, on the other hand, had emphasised[20] that the court should focus on the reasons for the withdrawal of the admission, and this approach was approved in *Sollit*. Interestingly and, it is respectfully submitted, quite correctly, Anderson J noted that the pre-action protocols and pre-disclosure were 'matters which have had significant implications for the way the English court viewed attempts to resile, but of course they have no relevance to our situation here'. He reasoned that while the Jamaican court was not bound by either *Gale* or *Sollit*, the majority view in the former case remained the more persuasive authority to follow as it contained the correct statement of the approach to be adopted. He continued:

16 (2003) Supreme Court, Jamaica, no W-016/2002 (unreported).

17 (1987) *The Times*, 24 July.

18 [1996] 1 WLR 1089.

19 23 February 2000 (unreported). See www.hardwicke.co.uk.

20 [1996] 1 WLR 1089, pp 1100–102. *Gale v Superdrug Stores* was applied in *Davies Attbrook (Chemists) Ltd v Benchmark Group plc* [2006] 1 WLR 2493, where it was held (obiter) that the principles applicable to a late application to amend pleadings were that the application must be made in good faith, it must raise a triable issue with a reasonable prospect of success, and it should not prejudice another party in a manner that cannot be adequately compensated. There was nothing in CPR Pt 17 to require the applicant to provide a compelling explanation of the need for the amendment or the reason for its lateness.

> I accept that the test of prejudice to a participant is an appropriate one for the court to consider in coming to its decision. Indeed, it is implicit in our own Civil Procedure Rules 2002 which, in Rule 1.1(1), sets out the overriding objective as 'enabling the court to deal with cases justly' . . . In the proper exercise of any judicial discretion in circumstances such as the instant matter, certainly it is useful to bear in mind our own Rule 1.1(1) as well as the words of Sir George Waller in *Bird v Bird's Eye Walls Ltd* . . .
>
> I find it very difficult to visualise any personal injury case where if a formal admission of liability were withdrawn 18 months after it had been made, it would not prejudice the claim.
>
> I also find considerable cogency in the *dicta* of Bowen LJ in *Shoe Machinery Co v Cutlan*,[21] cited by Millett LJ in *Gale*, to the effect that: 'Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.'
>
> And I say this notwithstanding, indeed fully conscious of, the emphasis in the new rules on efficiency of the trial process in the interests of early and just resolution of disputes between litigants.

In the instant case, the defendant was, in the circumstances, 'clearly and considerably more at risk of prejudice than the plaintiff', and accordingly it was proper to allow the defendant to amend his defence, but with costs to the claimant.

AMENDMENTS AFTER THE END OF A LIMITATION PERIOD

(1) Rule 19.4 provides that a new party can be added to the proceedings or substituted for an existing party after the end of a limitation period only if (a) the addition or substitution is necessary and (b) the limitation period was current when the proceedings were started. An addition or substitution is necessary only if the court is satisfied that:

(a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party,[22] or

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21 [1896] 1 Ch 108, p 112.

22 It was held by Sykes J (Ag) in *Caribbean Development Consultants v Gibson* (2004) Supreme Court, Jamaica, no CL 323 of 1996 (unreported), following *International Bulk Shipping and Service Ltd v Minerals and Metals Trading Corporation of India* [1996] 1 All ER 1017, that there cannot be a substitution of parties under Rule 19.4 after the expiration of a limitation period where the original proceedings are a nullity, for example, as in the instant case, where the claimant was not a legal entity. Sykes J (Ag) also held that the conditions in (a), (b) and (c) should be read disjunctively.

(b) the interest or liability of the former party has passed to the new party;[23] or

(c) the claim cannot be properly carried on by or against an existing party unless the new party is added or substituted as claimant or defendant.

(2) Rule 20.6[24] provides that the court may allow an amendment to correct a mistake as to the name of a party provided that the mistake was (a) genuine and (b) not one which would cause reasonable doubt as to the identity of that party.

The relationship between CPR Rules 19.4 and 20.6 was examined in *Flickinger v Preble*.[25] This case concerned a negligence and fatal accident claim filed in 1997 against the operators of a hotel in Jamaica. In 2004, well outside the limitation period, the claimant applied to the court to amend the defendant's name by substituting 'Xtabi Resort Ltd' for 'Xtabi Resort Club and Cottage Ltd'. The defendant's attorney opposed the application, submitting that the application under Rule 20.6 would have the effect of substituting a new party in place of the defendant, in other words that this was an application 'for a change of party masquerading as a correction of name' and, if granted, would deprive the defendant of its limitation defence.

Sykes J first of all stated that the distinction between *misnaming* and *misidentification* was crucial to the determination of the matter, pointing out that

> this question of substitution/addition of parties and correction of a name has been a troublesome one in the history of civil procedure. Oftentimes, whether because of carelessness or otherwise, errors are made when the claimant is seeking to identify and name the correct defendant. The risk of error is perhaps greater when one is suing a company. Sometimes the wrong tortfeasor is sued. At other times, the correct tortfeasor is sued but is given the wrong name. The wrong name may be a simple case of misspelling or it may be much more serious, such as giving the defendant the name of an existing person.

As Sykes J explained, Rule 20.6 applies where the claimant intends to sue X, but mistakenly calls him 'Y'. In this situation, *the correct defendant is before the court*, but he is sued in the wrong name. 'There is no question here of depriving the defendant of any limitation defence; it is simply getting the name right.' On the other hand, Rule 19.4 applies where the mistake is suing X in the erroneous belief that X was the tortfeasor, whereas in reality Y was the tortfeasor. In other words, where *the wrong defendant is before the court*, and, in the wording of Rule 19.4(3) (a), the application is for 'the new party to be substituted for a party who was named in the claim form in

23 1e, by death or bankruptcy.

24 Rule 20.2 in the other Caribbean jurisdictions.

25 (2005) Supreme Court, Jamaica, no CLF 013 of 1997 (unreported).

mistake for the new party'. An example of the latter type of case is *Horne-Roberts v SmithKline Beecham plc*,[26] which was decided under the equivalent Rule 19.5 of the English rules. Here, the claimant sued Merck, erroneously believing that it had manufactured the offending pharmaceutical product, whereas in fact SmithKline Beecham was the manufacturer and the potential tortfeasor; in other words, the wrong defendant was before the court; it was a mistake as to identity and not as to name. The claimant discovered the error after expiry of the limitation period, and applied to substitute SmithKline Beecham as defendant. It was held that the amendment should be allowed, on the basis that the claimant intended to sue the manufacturer of the defective product. The proper question for the court was that identified in the pre-CPR case of *Evans Construction Co Ltd v Charrington and Co Ltd*,[27] viz: 'Who did the claimant *intend* to sue?', and in answering the question the court should look at all the circumstances of the case, including a perusal of the particulars of claim to see what is being alleged.

In the *Flickinger* case, Sykes J found that the particulars of claim showed clearly that the claimant was targeting the operators of the hotel at the time of her husband's death; the correct defendant was before the court; it was a case of *misnaming* within Rule 20.6, and not one of misidentification within Rule 19.4; the amendment sought was not a change of parties but a change of name as, in all the circumstances of the case, 'no-one could reasonably doubt who was the intended defendant'. Sykes J added that 'it must be in rare circumstances that a court could find that a case fell within Rule 20.6 and still deny the application'.

In *Barton v McAdam*,[28] on the other hand, the claimant had been injured in 1993 when the bus in which he was travelling as a passenger collided with another vehicle, allegedly due to the negligence of the bus driver. Proceedings had been instituted against the bus driver and one 'Mr Clinton Wright' who was sued as owner of the bus. In December 2003 the claimant's attorney applied to the court for permission to amend the claim by substituting 'Wright's Motor Service Ltd' as the owner of the bus. The amendment was sought on the ground that the claimant, at the time of instituting the proceedings, believed that Mr Clinton Wright was the owner of the bus when in fact the owner was Wright's Motor Service Ltd.

In considering whether the amendment should be allowed in the instant case, Sinclair-Haynes referred to the following dictum of Dyson LJ in *Parsons v George*:[29]

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26 [2002] 1 WLR 1662.

27 [1983] 1 All ER 310.

28 (2005) Supreme Court, Jamaica, no CL 1996 B 110 (unreported).

29 [2004] 3 All ER 633, at 637.

> There are circumstances in which it would be manifestly unjust to a claimant to refuse an amendment to add or substitute a defendant even after expiry of the relevant limitation period . . . A common example of such a case is where the [claimant] has made a genuine mistake and named the wrong defendant, and where the correct defendants have not been misled and they have suffered no prejudice in relation to the proceedings (except for the loss of their limitation defence).

Sinclair-Haynes J considered that the pertinent questions under Rule 19.4 were: (a) Was the claimant's mistake genuine and had it misled the defendant or created doubt as to whom the claimant intended to sue? (b) Did the fact that the claimant had negligently or imprudently chosen to ignore the denial of ownership of the vehicle by Mr Wright in his defence put the matter outside the kind of mistake envisaged by Rule 19.4? (c) Should the court's jurisdiction extend to such situations? The learned judge answered 'Yes' to the first and third questions and 'No' to the second. In the instant case, the claimant was

> genuinely mistaken in his belief that Mr Wright was the owner of the buses . . . The claimant intended to sue the owner of the vehicle . . . Members of the community knew the buses as Mr Wright's buses . . . The defendant in the instant case, Wright's Motor Services Ltd, is a small company whose directors and shareholders were Mr Wright, his wife and son. He could therefore be considered to have been the 'mind and will' of the company. Wright's Motor Services Ltd, though a registered company with separate legal personality, acted through living persons, Mr Wright being chief of those persons. The mistake of suing Mr Wright could not have created reasonable doubt or misled Wright's Motor Services Ltd as to whom the claimant intended to sue.

Permission to amend was accordingly granted.

New causes of action

There is no provision in the CPR for the substitution or addition of a new *cause of action* after expiry of a limitation period, and in *Jamaica Railway Corporation v Azan*[29] K Harrison JA pointed out that the Jamaican rules do not state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action, as opposed to a new party. The learned Justice of Appeal pointed out, however, that the authorities have established certain principles in relation to what amounts to a new cause of action, such as:

(a) if the new plea introduces an essentially distinct allegation, it will be a new cause of action (*Lloyds Bank plc v Rogers*[30];

29 (2006) Court of Appeal, Jamaica, Civ App no 115/05 (unreported).

30 (1996) *The Times*, 24 March 1997.

(b) where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action (*Savings and Investment Bank Ltd v Fincken*[31]);

(c) a new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded (*Brickfield Properties Ltd v Newton*[32]).

In the instant case, the claimant had applied to add, as an alternative to his claim for breach of contract, a claim for recovery of a deposit as 'money had and received'. K Harrison JA took the view that it could not be said that a new cause of action was being added. No new facts were being introduced by the claimant/respondent; he merely wished to say that if the defendant/appellant succeeded in establishing that, in law, there was no valid contract between the parties, he should be able to recover his deposit. 'In those circumstances, to prevent him from putting that case before the court would impose an impediment on his access to the court which would require justification . . . Bearing in mind each of the concepts set out in CPR 1.1 as making up the overriding objective, that cases should be dealt with justly, the learned trial judge did not err . . . in granting the amendment.'

31 [2001] EWCA Civ 1639; The Times, 15 November 2001.

32 [1971] 1 WLR 862.

CHAPTER 11

APPLICATIONS FOR COURT ORDERS

PROCEDURE

Applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.[1] If an application is made for a hearing other than at a case management conference or pre-trial review, the court will order the applicant to pay the costs of the application, in the absence of special circumstances.[2]

Application must be in writing in Form 7 (Jamaica) or Form 6 (OECS) unless the court permits an oral application.

The application must state:

(a) briefly, the grounds on which the order is being sought; and

(b) what order the applicant is seeking.[3]

The applicant must file with the application, or not less than three days before the hearing, a draft of the order sought, and serve a copy on all the respondents.[4]

As a general rule, the applicant must give notice of the application to all the respondents, but notice need not be given if any rule or practice direction so provides. Affidavit evidence in support is not needed, unless the court requires it.[5]

The notice of application must state the date, time and place when the application is to be heard.[6] The general rule is that it must be served as soon as practicable after the day on which it is issued and at least seven days before the hearing, but the court may accept a shorter period and deal with the application if it considers that, in the circumstances, sufficient notice has been given. In *St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd*,[7] Saunders JA stated that, as a matter of good practice and common

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1 Rule 11.3(1).

2 Rule 11.3(2); *Issar Group of Companies Ltd v West Indies Alliance Insurance Company Ltd* (2004) Court of Appeal, Jamaica, Civ App no 74 of 2004 (unreported).

3 Rule 11.7(1).

4 Rule 11.7(2); *Kingston Telecom Ltd v Dahari* (2006) Supreme Court, Jamaica, no HCV 2003/243 (unreported).

5 Rule 11.8.

6 Rule 11.10.

7 (2003) OECS Court of Appeal (St Christopher and Nevis), Civ App no 6 of 2002 (unreported).

sense, it was important for solicitors who have filed applications to the court not to wait for a hearing date before serving the other side, in view of the provision in Rule 11.11(1) enjoining practitioners to serve their applications on the other side 'as soon as practicable after the day on which it is issued'. It appeared that it was the practice of many court offices to retain the filed documents until a hearing date was obtained, but the prudent course for a solicitor to take was to retrieve some or all of the documents as they were filed, so that they might be served on the other side as soon as the application was filed, and, when a hearing date was provided, it would always be possible to notify the other side of that date.

If the applicant or any person on whom a notice of application has been served fails to attend the hearing, the court may proceed in his absence. However, a party who was not present when an order was made may, within a period of 14 days after the date of the order, apply to set aside or vary the order. Such application must be supported by affidavit evidence showing a good reason for the failure to attend and that it is likely that if the party had attended some other order might have been made.[8]

The court may deal with an application without a hearing in those cases where no notice of application is required, if the court considers that it can be dealt with over the telephone or by any other means of communication, or if the parties agree.[9]

8 Rule 11.16 [Rule11.3 (B'dos)].

9 Rule 11.14 [Rule 11.11 (B'dos); Rule 11.13 (T&T)].

CHAPTER 12

INTERIM INJUNCTIONS

The primary purpose of an interim injunction (the term used by the CPR in place of the former term 'interlocutory injunction') is to preserve the status quo until trial of the action. A full interim injunction granted *inter partes* may continue in force 'until judgment in the action or further order', whereas an interim injunction granted *ex parte* (without notice) will continue in force until a named date which, according to CPR Rule 17.4(4), must not be more than 28 days after the order, unless another Rule permits a longer period. It is normally envisaged that, on expiry of an *ex parte* injunction, the applicant will apply to the court *inter partes* (with notice) for a further order restraining the defendant until the trial.[1]

JURISDICTION

Jurisdiction to grant injunctions is derived not from the CPR but from the various Supreme Court Acts and from the court's inherent equitable jurisdiction. For instance, Judicature (Supreme Court) Act, s 49(b) (Jamaica) provides that 'an injunction may be granted . . . by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that such order should be made'.[2] This jurisdiction is confirmed by CPR Rules 17.1 and 17.2 which provide that the court may grant an interim injunction at any time after issue of the claim form, and even before issue if the matter is urgent and the applicant gives an undertaking to issue and serve a claim by a specified date.[3]

PROCEDURE

Under the CPR, an applicant for an interim injunction will need to issue an application notice within Rule 11.7, setting out the nature of the order sought. The application must be supported by affidavit evidence and, whenever possible, a draft order should be filed with the application notice, together

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1 Thus the onus is on the claimant to justify the continuance of the injunction at the *inter partes* hearing, and not on the defendant to apply for a discharge. See *Williams v Ramgeet* [1992–93] CILR 136, at 140, Grand Court, Cayman Islands.

2 See also, eg, Supreme Court of Judicature Act, Ch 4:01, ss 14, 23(5) (Trinidad & Tobago); Supreme Court of Judicature Act, Cap 117A, ss 44, 45 (Barbados).

3 A defendant who counterclaims or brings ancillary proceedings may seek an interim injunction (whether or not the claimant applies for a injunction). It is not necessary for the defendant to have filed any pleadings in the action: *Sargant v Reed* (1876) 1 Ch D 600.

with a computer disk containing the draft. Application may be made at any time during the proceedings, whether at a case management conference (the normal forum for all procedural applications) or otherwise. The court may grant an interim remedy before any claim has been issued, provided the matter is urgent or it is otherwise desirable to do so in the interests of justice, and subject to the claimant giving an undertaking to issue and serve a claim form by a specified date.[4] Applications for injunctions are heard by a High Court or Supreme Court Judge.

The affidavit in support of an *inter partes* or an *ex parte* application must contain a clear and concise statement of:

(a) the facts giving rise to the cause of action against the defendant;
(b) the facts giving rise to the claim for injunctive relief; and
(c) the precise relief claimed.[5]

The affidavit in support of an *ex parte* application must contain the following additional matters:

(a) the facts relied on as justifying the application being made *ex parte*, showing that an injunction is necessary and that the matter is urgent;
(b) details of any notice given to the defendant or, if no notice was given, the reasons for giving none;
(c) details of any answer asserted (or likely to be asserted) by the defendant either to the substantive claim or to the interim relief; and
(d) any facts known to the claimant which might lead the court to refuse to grant the relief.

If the defendant learns of the hearing of an *ex parte* application and decides to attend, he may oppose the application; and where an order has been made, he may apply *ex parte* for discharge or variation of the order before the date fixed for the *inter partes* hearing, if he can show 'sufficiently cogent grounds for doing so'.[6]

Duty of disclosure

A party who seeks an *ex parte* injunction is under a duty to make full and frank disclosure to the court of all facts which are material to the proceedings, including those facts that the defendant might have been expected to bring forward in opposition to the injunction, had he had the opportunity to do so.[7] Thus, for instance, the applicant must disclose to the court details of

4 Rule 17.2(2).

5 Practice Direction [1983] 1 WLR 433.

6 *London City Agency Ltd v Lee* [1970] Ch 597, at p 599, per Megarry J; *Manogeesingh v Airports Authority of Trinidad & Tobago* (1993) 42 WIR 301.

7 *Coosals Quarry Ltd v Teamwork (Trinidad) Ltd* (1985) 37 WIR 417, p 422, per Sharma J (a case of an *ex parte* Mareva injunction). However, 'the principle . . . does not . . . extend to disclosure of the evidence relevant to [the] issue', though 'if . . . the plaintiff concealed a fact which makes his contention on the issue untenable, then it would amount to suppression of a material fact': *Sadaphal v Paul* (1961) 3 WIR 340, p 344, per Gomes CJ. See, also, *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350. There is no such duty of disclosure where an interim injunction is sought on notice, though there may be some duty to disclose matters of

any defences indicated by his opponent in correspondence between the parties and any facts relevant to the value and enforceability of the applicant's undertaking as to damages. Material non-disclosure by the applicant is a ground for discharging an *ex parte* injunction without any hearing on the merits of the application.[8]

When determining the consequences of a breach of the duty to make full and frank disclosure, the court should take all the relevant circumstances into account, including the gravity of the breach, any excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. The court should also take into consideration whether the consequences of the breach are remediable, and bear in mind the need for proportionality in accordance with the overriding objective.[9]

Duty to apply promptly

An application for an *ex parte* interim injunction must be made promptly, since it is of the essence of such an injunction that it is to be issued only in cases of urgency.[10] Thus, a ground for the discharge of the injunction in *Adanac Industries Ltd v Black* was that the plaintiff's application had not been sufficiently prompt. Wooding CJ said:[11]

> An injunction is a very serious matter, and it may have very grave consequences. Accordingly, no such order ought to be made against a party without first giving him the opportunity of being heard unless the circumstances are such as call for prompt and immediate action. Now, clearly in this case, the plaintiff himself could not have considered that prompt and immediate action was necessary, because he swore to his affidavit on 7 November, he did not file his writ until three days later, and he did not seek the *ex parte* injunction until five days after that. How, in view of such a lapse of time, it could possibly be made to appear to the learned judge that there was need for prompt and immediate action passes our comprehension.

The principle that *ex parte* injunctions should be granted only in cases of 'real urgency' was emphasised by the Jamaican Court of Appeal in *Inglis v Granberg*.[12] In this case, Parkin J (Ag) had granted an *ex parte* injunction to

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substantial importance that favour a party who is absent from the hearing: *Aird v Esso Standard Oil Ltd* (1997) Supreme Court, Jamaica, no CLA 186 of 1996 (unreported).

8 See *Lennox Petroleum Services Ltd v Staptracks Rebuilding Co Ltd* (1982) High Court, Trinidad & Tobago, no 2 of 1982 (unreported); *Taylor v Sherman* (1993) Supreme Court, The Bahamas, no 1392 of 1992 (unreported); cf *Intervascular Inc v De Goicoechea* (1995) Supreme Court, The Bahamas, no 1423 of 1994 (unreported).

9 *Eton Consultants Holdings Ltd v Dorot Properties and Holdings Ltd* (2008) High Court, British Virgin Islands, no BVIHCV2007/0209 (unreported) and *Robelco Ltd v Svoboda Corp* (2008) High Court, British Virgin Islands, no BVIHCV2007/0311 (unreported), per Hariprashad-Charles J.

10 An application for an interim injunction *inter partes* may also be refused where there has been an unjustifiable lapse of time: *Hemans v St Andrew Developers Ltd* (1993) 30 JLR 290, Supreme Court, Jamaica, per Harrison J (Ag).

11 (1962) 5 WIR 233, p 234.

12 (1990) 27 JLR 107, Court of Appeal, Jamaica. See, also, *Goodman v Rayside Concrete Works Ltd* (1988) High Court, Barbados, no 577 of 1988 (unreported), where Williams CJ refused to grant an injunction *ex parte* on account of the plaintiff's 'leisurely approach' in not having issued a writ in respect of an alleged nuisance which had existed for 10 years!

restrain the appellant from trespassing on the respondent's premises, the injunction to last for 14 days. The appellant applied to the Court of Appeal to set aside the order on the ground that the respondent's affidavit in support had failed to show any urgency. It was in fact clear from the affidavit that the respondent had known of the alleged trespass for nearly four months before he applied for the injunction. The Court of Appeal set the injunction aside. In the words of Downer JA:[13]

> Interim injunctions belong to that exceptional category of remedies which are granted in the absence of the defendant. In exercising its discretion to grant such a remedy, an essential prerequisite was that the matter was of such urgency that there was no time to serve the defendant. In exceptional cases the certainty of success at the interlocutory stage may persuade the court to grant the remedy where urgency is not established, but this must be a rare event.
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> . . .
>
> Following the principles in *Bates v Lord Hailsham*,[14] it is clear that the order made in the Supreme Court was wrong. The respondent had full opportunity to, and ought to have given to the appellant notice of his intention to seek an injunction.

Service of injunction

A copy of the interim injunction duly indorsed with a penal notice[15] must be served personally on the defendant by a marshal of the court, though such personal service may be dispensed with where the defendant was present when the order was made, or where he was notified of the terms of the order, whether by telephone, telegram or otherwise. Where the defendant is a company, service must be effected on the officers of the

13 (1990) 27 JLR 107, p 109.

14 [1972] 1 WLR 1373.

15 It is essential that the injunction be indorsed with a penal notice: *Benjamin v Attorney General* (1995) High Court, Grenada, no 249 of 1995 (unreported), per St Paul J; *Morales v Dillon* (1984) High Court, Trinidad & Tobago, no 440 of 1958 (unreported), per Persaud J), as such indorsement is a prerequisite for proceedings for contempt in the event that the defendant disobeys the order. CPR Rule 53.3(b) specifically provides that the court may not make a committal order unless, at the time the court order (such as an injunction) was served, it was endorsed with a penal notice. But see *Rowe v Administrative Services Ltd* (2004) High Court, St Kitts/Nevis, no SKBHCV2003/0022 (unreported), per Baptiste J. It is not necessary that all copies of an injunctive order should carry such an indorsement, provided the copy with which the defendant is served carries one. In *Williams v Ramgeet* [1992–93] CILR 136, Grand Court, Cayman Islands, the copy of a non-molestation order, which was served on the defendant, did not bear a penal indorsement. Later, a further copy of the order, properly indorsed, was served. Harre J dismissed a motion for committal for an alleged breach of the order, on the ground that 'there was a fatal bar to the enforcement by committal of the order', which 'cannot be corrected by the service of another document thereafter'. See, also, *Kuarsingh v Bhagwandeen* (1982) High Court, Trinidad & Tobago, no S399 of 1982 (unreported).

Figure 10
Form of *ex parte* interim injunction

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM No HCV 3881/2006

BETWEEN ROXY DEVELOPMENTS LTD CLAIMANT

AND

JASON EARL BOSWORTH DEFENDANT

ORDER

Before the Hon Mr Justice De Vere
Acting Judge of the Supreme Court
In Chambers

UPON HEARING Counsel for the Claimant *ex parte*

AND UPON READING the affidavit of Dexter James Gordon filed the 18th day of June 2007.

AND UPON THE PLAINTIFF by Counsel undertaking to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the Defendant shall have sustained any by reason of this Order which the Claimant ought to pay.

IT IS ORDERED THAT the Defendant be restrained and an injunction is hereby granted restraining him, whether by himself, his servants or agents, or otherwise from selling, parting, leasing and/or charging the said property conveyed to him by a Conveyance dated the 18th day of August 2005, made between Deborah Fox, Registrar of the Supreme Court of the one part and the Defendant of the other part, and registered at Volume 1279 Folio 165, and/or parting with any monies now in his hands or that of his servants and/or agents being proceeds of any such sale until after the hearing *inter partes* on the 23rd day of July 2007.

Liberty for the Defendant to apply to discharge this order on one day's notice.

Dated this 27th day of June 2007.

_____

Registrar

If you, the within-named Jason Earl Bosworth, fail to comply with the terms of this order, proceedings may be commenced against you for contempt of court and you may be liable to be imprisoned.

company against whom enforcement proceedings may subsequently be taken.

An affidavit of service should be filed and should accompany any subsequent motion to commit the defendant for contempt on account of his non-compliance with the order, since Rule 53.3(a) requires the plaintiff to show that notice of the order was served on the defendant.

The return date

Ex parte interim injunctions, as has been seen, are normally issued effective for a short period (for example, five days or one week) during which period the plaintiff must serve notice on the defendant of his intention to apply at the expiry of the injunction that it should be continued until trial. This puts the onus on the plaintiff to justify the continuance of the injunction at the *inter partes* hearing (the 'return date').[16] In *Williams v Ramgeet*,[17] however, Harre J pointed out that, in the Cayman Islands, the practice of the Grand Court was to grant *ex parte* injunctions 'until judgment or further order' rather than for a short period of days. This practice had 'advantages in some cases in a jurisdiction such as the Cayman Islands' (unspecified), but it also had the effect of putting the onus on the defendant to apply to discharge the injunction. On the other hand, it was pointed out in *Manogeesingh v Airports Authority of Trinidad & Tobago*,[18] that where an injunction is granted to extend 'to [a certain day] or until further order', it may be *dissolved at an earlier date* than the day limited, but it cannot continue beyond such date without a 'fresh order '. On an application made *ex parte* on sufficiently cogent grounds, the court had power to discharge or vary an injunction granted *ex parte*. In the words of Bernard JA,[19] 'granted that there can only be but one return date, nevertheless an *ex parte* application can be made before that date in circumstances of an exceptional kind for the discharge or variation of an injunction which was granted *ex parte*'.

At the hearing, the court may make any of the following orders:

(a) to continue the injunction 'until judgment in the action or further order';[20]

(b) to require the defendant to give an undertaking in the same terms (and having the same effect) as the injunction;

(c) to dismiss the application to continue the injunction, with costs;

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16 The summons for continuance of the injunction until trial or further order should be accompanied by the affidavit of merits used on the *ex parte* application: *Williams v Ramgeet* [1992–93] CILR 136, p 140, per Harre J.

17 *Ibid.*

18 (1985) 42 WIR 301, p 316, per Barnard JA; p 324, per Persaud JA.

19 *Ibid.*

20 The injunction may be continued in a modified form: see *Grenada Broadcasting Corp v Spice Capital Radio Ltd* (1997) Supreme Court, Grenada, no 137 of 1997 (unreported).

(d) to order an early trial (whether or not the injunction is continued) in which case the court will give directions as to the delivery of pleadings and set a date for the trial, treating the hearing as if it were a case management conference.[21]

THE CAUSE OF ACTION

There must be a substantive cause of action in the jurisdiction in which the injunction is sought. This requirement was explained by Lord Diplock in *The Siskina*,[22] in a passage that has been frequently cited in Commonwealth Caribbean courts:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

Thus, it is a general principle that a plaintiff cannot obtain an injunction unless he can show an invasion of some legal or equitable right.[23] Second, a plaintiff will not be granted an interlocutory injunction where the dispute is not justiciable in the particular jurisdiction. For instance, in *Berliner Bank AG v Karageorgis*,[24] a Mareva injunction[25] issued in the Supreme Court of Bermuda restraining the defendant from removing certain assets belonging to a party to litigation in the High Court in England was discharged on the

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21 In *Burbar Ltd v Gote Properties Inc* (1993) High Court, Barbados, no 2188 of 1992 (unreported), Chase J, in refusing an application for interlocutory injunctions, ordered an early trial of the action and directed that the affidavits should stand as pleadings. In *Crawford v Musson (Jamaica) Ltd* (1989) 26 JLR 139, in which an interlocutory injunction was sought to restrain a transfer of shares, Clarke J considered the matter to be of great importance and, since any appreciable delay in trying the case could cause injustice, he made an order for a speedy trial of the case by a judge sitting alone, and he further ordered that defences be filed within 30 days, and a reply, if any, within 14 days of delivery of the defence.

22 [1979] AC 210, p 256, per Lord Diplock. See *Sibir Energy plc v Gregory Trading SA* (2005) High Court, BVI, no BVIHCV2005/0174 (unreported), per Hariprashad-Charles J.

23 *Ibid*, p 256. In *Sportsmax Ltd v Entertainment Systems Ltd* (2005) Supreme Court, Jamaica, no HCV 1851 of 2005 (unreported), Rattray J held that the claimant had established a right to protection from breaches by the defendants of the Fair Competition Act. Cf *Lightbody v Lightbody* (2006) Supreme Court, Jamaica, no 2005 HCV 2305 (unreported), per Sykes J.; *Morrison v Lemond* (1989) 26 JLR 43.

24 (1997/98) 1 OFLR 145.

25 See below, Chapter 13.

ground that there was no substantive cause of action in existence in Bermuda against the foreign party, and therefore no jurisdiction to issue the injunction. Similarly, in *Koch v Chew*,[26] it was held by Georges JA, in the British Virgin Islands High Court, that a Mareva injunction could only be granted if it were ancillary to a substantive claim which satisfied the requirements of Ord 11, Rule 1 for service out of the jurisdiction. In the instant case, a Mareva injunction could not be obtained to enforce a foreign judgment.

GENERAL PRINCIPLES FOR THE GRANT OF INTERIM INJUNCTIONS

'Guidelines' upon which the court should exercise its discretion to grant or refuse an interim injunction were established in the leading case of *American Cyanamid Co v Ethicon Ltd*.[27]

There must be a serious question to be tried

This test is not difficult to satisfy. It means that the action must not be frivolous or vexatious, and must have some prospect of succeeding. The court should not 'at this stage try to resolve conflicts of evidence on affidavits as to the facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial'.[28]

Thus, unless the court takes the view that the claim has no real prospect of succeeding, it should go on to consider the 'balance of convenience'.

Balance of convenience

The term 'balance of convenience' has been sanctioned by long usage, but it has been suggested that a more appropriate term would be 'balance of

26 (1997/98) 1 OFLR 471. See also *Sibir Energy plc v Gregory Trading* (*SA* 2005) High Court, BVI, no BVIHCV2005/0174 (unreported), per Hariprashad-Charles J.

27 [1975] AC 396.

28 *Ibid*, p 407. See *Jockey Club v Abraham* (1992) High Court, Trinidad & Tobago, no 2520 of 1990 (unreported), per Best J; *Samlalsingh v De Verteuil* (1976) High Court, Trinidad & Tobago, no 1634 of 1976 (unreported), per Roopnarine J; *Kowlessar v Gomez* (1994) High Court, Trinidad & Tobago, no 1200 of 1993 (unreported), per Best J. In *Patvad Holdings v Jamaican Redevelopment Foundation Inc* (2007) Supreme Court, Jamaica, no 2006HCV01377 (unreported), McDonald-Bishop J (Ag) held that, in determining whether there was a serious issue to be tried in the context of restraining the exercise of a mortgagee's power of sale, the court would, of necessity, have to examine the merits of the claimant's contentions by reference to the undisputed mortgage instrument and other relevant documents before the court. This was particularly imperative as the mortgagee's right to realise its security, once it had arisen and become exercisable, was not lightly to be interfered with. Accordingly, the affidavit evidence needed to show 'a serious question to be investigated, that is, one of substance and reality'.

justice'[29] or 'balance of the risk of doing an injustice'.[30] In determining where the balance of convenience lies, the court will consider the following factors:

(a) whether the plaintiff would be adequately compensated by damages. As Lord Diplock explained:[31]

> the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be *adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.* If damages in the measure recoverable at common law would be an adequate remedy, *and the defendant would be in a financial position to pay them*, no interlocutory injunction should be granted,[32] however strong the plaintiff's claim appeared to be at that stage.

Damages will not be adequate in this context where:

- the defendant would be unable to pay them;
- the damage is non-pecuniary, as in the case of many actions for nuisance;
- the harm complained of is irreparable, for example, loss of the right to vote; or
- the quantum of damages would be difficult to assess, for example, loss of goodwill.

(b) whether the defendant would be adequately protected by the plaintiff's undertaking in damages. Again, in Lord Diplock's words:[33]

> If . . . damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be *adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of the trial*. If damages in the measure recoverable under such an undertaking would be an adequate remedy, *and the plaintiff would be in a position to pay them*, there would be no reason upon this ground to refuse an interlocutory injunction.

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29 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, p 413.

30 *Cayne v Global National Resources plc* [1984] 1 All ER 225, p 237, per May LJ.

31 [1975] AC 396, p 408.

32 See, eg, *Hemans v St Andrew Developers Ltd* (1993) 30 JLR 290, Supreme Court, Jamaica, per Harrison J (Ag).

33 [1975] AC 396, p 408.

(c) where there is doubt as to the adequacy of the respective remedies in damages for plaintiff and defendant, the court will consider various factors such as preserving the status quo and, as a last resort,[34] the relative strength of the parties' cases. It has been emphasised that there is no finite list of matters that the court may take into account in deciding where the balance of convenience lies. In Lord Diplock's words:[35]

> It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

In *Little Bay Ltd v Capital and Credit Merchant Bank*,[36] the claimant sought an interlocutory injunction to restrain the defendant mortgagee from negotiating a sale of the mortgaged property, while the defendant sought to have the claim struck out as an abuse of the process of the court in that it disclosed no reasonable ground for bringing the claim. Sykes J cited the dictum of Lord Diplock in *American Cyanamid* to the effect that, apart from the factors to which he had referred, 'there may be other special factors to be taken into consideration in the particular circumstances of individual cases'. The circumstances of the instant case were that the claimant operated a business that was an ongoing enterprise and the proposed sale of the property by the mortgagee would result in persons being put out of work. On the other hand, the defendant would not suffer any prejudice if the injunction were continued until a hearing fixed for a date four months ahead. Damages would not be adequate compensation if it happened that the claimant succeeded, since 'to deprive a man of his business with the possibility of unemployment is not a trivial thing'. On the other hand, if the defendant succeeded it would undoubtedly have the property to sell and the claimant would remain liable for any balance outstanding. The injunction was therefore granted until the date of the hearing.

PRESERVING THE STATUS QUO

In *American Cyanamid*, Lord Diplock stated that:

> . . . where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*.

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34 But in *Patvad Holdings Ltd v Jamaican Redevelopment Foundation Inc* (2007) Supreme Court, Jamaica, no 2006HCV10377 (unreported), McDonald-Bishop J (Ag), citing dicta of Pennycuick J in *Fellowes v Fisher* [1975] 2 All ER 829, at p 843–844, stated that, in considering whether injunctive relief should be granted in proceedings where the strength of each party's case rested almost entirely on undisputed documentary evidence, it was not possible to disregard the relative strength of the parties' cases and relegate it to the status of being a matter of last resort. See also *Henry v Burns-Gayle* (2006) Supreme Court, Jamaica, no 2005HCV1971 (unreported), per Mangatal J.

35 *Ibid*, p 408.

36 (2004) Supreme Court, Jamaica, no HCV 540/2004 (unreported).

> If the defendant is enjoined temporarily from doing something he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake.[37]

In *Chong v Young*,[38] the trial judge had granted an interlocutory injunction restraining the defendants from transferring or dealing with certain land, on the plaintiffs' undertaking in damages. The plaintiffs' affidavit in support was silent as to their ability to pay; equally, the defendants had produced no evidence that the plaintiffs were unable to pay. The trial judge had nevertheless found the plaintiffs' undertaking in damages to be of value.[39] On appeal, the Jamaican Court of Appeal held that, in addition to the lack of evidence as to the plaintiffs' means, there was no estimation of the damage that the defendants would suffer if they were restrained from dealing with the land as they had planned, and the case therefore seemed 'to fall neatly within the above dictum of Lord Diplock'.[40] The trial judge had accordingly been right in granting the injunction to preserve the status quo.

In *Miller v Cruickshank*,[41] C had been barred from representing his school in an inter-secondary schools cricket competition, on the ground that he was not eligible to compete under the rules, having recently transferred from another school. He sought and obtained an interim injunction restraining the headmaster of the school and the secretary of the Inter Schools Sports Association from preventing him from competing, if selected. On appeal to the Jamaican Court of Appeal, the injunction was set aside. One of the grounds of the discharge was expressed by Carey JA as follows:[42]

> In this case, the question of compensation in damages, whatever the outcome, does not arise. Neither of the parties has the slightest interest in money; honour is at stake. In these circumstances, in an endeavour to see where the balance of convenience lies, it is a counsel of prudence 'to take such measures as are calculated to preserve the *status quo*' (per Lord Diplock in *American Cyanamid v Ethicon Ltd)*. In my opinion, the preservation of the *status quo*

37 *Ibid*, p 408.

38 (1991) 28 JLR 610, Court of Appeal, Jamaica.

39 In *Sun Fish Hatcheries Jamaica Ltd v Paradise Plum Ltd* (1990) 27 JLR 348, Supreme Court, Jamaica, Courteney Orr J pointed out that in England it was usually incumbent on a plaintiff who applied for an interlocutory injunction to tender in evidence particulars of his financial position, but 'nevertheless, the authorities suggest that, in general, the court will not deny a plaintiff an interlocutory injunction to which he would otherwise be entitled, simply because his undertaking as to damages would be of limited value'. Thus, for example, an undertaking as to damages could properly be taken from a legally aided plaintiff: *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502. These principles were applied by Sykes J in *Lightbody v Lightbody* (2006) Supreme Court, Jamaica, no 2005 HCV 2304 (unreported).

40 (1991) 28 JLR 610, p 614, per Rowe P.

41 (1986) 44 WIR 319, Court of Appeal, Jamaica.

42 *Ibid*, p 325.

> required the respondent to continue in his status of not participating in the competition, and the headmaster of the school and the secretary of the ISSA (the appellants) to continue honouring their obligation under the rules. I think that it is right to point out that, in this regard, the court is called upon to weigh the respective risks that injustice may result from its deciding one way rather than the other, at a stage when the evidence is incomplete.

CASES OUTSIDE THE *AMERICAN CYANAMID* PRINCIPLES

In certain classes of case, the courts do not apply the *American Cyanamid* guidelines to the granting of interlocutory injunctions. They include the following.

Defamation actions

It was established in *Bonnard v Perryman*[43] that, in general, an interlocutory injunction will not be granted in a defamation action where the defendant intends to plead justification or fair comment on a matter of public interest. It has been held that this rule has been unaffected by *American Cyanamid* because of the overriding public interest in protecting the right to free speech. In order to rely on the rule in *Bonnard v Perryman*, (a) the defendant must state in his affidavit an intention to plead justification or fair comment, and (b) the alleged defamatory statement must not be clearly untruthful.

The *Bonnard v Perryman* rule was applied in the Barbados High Court in *Forde v Sealy*,[44] where the plaintiffs commenced proceedings against the defendant for damages for slander and for an interlocutory injunction to restrain further publication of the alleged slander pending the outcome of the trial. Williams CJ (Ag) examined a number of English authorities, which confirmed that the rule in *Bonnard v Perryman* had been unaffected by *American Cyanamid*, and concluded:[45]

> In my view, this approach is a sound one. Freedom of speech must continue to be cherished as it always has been. And a rule born out of the extreme importance which the great common law judges of the past attached to freedom of speech should not now be casually thrown aside. Moreover, as indicated in the cases cited earlier, where justification and fair comment are raised, the decision whether or not there is a slander has to await trial, whether the trial be by jury or a judge.

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43 [1891] 2 Ch 269.

44 (1979) 35 WIR 53. Cf *Bradshaw v Sealy* (1978) 32 WIR 111, High Court, Barbados, where, in a similar slander action, Husbands J applied *American Cyanamid*, there being no plea of justification or fair comment.

45 *Ibid*, p 59.

Covenants in restraint of trade

It was held in *Office Overload Ltd v Gunn* that '. . . covenants in restraint of trade are in a special category . . . If they are prima facie valid and there is an infringement, the court will grant the injunction'.[46]

A restraint will be prima facie valid if (a) all the facts are before the court, and (b) the covenant is prima facie reasonable in ambit, area and duration. The rationale for this approach is that in many cases the trial would not take place until some years after issue of the writ and if, on an application for an interlocutory injunction, the merits were not considered and the injunction refused, the effect would be to deprive the plaintiff entirely of the benefit of the covenant. More recent decisions seem to indicate that the *Office Overload* rule will oust *American Cyanamid* only where the plaintiff's case is 'an open and shut one'.[47]

Actions against public authorities

The principle established in *Smith v Inner London Education Authority*[48] is that public authorities should not be restrained from exercising their statutory duties and powers unless the plaintiff has an extremely strong case on the merits.

Restrictive covenants

Doherty v Allman[49] is authority for the principle that a perpetual injunction will be granted 'as of course' to restrain a breach of a valid negative covenant, and the same rule has been held to apply to interlocutory injunctions,[50] at least where there is a clear breach of the covenant.[51]

In *Trevand Manufacturing Co Ltd v Stoeckert*,[52] the plaintiffs had obtained an interlocutory injunction in the lower court to restrain the defendants from committing a nuisance on their land, which also amounted to a breach of a restrictive covenant. The Jamaican Court of Appeal dismissed the defendants' appeal on the ground that:

> . . . [the defendants'] activities prima facie conflict with the restrictive covenant which regulates the user of the premises. The only effective way

46 [1977] FSR 39.

47 *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, CA, p 393, per Balcombe LJ. Applications for interlocutory injunctions to restrain disclosure or misuse of confidential information by ex-employees in cases where there is no covenant in restraint of trade are governed by *American Cyanamid*: *Lock International plc v Beswick* [1989] 3 All ER 373.

48 [1978] 1 All ER 411.

49 (1878) 3 App Cas 709.

50 *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, p 259.

51 *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 WLR 814, p 831.

52 (1990) 27 JLR 340, Court of Appeal, Jamaica.

> of safeguarding such continuing activities which, in addition to constituting a breach of the restrictive covenant also constitute a nuisance, is by the grant of a permanent injunction. The present case being one in which a permanent injunction could be granted at trial in the event of the plaintiffs succeeding, the learned trial judge was not in error in not refusing outright the order for the interlocutory injunction.[53]

On the other hand, an interlocutory injunction was refused in *Williams v Canadian Imperial Bank of Commerce Trust Co (Caribbean) Ltd*,[54] since there was uncertainty as to the terms of a restrictive covenant and the effect of a previous order made in respect of it. Chase J held, in the Barbados High Court, that there was a serious question to be tried, and *American Cyanamid* applied.

Final disposal of the action

In *NWL Ltd v Woods*,[55] Lord Diplock stated that '*American Cyanamid* . . . was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial'.

It seems that there are two questions to be considered in such cases: (a) on the assumption that the interlocutory injunction is refused, and taking into account the likely length of time it would take for the matter to come to trial,[56] is there any realistic prospect that the plaintiff would wish to proceed to trial?; and (b) on the assumption that the interlocutory injunction is granted, is there any realistic prospect that the defendant will insist on the matter going to trial in order to vindicate his defence and to have the injunction discharged? If it is a case where neither party has any real interest in going to trial, the interlocutory application will finally determine the action. In such a case, the court will not apply the *American Cyanamid* guidelines but will apply the broad principle of doing its best to avoid injustice, and will award an injunction only if the plaintiff's case is overwhelming on the merits. In Eveleigh LJ's words,[57] 'it would be wrong to run the risk of causing an injustice to a defendant who is being denied the right to trial where the defence put forward has been substantiated by affidavits and a number of exhibits'.

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53 *Ibid*.

54 (1979) High Court, Barbados, no 873 of 1979 (unreported).

55 [1979] 3 All ER 614, p 625.

56 See *Galaxy Leisure and Tours Ltd v Wyndham Hotel Co Ltd* (1996) 33 JLR 166, Supreme Court, Jamaica.

57 *Cayne v Global Natural Resources plc* [1984] 1 All ER 225, p 233.

A Jamaican case that illustrates this principle is *Miller v Cruickshank*,[58] the facts of which have already been given. A second ground on which the Jamaican Court of Appeal discharged the interim injunction was that where there was a triable issue between the parties (in this case, the interpretation of the competition rules) but no claim for damages, and the grant of an interlocutory injunction would give the plaintiff all that he sought in the substantive action, the injunction should not be granted. Rowe P said:[59]

> If the injunction remains in force the respondent would have gained his total objective. Nothing of practical value would be left in the action and if the respondent elected to go to trial it would be of the merest academic interest to him, he having already reaped all the benefits he could ever obtain from the action.
>
> Mr Henriques submitted, quite rightly, that the court's discretion ought not to be exercised in that way, and he relied on the decision of the English Court of Appeal in *Cayne v Global Natural Resources plc*.[60] The facts in that case are as complicated as those in this case are simple. Of those facts, Eveleigh LJ said[61] 'The case is riddled with complexities of one kind or another', but over-simplified they relate to an application by minority shareholders to prevent directors of a company from issuing a large number of shares in the company prior to a general meeting, as the minority shareholders apprehended that this was being done to maintain those directors in office. Sir Robert Megarry VC held that there was no real prospect of the plaintiffs succeeding in their action for a permanent injunction and he declined to grant the injunction. In so doing, he did not even go on to consider the balance of convenience. Eveleigh LJ interpreted the opinion of Megarry VC in these words:[62]
>
> The view that the Vice Chancellor took on the facts was this. If an injunction was granted to the plaintiffs, that would be an end to the substance of the matter and the injunction would not in effect amount to a holding operation: it would be giving the plaintiffs all that they came to the court to seek, namely their injunction, and when the time came for trial there would be no point in a trial because the object of the plaintiffs would have been achieved, seeing that the annual general meeting would have been held.

The broad principle identified by Eveleigh LJ on which the court should act was 'What can a court do in its best endeavour to avoid injustice?'; and he answered the question thus:[63]

> The question, it seems to me, is: should the court exercise its discretion bearing in mind all the circumstances of the case, when to decide in favour of the

58 (1986) 44 WIR 319, Court of Appeal, Jamaica. See, also, above, p 101.

59 *Ibid*, p 322.

60 [1984] 1 All ER 225.

61 *Ibid*, p 226.

62 [1984] 1 All ER 225, p 232.

63 *Ibid*, p 233.

> plaintiffs would mean giving them judgment in the case against Global without permitting Global the right of trial? As stated that way, it seems to me that would be doing an injustice to the defendants.

Kerr LJ was of a similar opinion. He said:[64]

> The practical realities in this regard are that if the plaintiffs succeed in obtaining an injunction, they will never take this case to trial.

After reviewing the evidence, Kerr LJ concluded:

> In these circumstances, it seems to me that it would be wholly wrong for this court, in effect, to decide the entire contest between the parties summarily in the plaintiffs' favour on the untested material before us. This does not present any overwhelming balance on the merits in the plaintiffs' favour, or any other overriding ground for an immediate injunction without a trial. There is only a triable issue whose outcome is doubtful: and that issue should be tried and not pre-empted.
>
> In my view, it would work an injustice to the appellants to permit the interim injunction to stand.

Carey JA came to the same conclusion. He said:

> *Cayne v Global Natural Resources plc*[65] demonstrates that:
>
> Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case, the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial.
>
> To avoid injustice, all the circumstances of the case must be looked at, and that means having regard to all the practical realities. The practical realities in this situation are that if the injunction were granted, the respondent would have qualified for selection and would doubtless play in the semi-final, and possibly in the final. He would have been given the high honour of joining the select few, among whom are names to conjure with, viz JK Holt Jnr, O'Neil 'Collie' Smith, Easton McMorris and others of the elite. What need would there be for any declaration thereafter? It may be, his time will come. It cannot be done in this way. Whether on the footing of the balance of convenience or to avoid injustice. I am of opinion that the trial judge erred in principle, and, in granting the injunction, wrongly exercised his discretion. His order cannot therefore be allowed to stand. It must be set aside.

64 *Ibid*, p 235.

65 *Ibid*, p 235.

MANDATORY INTERIM INJUNCTIONS

The courts are much more reluctant to grant mandatory interim injunctions than to grant (a) mandatory perpetual injunctions or (b) prohibitory interim injunctions. In a number of Jamaican cases,[66] the following *dictum* of Megarry J in *Shepherd Homes Ltd v Sandham*[67] has been cited:

> It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation . . .
>
> On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

In *Rudd v Crowne Fire Extinguisher Services Ltd*,[68] a mandatory interim injunction was refused by the Jamaican Court of Appeal as it could not be said, either in the light of the affidavit evidence or the law, that it was an unusually strong and clear case. In particular, there were difficult points of statutory construction and issues of negligence to be decided. The applicant had an 'arguable' case but not a sufficiently 'powerful' one to qualify for a mandatory interim injunction. On the other hand, in *National Water Commission v Knight*,[69] Cooke J granted an interim injunction ordering the defendant to remove a building that had been erected on the plaintiff's land with full knowledge that it was in breach of covenant, and in a 'high handed and devious' manner. The learned judge said:

> It is well recognised that the grant of a mandatory interlocutory injunction is a very drastic step. In *Esso Standard Oil SA Ltd v Chan*, Campbell JA delivered himself thus:[70]
>
> > The principle applicable to the grant of a mandatory interlocutory injunction which is comparable in its nature and function to a *mandamus*

66 See, eg, *Esso Standard Oil SA Ltd v Chan* (1988) 25 JLR 110; *Rudd v Crowne Fire Extinguisher Services Ltd* (1989) 26 JLR 565; *National Water Commission v Knight* (1997) 34 JLR 617, Supreme Court, Jamaica.

67 [1970] 3 All ER 402, pp 409, 412.

68 (1989) 26 JLR 565, Court of Appeal, Jamaica.

69 (1997) 34 JLR 617, Supreme Court, Jamaica. Cf *Jeelal v Jeelal* (1985) Court of Appeal, Trinidad & Tobago, Civ App no 24 of 1983 (unreported).

70 (1988) 25 JLR 110, p 112.

> is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established, and also the right sought to be protected is clear.

The use of the word 'ordinarily' should not be overlooked. The consideration of the presence of damage and the extent of such damage is an important factor . . .

In this case, as I have already indicated, the defendant set out to flagrantly disregard his obligation. To compound matters he constructed without any regard for the requisite statutory permission. It is only now that the defendant says in para 22 of his affidavit that he has employed 'a draughtsman to prepare a plan of the premises for submission to the Kingston and St Andrew Corporation for its approval'. So on the case for the defendant he has been building for four years knowing that he did not have a right so to do. It will be recalled that in para 16 of the defendant's affidavit he said that the 'concrete building is in plain sight from the road'. This statement is misleading. The leased property had a 10ft solid wall surrounding it. It was impossible to see what was taking place below the height of the wall. Construction was being carried out in a clandestine manner. From the beginning what the defendant really wanted was to purchase the land. I have no difficulty in saying that he has acted in a high handed and devious manner. His behaviour was designed 'to force the hand' of the plaintiff.

Our courts exercise great caution before an interlocutory mandatory injunction is ordered. In *Shepherd Homes Ltd v Sandham*,[71] Megarry J [expressed the] view that:

> No doubt, a mandatory injunction may be granted where the case for one is unusually sharp and clear; but it is certainly not a matter of course.

I have already reviewed the evidence presented before me and, despite the great caution which must be my constant companion in deciding this aspect of the case, I conclude that the plaintiff is entitled to an interlocutory mandatory order. I do not see how the defendant can complain when his loss in demolishing the construction is self-induced. In the circumstances of this case, it does not sit well on the tongue of the defendant to speak of comparative losses – or damage. He has not come to court with clean hands. I have already commented on his high handed and devious behaviour. This is a case that is 'unusually sharp and clear'.

I wish to deal with one final aspect. It pertains to the submission that to grant the interlocutory injunction sought will effectively bring the matter to a close. Well, in this regard, I respectfully adopt the approach of Lord Denning MR in *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd*[72] where he opined:

> Finally, Mr Thompson urged that this ought not to be dealt with on an interlocutory application because it would, in effect, be deciding the case finally here and now. So be it. That often does happen on interlocutory applications. We have before us all the information which is necessary

71 See above, p 107.

72 [1972] 1 QB 318, p 323.

> to decide it. It seems to me that, even though it may be deciding the case now, we should so decide it.
>
> It is my view that this case fits squarely in the category described. My treatment of the evidence will have already demonstrated this.

DISCHARGE OF INTERIM INJUNCTION

A defendant who seeks discharge of an interim injunction must apply under CPR Rule 11.16, to a High Court judge, who may be the same judge who granted the injunction. Discharge may be ordered on any of the following grounds:

(a) material non-disclosure on an *ex parte* application;[73]

(b) plaintiff's non-observance of the terms of the grant of the injunction;

(c) material change in circumstances since the grant;

(d) the facts do not justify the grant;

(e) plaintiff's failure to prosecute the substantive claim sufficiently expeditiously; or

(f) the effect of the injunction is oppressive, or interferes with the rights of third parties.[74]

Where an interim injunction has been granted *ex parte*, 'it would at first blush have seemed appropriate to do so on a prima facie view of the facts' deposed in the affidavits, but the hearing of the application to continue the injunction 'provides the court with the usual opportunity to review its first thoughts in the matter in the light of arguments *inter partes*'.[75] The court can accordingly discharge an interim injunction at the hearing. Similarly, an opportunity for review arises on an application to discharge an interim injunction supported by relevant facts that were not placed before the court at the *ex parte* hearing.[76]

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73 See, eg, *Dolan v Cooper* (1995) High Court, Antigua and Barbuda, no 296 of 1995 (unreported), where Benjamin J stated that the court 'may discharge an interim injunction already obtained *ex parte* if it appears that the interim order was irregularly obtained by suppression of facts' by the applicant for the injunction. See, also, *Ferguson v Ferguson* (1993) High Court, Grenada, no 180 of 1993 (unreported); *Parbal v Jurawan* (1978) High Court, Trinidad & Tobago, no 353 of 1978 (unreported); *Superior Security Co Ltd v General Accident Insurance Co (Jamaica) Ltd* (1992) 29 JLR 401, Court of Appeal, Jamaica.

74 'In appropriate cases, a third person who is not a party may apply to have an injunction discharged': *Lennox Petroleum Services Ltd v Staptracks Rebuilding Co Ltd* (1982) High Court, Trinidad & Tobago, no 2 of 1982 (unreported), per Edoo J, following *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966.

75 *Bahamas Oil Refining Company v Rolle* (1988) Supreme Court, The Bahamas, no 1181 of 1984 (unreported), per Gonsalves-Sabola J.

76 *Farrington v O'Brien Loans Ltd* (1989) Supreme Court, The Bahamas, no 1578 of 1988 (unreported), per Gonsalves-Sabola J.

In *Jada Construction Caribbean Ltd v The Landing Ltd*,[77] an application to continue an interim injunction, Edwards J found that the contents of a 'without prejudice' letter and an e-mail had not been disclosed to the court at the time the interim injunction was granted. These were 'material facts, some of which went against the grant of the injunctive relief sought ... [They] should have been disclosed to the court with the explanations then as to why the court should not act on them ... Given the quality of the facts that were not disclosed, the non-disclosure was deliberate, intentional and not innocent.' Edwards J nonetheless decided that this non-disclosure should not be the basis for refusing to continue the injunction, emphasising that, in deciding what should be the consequences of a breach of the duty of disclosure, the court must take into account all the relevant circumstances including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. Above all, the court must bear in mind the overriding objective and the need for proportionality.[78] The learned judge approved the following dictum of Balcombe LJ in *Brink's Mat Ltd v Elcombe*:[79]

> The rule that an *ex parte* injunction will be discharged if it was obtained without full disclosure has a twofold purpose. It will deprive the wrongdoer of an advantage improperly obtained; but it also serves as a deterrent to ensure that persons who make *ex parte* applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original *ex parte* injunction was obtained.

In *Mossel (Jamaica) Ltd v Thrush*,[80] there were instances of material non-disclosure by the claimant at the *ex parte* stage. At the *inter partes* hearing to determine whether the injunction should continue, Sykes J explained that *Brink's Mat Ltd v Elcombe* and the Jamaican case of *Jamculture Ltd v Black River Upper Morass Development Company Ltd*[81] had established that a court can discharge an injunction on the ground of non-disclosure even if an injunction would have been granted had the disclosure been

77 (2006) High Court, St Lucia, no SLUHCV2006/0771 (unreported).

78 *Memory Corporation plc v Sidhu (No 2)* [2000] 1 WLR 1433, at 1454.

79 [1988] 1WLR 1350, at 1358: followed in *Addari v Addari* (2005) OECS Court of Appeal, Civ App no 2 of 2005 (unreported), per Gordon, JA.

80 (2004) Supreme Court, Jamaica, no 2004 HCV2087 (unreported), per Sykes J.

81 (1989) 26 JLR 244, per Wright JA, described as 'the onerous duty on an *ex parte* applicant.': *Jamaica Beach Park Ltd v Jamaica Redevelopment Foundation Inc* (2005) Supreme Court, Jamaica, no HCV 01319 of 2005 (unreported), per Sykes J.

made.[82] The rationale for this power on an *ex parte* application was that the applicant ought to make known to the court all important facts, and failure to do so permitted the court, as a punitive measure, to discharge the injunction. The power deprived the wrongdoer of an advantage improperly obtained, and at the same time acted as a deterrent to those who failed to act with candour. On the other hand, bearing in mind that *ex parte* applications, by their very nature, 'usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste . . . the borderline between material facts and non-material facts may be a somewhat uncertain one', and the practical realities cannot be overlooked by the court. The history of the instant case showed that the claimant had been working against time, and the circumstances were very different from those in the *Jamculture* case where there had been a calculated decision to deceive the court; accordingly, since there was no intention to deceive the court[83] and in the context of the events to which the claimants were reacting, the non-disclosure was 'not sufficient to justify invoking the punitive power of the court'.

It was also emphasised by Gonsalves-Sabola J, in *Bahamas Oil Refining Co v Rolle*,[84] that where an interim injunction had been granted *ex parte*, 'it would at first blush have seemed appropriate to do so on a prima facie view of the facts' deposed in the affidavits, but 'the hearing of the summons to continue the injunction provided the court with the usual opportunity to review its first thoughts in the matter in the light of arguments *inter partes*'. The court could accordingly discharge an interim injunction at that hearing. Similarly, an opportunity for review arose on a summons to discharge an interim injunction supported by relevant facts that were not placed before the court at the *ex parte* hearing.[85]

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82 In *Gotel Communications Ltd v Cable and Wireless (Jamaica) Ltd* (2006) Supreme Court, Jamaica, no HCV 02006 of 2006 (unreported), Sykes J emphasised that, on the authority of *Lloyds Bowmaker v Britannia Arrow Holdings plc* [1988] 1 WLR 1337, at p 1348, per Dillon LJ, it was not correct to assert that non-disclosure was material as a basis for discharging an injunction only where it affected some point which it was necessary for the applicant for the injunction to establish. The duty of disclosure 'is not so limited. The applicant owes a duty of fullest and frankest disclosure'.

83 In *Clarendon Alumina Productions Ltd v Alcoa Minerals of Jamaica* (1988) 25 JLR 114, the Jamaican Court of Appeal held that the test as to whether an order made *ex parte* ought to be set aside for non-disclosure of material facts was whether the party who obtained the order (a) withheld the material in order to deceive the court or (b) deliberately misstated the facts with the intention of deceiving the court. This test is contrary to that propounded in *Brink's Mat v Elcombe* [1988] WLR 1350 and approved by the Jamaican Court in *Jamculture Ltd v Black River Upper Morass Development Company Ltd* (1989) 26 JLR 244, in which it was established that the setting aside of *ex parte* injunctions is not confined to cases of deliberate attempts to deceive the court. In *Gotel Communications Ltd v Cable and Wireless (Jamaica) Ltd* (2006) Supreme Court, Jamaica, no HCV 02006 of 2006 (unreported), Sykes J preferred the latter approach, pointing out that it had been supported by the later decision of the Court of Appeal in *San Souci Ltd v VRL Services Ltd* (2005) Court of Appeal, Jamaica, Civ App no 108 of 2004 (unreported).

84 (1988) Supreme Court, The Bahamas, no 1181 of 1984 (unreported).

85 *Farrington v O'Brien Loans Ltd* (1989) Supreme Court, The Bahamas, no 1578 of 1988 (unreported), per Gonsalves-Sabola J.

CHAPTER 13

FREEZING ('MAREVA') INJUNCTIONS AND SEARCH ('ANTON PILLER') ORDERS

FREEZING INJUNCTIONS

This type of discretionary interlocutory injunction,[1] which may be granted pre- or post-trial,[2] is designed to prevent a defendant to an action from disposing of his assets in such a way as to frustrate any eventual judgment made against him.[3] To ensure secrecy, the application is made *ex parte* by affidavit to a judge.[4]

The purpose of a freezing order is not to provide security against the defendant's insolvency[5], and it is not designed to elevate the claimant above any other creditors or claimants to the defendant's property; nor does the order determine whether rights exist or even what rights have been infringed. It is not an enforcement order, and its purpose is simply 'to ensure that something is available on which the judgment can bite'.[6] Thus, on principle, until judgment is delivered, the defendant is free to deal with his property as he thinks fit, provided he does not take steps to dissipate it so as to frustrate the eventual judgment of the court.

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1 The injunction is named after the decision of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213. The case was actually decided in 1975 but was not reported until 1980. See, generally, Rattray, C, 'The Mareva journey – from the Atlantic to the Caribbean' (1994) 4 Carib LR 245. Under the CPR, the Mareva injunction is renamed 'freezing order' (Rule 17.1(1).

2 However, a freezing injunction will not be granted to an applicant who has no cause of action against the defendant at the time of application: *Berliner Bank AG v Karageorgis* (1997) 1 OFLR 145, p 151, per Meerabux J, Supreme Court, Bermuda.

3 The court equally has power to grant a freezing injunction in relation to an arbitration that has not yet commenced, and to do so subject to a term providing for the arbitration to be commenced within a specified time, together with such terms as the court thinks fit: *Coosals Quarry Ltd v Teamwork (Trinidad) Ltd* (1985) 37 WIR 417, p 420, per Sharma J; *The Rena K* [1979] 1 All ER 397.

4 Practice Direction [1994] 4 All ER 52. See, also, CPR, Rule 17.4.

5 *Addari v Addari* (2005) OECS Court of Appeal, Civ App no 2 of 2005 (unreported), per Gordon JA.

6 *Shoucair v Tucker-Brown* (2004) Supreme Court, Jamaica, no HCV 01032 of 2004 (unreported), where Sykes J refused to make a freezing order since there was no evidence of any real risk of dissipation of the defendant's assets. Such risk was not established from the mere fact of the defendant's indebtedness, nor from the fact that he travelled out of Jamaica from time to time. Further, there was nothing to show that the defendant would not be able to meet any judgment that might be awarded against him. In short, there was no 'solid evidence' of a risk of dissipation.

A freezing injunction binds a third party with knowledge of its existence.[7] The third party will normally be served with the injunction before the defendant is served, especially if that third party has possession of the defendant's assets.[8] However, since the injunction is an order *in personam*, aimed at the defendant personally, and does not give to the claimant any proprietary rights over the defendant's assets, a bona fide purchaser for value of any property subject to the injunction who has no notice of the injunction will obtain a good title.[9]

The jurisdiction to grant a Mareva injunction was founded in England on s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which repealed s 25(8) of the Judicature Act 1893. Section 45 provided:

> A *mandamus* or an injunction may be granted . . . by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient.

Similar provisions are in force in Commonwealth Caribbean jurisdictions. For instance, s 49(b) of the Judicature (Supreme Court) Act of Jamaica provides that 'an injunction may be granted . . . by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that such order should be made'.[10]

Under the CPR, the Mareva injunction is called a 'freezing order' (Rule 17.1(1)(f)).

Requirements

The requirements for the granting of a Mareva injunction were summarised by da Costa CJ in the Bermudian Court of Appeal in *Bank of Bermuda Ltd v Todd*,[11] in which it was also pointed out that although in England the grant of this type of injunction has become 'commonplace', in Bermuda it still remained 'exceptional'. The court will usually require to be satisfied that:

(a) the claim is one over which the court has jurisdiction;[12]

(b) the plaintiff has a 'good arguable case';[13]

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7 A third party who, with knowledge of the injunction, assists in the disposal of the enjoined assets will be in contempt of court: *Z Ltd v A–Z* [1982] 1 QB 558, p 572, per Lord Denning MR.

8 Thus, an injunction made against a bank account has the effect of freezing the account as soon as the bank has notice of the injunction. A bank which, after receiving such notice, pays a cheque drawn on the account will be in contempt.

9 *Keene v Tuloch-Darby* (2005) Supreme Court, Jamaica, no CLK027/2001 (unreported), per Campbell J.

10 See, also, Supreme Court Act, Ch 53, s 21(1) (The Bahamas); Supreme Court of Judicature Act, Cap 117A (Barbados), s 44.

11 (1993) Court of Appeal, Bermuda, Civ App No 13 of 1992 (unreported).

12 *The Siskina* [1979] AC 210; *Koch v Chew* (1997/98) 1 OFLR 537, High Court, British Virgin Islands.

13 *Rasu Maritima SA v Pertambangan* [1978] QB 644, p 661, per Lord Denning MR.

(c) the defendant appears to have assets within the jurisdiction;[14]

(d) there is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted;[15]

(e) there is a real risk that if the injunction is not granted the defendant will be unwilling or unable to satisfy the plaintiff's claim; and[16]

(f) there is a balance of convenience in favour of granting the injunction.[17]

Justiciability of the claim

The plaintiff's claim must be justiciable in the particular jurisdiction. The requirement will be satisfied if the defendant can be served with process within the jurisdiction or, if he is outside the jurisdiction, if he can be served under CPR Pt 7.[18] On the other hand, a Mareva injunction will not usually be granted to freeze assets within the jurisdiction belonging to a foreign defendant who is outside the jurisdiction pending the conclusion of proceedings against him in a foreign country, as the claim has no connection with the local jurisdiction other than the presence of assets,[19] though there is some authority for the view that, in exceptional cases, and in the interest of comity, a Mareva injunction may be granted in aid of foreign proceedings despite the absence of any substantive cause of action in the particular jurisdiction.[20]

Good arguable case

In the *Bank of Bermuda* case,[21] da Costa CJ cited with approval the definition of 'good arguable case' in the Mareva context, given by Mustill J in *The Niedersachsen*,[22] as 'a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a

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14 *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972.

15 *Z Ltd v A–Z* [1982] 1 All ER 556.

16 *Etablissement Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445.

17 *Barclay-Johnson v Yuill* [1980] 3 All ER 190.

18 *Koch v Chew* (1997/98) 1 OFLR 537, High Court, British Virgin Islands. Cf Ord 9 (Guy); Ord 12 (Bel).

19 *Mercedes-Benz AG v Leiduck* [1996] 1 AC 284; *Girten v Andreu* (1998) Supreme Court, The Bahamas, no 692 of 1997 (unreported); *Bass v Bass* [2001] CILR 317.

20 *Grupo Torras SA v Mees Pierson (Bahamas) Ltd* (1998/99) 2 OFLR 163, following *Solvalub Ltd v Match Investments Ltd* (1997/98) 1 OFLR 152. See, also, *Walsh v Deloitte and Touche Inc*, Privy Council Appeal no 37 of 2000.

21 (1993) Court of Appeal, Bermuda, Civ App No 13 of 1992 (unreported).

22 [1984] 1 All ER 398, p 404. Da Costa CJ described Mustill J as 'a great authority on the *Mareva* injunction'. See, also, *Walsh v Deloitte and Touche Inc*, Privy Council Appeal No 37 of 2000; *Breitenstine v Breitenstine* (2003) Supreme Court, The Bahamas, no 1284 of 2001 (unreported).

better than 50% chance of success'. Mustill J had also emphasised that 'the court should not be drawn into a premature trial of the action, rather than a preliminary appraisal of the plaintiff's case'. It has also been stated that 'the plaintiff need not show that his case against the defendant is so strong that he is likely to obtain summary judgment'.[23]

Defendant has assets within the jurisdiction

The claimant must usually show that the defendant has some assets within the jurisdiction. Such assets may include land, chattels (such as motor vehicles, jewellery, antiques, etc.) ships,[24] choses in action,[25] and money in a bank account.

If the defendant has a bank account within the jurisdiction, such account may be frozen by a Mareva injunction whether the account is in the sole name of the defendant or in the joint names of the defendant and a non-party.[26] Moreover, the existence of a bank account in the defendant's name, even if overdrawn, is sufficient for the court to infer the presence of assets within the jurisdiction. For an injunction to be made against a bank account, the claimant should give particulars of the branch and the account number.

A Mareva injunction will not normally extend to assets outside the jurisdiction, but in exceptional cases the court may grant a 'worldwide' injunction affecting assets both within and without the jurisdiction.[27] Such an injunction will not be made if there are sufficient assets within the jurisdiction to satisfy any possible judgment in favour of the claimant.

A 'worldwide' Mareva injunction was made in *Jamaica Citizens Bank v Yap*.[28] In this case, the defendant was general manager of the claimant bank and a Jamaican resident. He had been dismissed from his post following an audit carried out by the bank, and the bank filed a writ against him, claiming damages for breach of contract, conspiracy, deceit and negligence. The bank also sought a Mareva injunction to restrain the defendant from disposing of and/or dealing with his assets wherever situated, up to a value of US$400,000. The application was supported by an affidavit in which it was alleged that in the course of his duties involving the processing of international credit card transactions, the defendant had established credit

23 *Maragh v Money Traders Investments Ltd* (1997) Supreme Court, Jamaica, no CLM 207 of 1997 (unreported), per Wolfe CJ.

24 See *Kaprifol Shipping SA v Caravanti Shipping Co Ltd* (1988) Supreme Court, The Bahamas, no 284 of 1988 (unreported).

25 *CBS (UK) Ltd v Lambert* [1983] Ch 37, p 42.

26 *SFC Finance Ltd v Masri* [1985] 2 All ER 747.

27 *Derby and Co Ltd v Weldon (No 2)* [1989] 1 All ER 1002; *Republic of Haiti v Duvalier* [1989] 1 All ER 456; *Laager v Kruger* [1996] CILR 361, Grand Court, Cayman Islands.

28 (1994) 31 JLR 42, Court of Appeal, Jamaica, Civ App No 82 of 1993 (unreported).

card relationships with certain telemarketers in the United States and Antigua, and had fraudulently authorised payments totalling US$400,000 to those telemarketers. The defendant had two bank accounts in Miami, from which he had transferred large sums to Hong Kong and other foreign countries. The Jamaican Court of Appeal upheld the grant of a 'worldwide' Mareva injunction against the defendant, 'until judgment or further order', with a '*Babanaft* proviso'[29] attached. Rattray P stated the conditions, which must be present for the grant of a freezing injunction, in a passage that has been widely cited[30] in judgments in Caribbean jurisdictions:

> On a preliminary appraisal [the applicant must] establish a 'good arguable case' . . . This is the minimum which the [applicant] must show in order to 'cross the threshold', in other words, as I understand it, to get a foot in at the door, so as to access the entrance chamber of further consideration. Having got to first base . . . he must establish the risk or danger that the assets . . . will be dissipated . . . At the *ex parte* stage of the application before the judge, the benefit of hearing both sides is naturally absent. To this extent, facts presented are assessed on face value, but the [applicant] still has two tests. At the *inter partes* stage, when there is an opportunity for the filing of rebutting affidavits and the exposure of the fuller picture, at the end of the day the evidence as a whole has to be considered in determining whether or not to exercise the jurisdiction.

Real risk of disposal of assets by defendant

In order to obtain a Mareva injunction, the claimant must convince the court that there is a real risk that the defendant will remove assets from the jurisdiction or dissipate or dispose of them.[31] Although it is now clear that a Mareva injunction may be made against a resident as well as a non-resident defendant,[32] the court is more likely to infer a risk of disposal where the defendant is resident outside the jurisdiction or is a company based abroad.[33] On the other hand, the mere fact that a defendant is a foreigner with assets within the jurisdiction does not in itself warrant the

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29 See below, p 121.

30 See, eg, *Apgar v Howlett-Davis* (2004) Supreme Court, Jamaica, no HCV 000312 of 2004 (unreported), per Sykes J; *Shoucair v Tucker-Brown* (2004) Supreme Court, Jamaica, no HCV 01032 of 2004 (unreported), per Sykes J.

31 The duty of the claimant is to make all the necessary enquiries about the origins, dealings and assets of the defendant: *Intercommercial Bank Ltd v Moosai Development Co Ltd* (2001) High Court, Trinidad & Tobago, no S1437 of 2000 (unreported).

32 *Watkis v Simmons* (1988) 25 JLR 282, Court of Appeal, Jamaica. *Barclay Johnson v Yuill* [1980] 3 All ER 190.

33 In *Coney Island Caribbean Amusements Inc v Good Times Shows Inc* (1984) 37 WIR 79, Williams Ag CJ, in the Barbados High Court, took the view that there was 'obviously a risk of the assets being removed before judgment is satisfied, since the affidavits disclose that the defendant is a Coney Island operator who is in [Barbados] for a very limited period'.

grant of an injunction,[34] for, as Kerr LJ emphasised in *Z Ltd v A–Z*, an injunction should not be made against a defendant who has substantial links with the jurisdiction, such as 'persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to dissipate merely to avoid some judgment which seems likely to be given against them'.[35] This approach was taken in *Coosals Quarry Ltd v Teamwork (Trinidad) Ltd*,[36] where a Mareva injunction was sought against a company incorporated in Trinidad & Tobago and a subsidiary of a well-established foreign company specialising in large scale engineering works and road building. The injunction was refused by Sharma J on the ground, inter alia, that the defendant had been involved in several projects in Trinidad & Tobago and there was no evidence that the company was likely to dispose of or remove its assets from the jurisdiction. Similarly, in a recent Jamaican case, *Can-Cara Development Ltd v Magil Construction Jamaica Ltd*,[37] a freezing injunction was refused, since the defendant, a foreign company that had entered into a 'joint venture agreement' with the Ministry of Housing to build 600 houses on approximately 99 acres of land had, 'in contradistinction to disposing of assets in order to avoid a judgment . . . made significant investment in Jamaica involving the introduction of significant foreign exchange . . . It has not been traversed . . . that the company has projects in the pipeline amounting to over three billion dollars . . . Nothing has been demonstrated . . . to indicate that [the defendant] is acting in any way distinct from its usual or ordinary course of business'.

In *Wheelabrator Air Pollution Control v Reynolds*,[38] Carey JA, in the Jamaican Court of Appeal, emphasised that it was 'not sufficient merely to assert a belief in the fear of removal. The fear must be determined on the basis of the facts disclosed in the affidavit'. Accordingly, in the case of *Half Moon Bay Ltd v Levy*,[39] where the claimant's allegation was that there was a risk of removal of the proceeds of sale of a hotel owned by the defendant, based on the fact that such proceeds could be easily transferred out of the jurisdiction, Wolfe CJ said:

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34 *Bank of Nova Scotia v Emerald Seas Ltd* [1984] CILR 180, p 193, per Hull J, Grand Court, Cayman Islands; *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972.

35 [1982] 1 All ER 556, p 572.

36 (1985) 37 WIR 417. Cf *Century National Bank Ltd v CNB Holdings Ltd* (1997) Supreme Court, Jamaica, no CL 1996/C330 (unreported), where Walker J held that the fact that the defendants had strong ties with the United States, where Jamaican judgments were not enforceable under any reciprocal enforcement legislation, was a relevant consideration.

37 (2005) Supreme Court, Jamaica, no HCV 2416/2003 (unreported), per Campbell J, following *Chittel v Rothbart* (1982) 39 DLR (2d) 513 and *Wheelabrator Air Pollution Control v Reynolds* (1985) 37 WIR 417. See also *National Insurance Corporation v Rochamel Development Company Ltd* (2006) High Court, St Lucia, no SLUHCV2006/0638 (unreported), per Edwards J; *Shoucair v Tucker-Brown*, fn 6, above.

38 (1985) 37 WIR 417, cited in *Half Moon Bay Ltd v Levy* (1997) 34 JLR 215, Supreme Court, Jamaica.

39 *Ibid*, p 220.

> This to my mind is not sufficient to establish the risk factor. No evidence has been adduced which suggests that the defendant is taking steps to dissipate the assets or remove them from the jurisdiction. This case is readily distinguished from the *Wheelabrator* case.
>
> In *Wheelabrator*, the defendant company was a foreign company with no assets in Jamaica, but the sum payable under the contract. It was therefore an inescapable inference that the proceeds of the contract would be taken out of the jurisdiction.
>
> The plaintiff should depose in his affidavit to objective facts from which it may be inferred that the defendant is likely to remove his assets abroad or dissipate them; unsupported statements or expressions of fear have little weight.
>
> In the circumstances, I find that there are no objective factors to show that the defendant intends to remove his assets from the jurisdiction or dissipate them within the jurisdiction, and that the defendant has no such intention. As indicated before, the plaintiff's case is based on unsupported expressions of fear. Mere intention to sell does not in my view provide the necessary proof.
>
> If, at the *ex parte* hearing, the evidence of the defendant had been available, that he has lived in Jamaica all his life and that the reason for selling was that he wished to retire, I certainly would not have granted the injunction in the terms in which it was granted at all.

In *Bank of Bermuda Ltd v Todd*,[40] an action was brought by the bank against T, the former manager of its credit department, in respect of certain alleged breaches of fiduciary duty. The bank obtained a Mareva injunction restraining T from removing his assets from the jurisdiction or from dealing with them. T sought a discharge of the injunction on the ground, inter alia, that the bank had not established that there was a real risk of dissipation of T's assets. In considering the proper approach to this question, da Costa JA, in the Court of Appeal of Bermuda, cited with approval the following passage from the judgment of Mustill J in *The Niedersachsen*:[41]

> Certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or, the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.

40 (1993) Court of Appeal, Bermuda, Civ App No 13 of 1992 (unreported).

41 [1984] 1 All ER 398, p 406.

In the instant case, there was evidence of a 'disregard for legal propriety' on the part of T in managing the affairs of the credit department and this, coupled with 'a history of business dealings designed to disguise his own involvement', led the court to conclude that there was a real risk of dissipation of assets.

One of the arguments put forward by the defendant in the *Bank of Bermuda* case was that a delay of some 20 months from the time when the claimant first learned of the defendant's alleged fraudulent activity to the date of its application for a Mareva injunction was inconsistent with any genuine fear that the defendant's actions would result in dissipation of his assets. This argument was considered by da Costa JA (who referred to the grant of an *ex parte* injunction being, by definition, confined to cases of urgency) but he seems to have taken the view that it was outweighed by the factors pointing to a risk of dissipation. In *Kilderkin Investments Ltd v Player*,[42] on the other hand, Summerfield CJ, in the Grand Court, Cayman Islands, pointed out that the fact that the summons in this case had been brought *inter partes* suggested that there was no fear of a risk of removal of assets from the jurisdiction. Although Summerfield CJ held that the requirement of risk of removal had not been established in this case, he referred to the special circumstances of 'offshore' jurisdictions such as the Cayman Islands, in the following passage:[43]

> If there had been a real danger of the removal of the assets from the jurisdiction, they would by now, no doubt, have been removed and an injunction would be pointless. If they have not been removed by now, then there never was a real danger of premature removal. Clearly, this point of the guidelines had not been established. In the *Third Chandris* case, considerable weight was attached to this aspect. It may well be that this court will have to give further consideration to the application of this point in applications for a *Mareva* injunction in this jurisdiction, as different considerations may arise from those in England. Where considerable sums of money are involved and the persons concerned have no strong ties to the Islands, or a company is involved which can easily fold or be stripped of its assets, the temptation to remove the assets from the jurisdiction to escape the effects of a judgment of this court must be great. That temptation gives rise to a risk. Risk may be inferred from circumstances here which might not give rise to the same inference in England. This is particularly so where a person is using this jurisdiction to conceal or harbour the proceeds of a fraud or other misfeasance. However, that possibility was not the subject of argument and I was left to decide the matter on the principles set out in the *Third Chandris* case.

42 [1980–83] CILR 403.

43 *Ibid*, p 408.

Procedure for obtaining pre-trial freezing injunction

The plaintiff's attorney should take the following steps:[44]

(1) *Draft a claim form and particulars of claim* (under CPR) ready for issue, setting out clearly and precisely the relief claimed.

(2) *Prepare an affidavit* which:

(a) deposes to facts showing a good arguable case against the defendant, and states that the defendant is resident within the jurisdiction or the claim is triable in the jurisdiction;

(b) identifies specific assets, such as bank accounts, which the plaintiff wishes to be frozen; and

(c) deposes to facts from which the court can conclude that there is a risk of removal of those assets from the jurisdiction or dissipation by the defendant.

Further guidelines as to the content of the affidavit were laid down by Lord Denning MR in *Third Chandris Shipping Corp v Unimarine SA*,[45] and have been frequently cited in courts in the Caribbean:[46]

(a) the claimant should make full and frank disclosure of all matters in his knowledge that are material for the judge to know;

(b) the claimant should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points against him by the defendant;

(c) the claimant must give some grounds for believing that the defendant has assets here; and

(d) the claimant should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied.

(3) *Prepare a draft injunction.* Standard forms for domestic and worldwide Mareva injunctions were laid down in Practice Directions of 1994[47] and 1996.[48] The draft injunction should contain the following, inter alia:

(a) *claimant's undertakings*:

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44 See Barnard, D and Houghton, M, *The New Civil Court in Action*, 1993, London: Butterworths, p 248. See also CPR, Rules 17.3 and 17.4.

45 [1979] 2 All ER 972, pp 984, 985.

46 Eg, *Coosals Quarry Ltd v Teamwork (Trinidad) Ltd* (1985) 37 WIR 417, p 423, per Sharma J; *Kilderkin Investments Ltd v Player* [1980–83] CILR 403, p 407, per Summerfield CJ; *Bank of Bermuda Ltd v Todd* (1993) Court of Appeal, Bermuda, Civ App No 13 of 1992 (unreported), per da Costa JA; *Coney Island Caribbean Amusements Inc v Good Times Shows Inc* (1984) 37 WIR 79, p 81, per Williams CJ (Ag).

47 [1994] 4 All ER 52.

48 (1996) *The Times*, 31 October.

(i) the usual undertaking as to damages. A claimant may be required to make a payment into court as compensation to the defendant in the event that the injunction causes loss to him;

(ii) notification of the injunction to the defendant. Apart from this requirement, a copy of the affidavit in support of the injunction must also be served on the defendant together with the claim form (unless it has already been served);

(iii) information for the third parties involved regarding their right to apply to the court for a variation of the injunction or to apply for directions;

(iv) indemnification of any third party in respect of expenses that are incurred in complying with the injunction.

(b) *prevention of the defendant from dissipating his assets*. In addition, an injunction often contains discovery in respect of the nature and location of other assets and documents, and where necessary the delivery of those items.[49]

(c) *provisos and limitation of the injunction*:

(i) *provisos.* The injunction should allow the defendant to draw on his assets for his ordinary living expenses in accordance with his lifestyle; to pay his litigation costs;[50] and to settle his business debts. The injunction will also expressly state that the defendant's bank should have a right of set off in respect of the defendant's debts which accrued before the injunction. Also, an injunction operating against foreign assets should contain the proviso that, in so far as it is intended to have extra-territorial effect, no person should be affected by it until, and only to the extent that, it is declared enforceable by the relevant foreign court (unless the person is the one to whom the injunction is addressed, or a third party who is within the jurisdiction of the courts where the case is proceeding and who has notice and is able to prevent breaches of the injunction). This is known as a '*Babanaft* proviso';[51]

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49 See *Re Agua Santa Concrete Products Ltd* (1990) 3 Carib Comm LR 12, High Court, Trinidad & Tobago. In *Laager v Kruger* [1996] CILR N 2, Grand Court, Cayman Islands, Williams J (Ag) held that the court may, in aid of a Mareva injunction, order discovery going beyond the usual process of disclosure of assets by affidavit, by the inspection and copying of the defendant's financial documents seized by the police, if the claimant can show that his access to the documents is threatened by the risk of their removal out of the jurisdiction upon the defendant's extradition, or of their destruction by the defendant. See, also, *United Bank for Africa Ltd v Trivest Co Ltd* (1982) Supreme Court, The Bahamas, no 430 of 1981 (unreported).

50 *TDK v Video Choice Ltd* [1986] 1 WLR 141; *JP Morgan and Co v Collins* [1996] CILR N 6, Grand Court, Cayman Islands.

51 See *Babanaft International Co v Bassatne* [1989] 1 All ER 433; *Derby and Co Ltd v Weldon (No 2)* [1989] 1 All ER 1002.

(ii) *limitations*. The injunction may be of limited duration, in which case a return date for the claimant to renew the injunction will be fixed, or it may be expressed to continue 'until trial (or judgment) or further order'.[52] In the latter case, the injunction should include a provision allowing the defendant to apply for discharge or variation of the injunction on 24 hours' notice to the claimant's attorneys.

Inter partes hearing

An *inter partes* hearing will take place if the claimant wishes to extend the duration of the injunction, or if the defendant applies to have the injunction varied or discharged.

Variation

The defendant may apply to a High Court judge for a variation of the freezing injunction. The defendant must first provide the court with security to cover the claimant's claim, and the defendant must also have complied with any discovery made pursuant to the injunction.

Grounds for variation include a change of circumstances or inadequate provision made for the defendant as listed under the section headed 'provisos'.[53]

Discharge

A defendant may make an application to set aside a freezing injunction. A High Court judge may grant the discharge where:

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52 In *Vickers v Visual Sciences International Ltd* (1982) Court of Appeal, Bermuda, Civ App no 10 of 1981 (unreported), Blair-Kerr P took the view that, unless there are special circumstances, a return date to renew the injunction should be fixed; but the same court in *Bank of Bermuda Ltd v Todd* (1993) Court of Appeal, Bermuda, Civ App No 13 of 1992 (unreported), per da Costa JA, emphasised that the *Vickers* case cannot be taken to have laid down any rule of law, and the judge retains his discretion as to the appropriate form of injunction. See, also, *C Corp v P* [1994–95] CILR 189, Grand Court, Cayman Islands. It is an abuse of the process of the court for a party who is awarded Mareva injunctive relief not to proceed with the action. See *Walsh v Deloitte and Touche Inc*, Privy Council Appeal no 37 of 2000 (pp 8–9); *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc* [1988] 1 WLR 1337. CPR Rule 17.4 (5) provides that where an injunction is granted *ex parte*, the judge must fix (a) a date for the further consideration of the application and (b) a date on which the injunction will terminate unless a further order is made on the further consideration of the application.

53 See *JP Morgan and Co v Collins* [1996] CILR N 6, Grand Court, Cayman Islands, where Harre CJ held that where a defendant has no funds other than those subject to the injunction, it is wrong in principle to prevent his drawing on them to pay legal expenses to contest the injunction, as to do so would be effectively to give summary judgment for the claimant. In *Warren v Bosung Engineering and Construction Co Ltd* (2004) Supreme Court, Jamaica, no CLW011/2002 (unreported), Cole-Smith J varied a Mareva injunction to permit the defendant to pay legal fees.

(a) *There has not been full and frank disclosure by the claimant*. The claimant's duty extends not only to revealing material facts but also to making reasonable investigations that may reveal material facts.

In *Half Moon Bay Ltd v Levy*, Wolfe CJ explained the position thus:[54]

> The court will discharge or modify the order where the plaintiff failed to give full and frank disclosure of material facts at the *ex parte* hearing. It is incumbent on the plaintiff to draw the attention of the Judge to all facts and arguments which, if the defendant were present, he might put forward in opposition to the grant of the *Mareva* injunction. The plaintiff is obliged to make reasonable enquiries before he applies for the injunction, so that he is in a position to know what such arguments for the defendant might be.

(b) *The defendant establishes that there is no real risk that he will dispose of his assets*.

(c) *The defendant provides security for the claimant's claim*. This may consist of a charge over the defendant's property, payment of money into a bank account in the joint names of the defendant's and the claimant's attorneys, or payment of the sum claimed into court.

(d) *The claimant's affidavit is irregular*. An additional ground for discharge was applied by the Barbados High Court in *Vantage Distributors Ltd v Top Mode Ltd*,[55] where the defendant sought discharge of a Mareva injunction on the ground that the affidavits sworn by a director of the claimant company did not comply with Ord 41, Rule 5 of the RSC,[56] in that the sources and grounds of information and belief were not stated. After referring to *dicta* of Lord Alverstone CJ to the effect that such affidavits 'ought not to be looked at at all . . . unless the defendant's statement is corroborated by someone who speaks from his own knowledge',[57] and to the even stronger language of Rigby LJ, who described such affidavits as 'utterly irregular',[58] King J directed the offending affidavit to be struck out, with the result that the Mareva injunction obtained thereby was discharged.

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54 (1997) Supreme Court, Jamaica, no CL H-012 of 1996 (unreported). Differences in affidavits filed by partners are not necessarily indicative of non-disclosure: *Samlal Seepersad Hardware Ltd v Lyons Automobiles Ltd* (1996) High Court, Trinidad & Tobago, no S1300 of 1996 (unreported), per Barnes J.

55 (1992) 28 Barb LR 139.

56 See also CPR Rule 30.3(2).

57 *Young v JL Young Manufacturing Co Ltd* [1900] 2 Ch 753, p 754.

58 *Ibid*, p 755.

Figure 11
Mareva injunction

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2003
CLE/GEN/No 7856

BETWEEN

LAMBADA HOLDINGS LIMITED — INTENDED PLAINTIFF

AND

LAWSON GAYNOR — INTENDED DEFENDANT

INJUNCTION PROHIBITING DISPOSAL OF ASSETS WORLDWIDE

IMPORTANT

NOTICE TO THE DEFENDANT:

(1) This Order prohibits you from dealing with your assets up to the amount stated. The Order is subject to the exceptions at the end of the Order. You should read it all carefully. You are advised to consult an attorney as soon as possible. You have a right to ask the court to vary or discharge this Order.

(2) If you disobey this Order, you may be found guilty of contempt of court and may be sent to prison or fined or your assets may be seized.

THE ORDER

An application was made on the 3rd of April 2003 by counsel for the Plaintiff to The Honourable Mr Justice Holford Noake, who heard the application supported by the affidavit listed in Schedule I and accepted the undertakings in Schedule 2 at the end of this Order.

As a result of the application IT IS ORDERED by The Honourable Mr Justice Holford Noake that:

(1) *Disposal of assets*

(a) The Defendant must not (i) remove from The Bahamas any of his assets which are in The Bahamas whether in his own name or not and whether solely or jointly owned up to the value of $3.6 million, or (ii) in any way dispose of or deal with or diminish the value of any of his assets whether they are in or outside The Bahamas whether in his own name or not and whether solely or jointly owned up to the same value. This prohibition includes the following assets in particular:

(i) the property known as 25A Byron Street, Nassau, or the net sale money after payment of any mortgages if it has been sold;

(ii) the property and assets of the Defendant's business carried on at 25A Byron Street, Nassau, or the sale money if any of them has been sold; and

(iii) any money in the account numbered 41793882 at the Lower Bay Street branch of the Bank of Athens.

(b) If the total unencumbered value of the Defendant's assets in The Bahamas exceeds $3.6 million, the Defendant may remove any of those assets from The Bahamas or may dispose of or deal with them so long as the total unencumbered value of his assets still in The Bahamas remains above $3.6 million. If the total unencumbered value of the Defendant's assets in The Bahamas does not exceed $3.6 million, the Defendant must not remove any of those assets from The Bahamas and must not dispose of or deal with any of them, but if he has other assets outside The Bahamas the Defendant may dispose of or deal with those assets so long as the total unencumbered value of all his assets whether in or outside The Bahamas remains above $3.6 million.

(2) *Disclosure of information*

(a) The Defendant must inform the Plaintiff in writing at once of all his assets whether in or outside The Bahamas and whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The Defendant may be entitled to refuse to provide some or all of this information on the ground that it may incriminate him.

(b) The information must be confirmed in an affidavit, which must be served on the Plaintiff's attorneys within three days after this Order has been served on the Defendant.

EXCEPTIONS TO THIS ORDER

(1) This Order does not prohibit the Defendant from spending $1,500 per week towards his ordinary living expenses and $4,500 per week towards his ordinary and proper business expenses and also a reasonable sum on legal advice and representation. But before spending any money the Defendant must tell the Plaintiff's attorneys from where the money is to come.

(2) This Order does not prohibit the Defendant from dealing with or disposing of any of his assets in the ordinary and proper course of business.

(3) The Defendant may agree with the Plaintiff's attorneys that the above spending limits should be increased or that this Order should

be varied in any other respect, but any such agreement must be in writing.

(4) The Defendant may cause this Order to cease to have effect if the Defendant provides security by paying the sum of $3.6 million into court or makes provision for security in that sum by some other method agreed with the Plaintiff's attorneys.

DURATION OF THIS ORDER

This Order shall remain in force until judgment in this Action unless before then it is varied or discharged by Order of the Court.

This Order shall also cease to have effect if the Defendant provides security as provided above or if the Plaintiff does not provide a bank guarantee in the sum of $150,000 within three days of this Order.

VARIATION OR DISCHARGE OF THIS ORDER

The Defendant (or anyone notified of this Order) may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but anyone wishing to do so must first inform the Plaintiff's attorneys.

NAME AND ADDRESS OF PLAINTIFF'S ATTORNEYS

The Plaintiff's attorneys are: Odle Foss & Co
12B Pigeon Parade Nassau
Tel: 4258139 (Office hours)
3274416 (Out of office hours)

INTERPRETATION OF THIS ORDER

In this Order, 'he', 'him', or 'his' include 'it' or 'its'.

EFFECT OF THIS ORDER

(1) A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

(2) A Defendant, which is a corporation and, which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any other way.

THIRD PARTIES

(1) *Effect of this Order*. It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of the Order. Any person doing so may be sent to prison, fined or have his assets seized.

(2) *Effect of this Order outside The Bahamas*. The terms of this Order do not affect or concern anyone outside the jurisdiction of this Court until it is declared enforceable or is enforced by a court in the relevant country and then they are to affect him only to the extent

they have been declared enforceable or have been enforced UNLESS such person is:

(a) a person to whom this Order is addressed or an officer or an agent appointed by power of attorney of such a person; or

(b) a person who is subject to the jurisdiction of this Court and

(i) has been given written notice of this Order at his place of residence or place of business within the jurisdiction of this Court, and

(ii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order.

(3) *Set off by banks*. This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility that it gave to the Defendant before it was notified of the Order.

(4) *Withdrawals by the Defendant*. No bank need enquire as to the application or proposed application of any money withdrawn by the Defendant if the withdrawal appears to be permitted by this Order.

SCHEDULE 1

The Plaintiff relied on the following draft affidavit:
[Alexander D Brown]

SCHEDULE 2

Undertakings given to the Court by the Plaintiff

(1) If the Court later finds that this Order has caused loss to the Defendant, and decides that the Defendant should be compensated for that loss, the Plaintiff will comply with any Order the Court may make.

(2) The Plaintiff will on or before the 7th day of April 2003 cause a written guarantee in the sum of $150,000 to be issued from a bank having a place of business within The Bahamas, such guarantee being in respect of any Order the Court may make pursuant to the foregoing paragraph. The Plaintiff will further, forthwith upon such issue, cause a copy of the guarantee to be served on the Defendant.

(3) As soon as practicable, the Plaintiff will issue and serve on the Defendant a Writ of Summons in the form of the draft writ produced to the Court together with this Order.

(4) The Plaintiff will cause an affidavit to be sworn and filed substantially in the terms of the draft affidavit produced to the Court.

(5) Anyone notified of this Order will be given a copy of it by the Plaintiff's attorneys.

(6) The Plaintiff will pay the reasonable costs of anyone other than the Defendant, which have been incurred as a result of this Order, including the costs of ascertaining whether that person holds any of the Defendant's assets, and if the Court later finds that this Order has caused such person loss, and decides that such person should be compensated for that loss, the Plaintiff will comply with any Order the Court may make.

(7) If for any reason this Order ceases to have effect (including in particular where the Defendant provides security as provided for above or the Plaintiff does not provide a bank guarantee as provided for above), the Plaintiff will forthwith take all reasonable steps to inform in writing any person or company to whom he has given notice of this Order, or who he has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect.

(8) The Plaintiff will not without the leave of the Court begin proceedings against the Defendant in any other jurisdiction or use information obtained as a result of an Order of the Court in this jurisdiction for the purpose of civil or criminal proceedings in any other jurisdiction.

(9) The Plaintiff will not without the leave of the Court seek to enforce this Order in any country outside The Bahamas.

Dated the 3rd of April 2003.

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Registrar

SEARCH ORDERS

An Anton Piller or search order is a mandatory injunction which orders a defendant to allow an independent attorney[59] to enter the defendant's premises for the purpose of searching and seizing documents or property which are relevant to the claimant's claim. An Anton Piller injunction is a form of discovery that can be combined with the other methods of disclosure. It is usually sought in cases of breach of copyright or infringement of patents, but is not confined to those types of claim.[60] An essential feature of the Anton Piller order is the element of surprise; the order is sought *ex parte*

59 See below, pp 130, 131.

60 See *Emanuel v Emanuel* [1982] 1 WLR 669.

so that the defendant will not have time to remove incriminating material. An application is normally made after issue but before service of the writ or claim form, though in urgent cases application may be made before issue. Under CPR Rule 17.1(1)(h), the Anton Piller order is called a 'search order'.

Anton Piller orders are not yet commonly encountered in the Caribbean, though it is likely that they will become important as more jurisdictions in the region introduce copyright and other intellectual property legislation.[61]

This type of interlocutory relief originated from the case of *Anton Piller KG v Manufacturing Processes Ltd*,[62] in which a German manufacturing company made a pre-trial *ex parte* application to search and seize documents in the possession of their agents who were believed to be supplying their competitors with confidential manuals and information about the plaintiffs' products. In ordering the relief sought, the court, per Ormrod LJ, outlined three requirements, while stating that the grant of the order was in any event subject to the discretion of the court:

(a) the claimant must show an extremely strong prima facie case on the merits;

(b) the claimant must show that the defendant's acts are causing serious actual or potential harm to the claimant's interests; and

(c) there must be clear evidence that the defendant has in his possession incriminating evidence or other material and that there is a serious risk that the defendant may destroy such material before an *inter partes* application can be made.[63]

Procedure

An application can be made, pre- or post-trial,[64] *ex parte* in Chambers.

The claimant should produce the following documents:

(a) claim form together with particulars of claim, setting out details of the substantive claim against the defendant;

(b) affidavit in support, showing evidence of the three matters laid down by Ormrod LJ in *Anton Piller*; and

(c) draft order, in the form set out in *Civil Procedure* ('*White Book*').

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61 The court has an inherent jurisdiction to grant Anton Piller orders. See CPR Rule 17.1(1).

62 [1976] Ch 55.

63 Lord Denning in *Yousif v Salama* [1980] 3 All ER 405 regarded the defendant as untrustworthy; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380.

64 In aid of execution of judgment: *Distributori Automatici Italia SpA v Holford General Trading Co Ltd* [1985] 1 WLR 1066.

The claimant's undertakings

The claimant's undertakings are partly implied and partly expressed. He impliedly undertakes not to use any materials obtained from the search for any purpose other than that for which they were obtained.[65] His expressed undertakings in the order are that:

(a) an independent attorney will serve on the defendant the Anton Piller order, a supporting affidavit and exhibits attached thereto, and a notice as to the date of the *inter partes* hearing;

(b) the defendant will be supplied with a written report prepared by the independent attorney to be considered by the court on the date of the *inter partes* hearing;

(c) the proceedings will remain secret until the *inter partes* hearing;

(d) if the seized materials are needed for proceedings other than those for which the Anton Piller order was sought, leave of the court will first be obtained; and

(e) he will pay any damages which the court orders him to pay.

Further, the claimant's attorney must undertake to keep in safe custody and insure all seized materials and return all such material either to the defendant or to his attorney within a reasonable time.

Independent attorney

It is now an established rule of practice in England and Wales that service of the relevant documents should be carried out by an independent attorney.[66] The function of the attorney is supervisory in nature. He must explain the meaning of the order in ordinary language and in an unbiased way to the defendant who is being served. If he fails to do so he may be liable for contempt of court.[67] He must also allow the defendant a short period of time, usually about two hours, in which to obtain legal advice, before executing the order.

The independent attorney must also be present at the time of the peaceful entry and search, which must take place during business hours.

It is not clear, however, whether courts in the Caribbean will follow this rule of practice. In the recent Trinidadian case of *Interserv Ltd v Kong*,[68] there

65 *Home Office v Harman* [1983] 1 AC 280.

66 *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840.

67 *VDU Installations Ltd v Integrated Computer Systems and Cybernetics Ltd* (1988) *The Times*, 13 August.

68 (1997) High Court, Trinidad & Tobago, no 5291 of 1996 (unreported). See, also, *Proman Inc v National Gas Co of Trinidad & Tobago* (1988) High Court, Trinidad & Tobago, no 3848 of 1988 (unreported).

was no independent attorney present at the time of execution of the Anton Piller order, which was carried out by the plaintiff's attorney. Nowhere in Ventour J's judgment was it suggested that the absence of an independent attorney was a breach of any rule of practice or procedure.

Safeguards for the defendant

An Anton Piller order may by its nature be oppressive. In the first place, it may generate among the defendant's creditors a feeling of mistrust of the defendant. It may also cause financial hardship to the defendant, especially where he is required to surrender his trade records to the claimant.[69] Therefore, in order to avoid unnecessary inconvenience and hardship, the claimant must follow the requirements of the order strictly. Failure to comply with the requirements may be used at the trial as evidence against the claimant.

On the other hand, it was held in *Interserv Ltd v Kong*[70] that, where the claimant exceeds the authority given to him by the order, this does not amount to a breach exposing him to contempt proceedings. In this case, an Anton Piller order required the defendant to allow the claimant to enter the defendant's premises 'for the purpose of inspecting, photocopying and looking for and removing into the claimant's attorney's custody', inter alia, (a) any computer hardware, and (b) any computer storage devices. After removing a computer, the claimant accessed the hard drive and printed certain files therefrom, which the defendant alleged to be a breach of the order. Ventour J held that there was no breach of the order and that contempt proceedings against the claimant were misconceived, the claimant having given no undertaking with respect to the computer or the material stored in it. He continued:

> If the plaintiff exceeds its authority by taking away more than that authorised by the order of the court, will such an act amount to contempt of court? I think not. In this regard the order simply renders lawful what would otherwise be unlawful; that is the taking away of the defendant's property. If, therefore, the plaintiff takes away what it is not authorised or empowered to take away it thereby exposes itself to an action in law for damages for trespass to goods or damages for infringement of intellectual property rights or any such cause of action. The plaintiff's action clearly, in my view, would not amount to a breach of the order of the court.

A further safeguard for the defendant is his common law privilege against self-incrimination.[71] The defendant is not required to disclose any material

69 In *Columbia Picture Industries Inc v Robinson* [1986] 3 All ER 338, the defendant's video store was closed down.

70 (1997) High Court, Trinidad & Tobago, no 5291 of 1996 (unreported).

71 *Arawak v Inspector of Banks and Trust Companies* (1994) 47 WIR 162, Court of Appeal, Eastern Caribbean States.

to the claimant that can be used in criminal proceedings against him. The considerations to which the court will have regard in deciding whether privilege can be claimed were stated in *Renworth Ltd v Stephenson*,[72] viz:

(a) whether there is a clear link between the answers and the offences; and

(b) whether any of the possible offences are offences in respect of which the privilege against self-incrimination has been removed and replaced by a more limited protection provided by statute.

Non-compliance by defendant

If the defendant fails to comply with the order, the two sanctions are (a) that he may be committed to prison for contempt, and (b) that failure to comply will be 'damning evidence' against him at the subsequent trial.[73] The obligation to allow entry and search arises only after the defendant has been given a reasonable time to seek the advice of his attorney. If, after such reasonable period, the defendant refuses entry, he may be held in contempt, even where he makes a successful application for discharge shortly afterwards.[74]

Variation and discharge

It is also open to the defendant or any other third party who may be affected by the grant of an Anton Piller order to apply for a variation or discharge. The same principles as under Mareva injunctions will be applied.[75]

ORDER FOR THE PRESERVATION OF PROPERTY

An alternative, and less drastic, means of securing the preservation of material relevant to an action is to seek an order under CPR Rule 17(1)(c)(i) whereby the court may make an order for the detention, custody or preservation of any property that is the subject-matter of the proceedings, or for the inspection of any such property in the possession of a party to the proceedings.

Such an order, which may be made at the case management conference[76] or earlier, is often used to obtain inspection of an opponent's property by the applicant's expert witness; for example, where the claimant's engineer needs to examine and test a machine in the defendant's factory, which has allegedly caused injury to the claimant. It may also be used where, for instance, in a libel action, the claimant seeks the preservation of books, tapes or videos containing libellous material.

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72 [1996] 3 All ER 244, p 250.

73 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55, p 62, per Ormrod LJ.

74 *Wardle Fabrics Ltd v Myristis Ltd* [1984] FSR 263.

75 See above, pp 122, 123.

76 By application notice within Part 11.

CHAPTER 14

DISCLOSURE AND INSPECTION OF DOCUMENTS

Disclosure is the procedure whereby one party to an action must disclose to the other party, by means of a list, the existence of all documents which are or have been in his control and which are directly relevant to the issues in the action.[1] Disclosure procedure refers to the disclosure and inspection of documents, as opposed to facts. 'Documents' include not only originals and photocopies of printed papers but also photographs, plans, tape recordings (including audio, video and video surveillance tapes) and computer programs. In short, 'documents' refers to any recorded information.[2]

The importance of disclosure is that:

(a) it will often reveal documents that are critical to a party's prospects of success in the litigation;

(b) it enables the parties to evaluate more accurately the strengths and weaknesses of their cases; and

(c) it enables the issues to be narrowed, thereby encouraging settlements, with the resultant saving of time and expense.

WHAT DOCUMENTS MUST BE DISCLOSED

Under the CPR, a party's duty to disclose documents is limited to those that are or have been in his control. A document is under a party's control if:

(a) it is or was in the physical possession of that party;

(b) that party has or has had a right to possession of it; or

(c) that party has or has had a right to inspect or take away copies of it.[3]

There are two kinds of disclosure under the CPR: (a) standard disclosure; and (b) specific disclosure.

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1 Rules 28.1(4) and 28.4(1)

2 Rule 28.1(2).

3 Rule 28.2 [Rule 28.11 (T&T)].

Standard disclosure[4]

Unlike under the RSC, there is no 'automatic' disclosure of documents under the CPR, and directions for standard disclosure should normally be given at the first case management conference. In standard disclosure, each party must disclose all documents which are *directly relevant to the matters in question in the proceedings.* A document is 'directly relevant' only where:

(a) the party with control of the document intends to rely on it;

(b) the document tends to adversely affect that party's case; or

(c) it tends to support another party's case.[5]

Examples of directly relevant documents in, for instance, a simple road accident case in which the claimant has suffered personal injuries and damage to his vehicle, are doctors' bills, wage slips showing loss of earnings, a letter from the claimant's employer and car repair invoices. Such documents are directly relevant because the claimant will no doubt rely on them to substantiate his claim for damages in tort. There may also be documents that tend to adversely affect the claimant's case and to support the defendant's case. Thus, for example, it has been held that a claimant may also be required to disclose all his *past* hospital records and general practitioner 's notes, since they might be of relevance in showing some wholly unrelated disease which might sometime in the future cause the claimant's earning capacity to be reduced before normal retirement age.[6]

When giving standard disclosure, a party must make a reasonable search[7] for documents falling within the scope of such disclosure. The factors relevant in deciding the reasonableness of a search include:

(a) the number of documents involved;

(b) the nature and complexity of the proceedings;

(c) the ease and expense of retrieval of any particular document; and

(d) the significance of any document which is likely to be located during the search.

The court may dispense with or limit standard disclosure, and the parties themselves may agree in writing to do so.[8]

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4 Rule 28.4 [Rule 28.2 (T&T)] and Rule 28.5.

5 Rule 28.1(4).

6 *Dunn v British Coal Corp* [1993] PIQR 275, CA.

7 Rule 28.5.

8 Rule 28.4(2), (3).

Specific disclosure[9]

An order for specific disclosure requires the party to whom the order is addressed to disclose only those documents or classes of documents specified in the order.[10] An application for specific disclosure may be made without notice at a case management conference.[11] There are three main types of circumstance where such an order may be useful:

(a) where the applicant wishes to challenge the sufficiency of the list provided by his opponent in standard disclosure;

(b) where, as an adjunct to a freezing or search order, the applicant seeks an order to disclose material documents and the whereabouts of any assets; and

(c) where a defendant, before serving a defence, requires specific disclosure against the claimant in order to assist him in putting forward a full defence rather than an initial bare denial.

In deciding whether to order specific disclosure, the court must consider whether such disclosure is necessary in order to dispose of the claim fairly or to save costs, having regard to the likely benefits and costs of the disclosure, and whether the party against whom the order is proposed to be made has the financial resources to comply.[12] If the answer to the latter question is in the negative, the court may make the order on terms that the claimant pays the other party's costs in making disclosure.[13]

Procedure

Each party must make, and serve on every other party, *a list of documents* identifying the documents or classes of documents in a convenient order and as concisely as possible.[14] The list is divided into two schedules:

(1) *Schedule 1, part 1* lists those documents (a) which are or were in the physical possession of the party, or (b) of which the party has or has had the right to possession, or (c) which the party has or has had a right to inspect or take copies of, and on which the party intends to rely in the proceedings.

Schedule 1, part 2 lists those documents of which the party claims he has a right to withhold disclosure and inspection, and states reasons for claiming a right not to disclose.

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9 Rule 28.6 (Jam); Rule 28.5 (OECS Bel and B'dos); Rule 28.7 (T&T).

10 Rule 28.6(1)(a) (Jam); Rule 28.5(1)(a) (OECS Bel and B'dos); Rule 28.7(1)(a) (T&T).

11 Rule 28.6(3) (Jam); Rule 28.5(3) (OECS Bel and B'dos); Rule 28.7(3) (T&T).

12 Rule 28.7. See *Gayle v Desnoes and Geddes Ltd* (2005) Supreme Court, Jamaica, no 2004/HCV (unreported), per Mangatal J.

13 Rule 28.7(3) (Jam); Rule 28.6(3) (OECS, Bel and B'dos); Rule 28.8(3) (T&T).

14 Rule 28.8 (Jam); Rule 28.7 (OECS, Bel and B'dos); Rule 28.6 (T&T).

(2) *Schedule 2* lists those documents that are no longer in the control of the party, and states what, to the best of the party's information and belief, has happened to them.

The attorney acting for the party making the list must explain the necessity of making full disclosure and the possible consequences of failing to do so, and the attorney must certify that the explanation has been given.[15] The party must also certify that he understands the duty of disclosure and that, to the best of his knowledge, the duty has been carried out.[16]

Upon receipt of the list of documents, the recipient may give written notice of his wish to inspect any document, except those no longer in the possession[17] of the party making disclosure and those which the latter claims a right to withhold.[18] The party making disclosure must permit inspection not later than seven days from the date of the notice.[19] If the recipient of the list undertakes to pay the reasonable cost of copying, the person making disclosure must supply him with a copy of each document requested not more than seven days after the date of the notice.[20]

Inspection of documents referred to in statements of case

Rule 28.17 provides that if any document is referred to in a claim form, statement of case, witness statement, affidavit or expert's report, a party who wishes to inspect and copy such document must give written notice of such desire to the party or witness who referred to the document. The recipient of the notice must comply not more than seven days after the notice is served. If the party serving the notice undertakes to pay the reasonable cost of copying, the recipient must supply a copy of each document requested not more than 10 days after receipt of the undertaking.

This procedure may be useful where, for example, a party's statement of case refers to 'an agreement in writing dated . . .', since it gives the opportunity for inspection of the document without waiting for formal discovery, which will not take place until at least the first case management conference. Thus, for instance, a document referred to in a claim form may be inspected by the defendant before he drafts his defence.

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15 Rule 28.8 [Rule 28.9 (Jam)].

16 Rule 28.9 [Rule 28.10 (Jam)].

17 As McCalla J (Ag) pointed out in *International Hotels Jamaica Ltd v New Falmouth Resorts Ltd* (2005) Court of Appeal, Jamaica, Civ App no 56 of 2003 (unreported), physical possession of the documents by the party required to give disclosure is not needed in order for him to give standard disclosure. He can comply with an order for standard disclosure simply by revealing that the document exists or existed.

18 Rule 28.11(2) [Rule 28.12(2) (Jam)].

19 Rule 28.11(3) [Rule 28.12(3) (Jam)].

20 Rule 28.11(4) [Rule 28.12(4) (Jam)].

A party who claims a right to withhold inspection of a document must make the claim, stating the grounds for it, in writing to the party seeking inspection.[21]

If a party fails to comply with a notice to inspect, the party seeking inspection may apply for an order of specific inspection; an affidavit in support will be necessary.

Privileged documents

A party making disclosure may object to producing privileged documents for inspection. Where privilege is claimed for any document, the court may itself inspect it in order to decide whether the claim is justified. The main types of privileged documents are:

(1) *Communications between attorney/solicitor and client.* Any document written or created by an attorney and addressed to his client (and vice versa) is privileged, provided it is intended to be confidential and is written or created with the object of obtaining or giving legal advice or assistance;[22] it is not necessary that the document should have been prepared with the present or any litigation in mind. Instructions and briefs to counsel and counsel's opinions, drafts and notes are also privileged. Advice of a non-legal nature given by an attorney or solicitor, such as investment advice, will probably also be privileged. This and the following types of communications are collectively referred to as 'legal professional privilege'.

(2) *Documents prepared with a view to litigation.* All documents which are prepared for the purpose (though not necessarily the sole or primary purpose) of assisting a party or his legal advisers in actual or anticipated litigation are privileged, whether they relate to obtaining or giving advice regarding the litigation, or to obtaining the necessary evidence. Examples of documents falling into this category are experts' reports, witness statements and affidavits. In order to attract privilege, the document must be shown to have come into existence when litigation was contemplated or pending.

It has been held that communications between an assured and the insurance company indemnifying him, such as an accident claim form, are privileged;[23] but the privilege does not extend to communications between co-defendants, nor to communications between a party personally and a third party, unless

21 Rule 28.14 [Rule 28.15 (Jam)].

22 *Minet v Morgan* (1873) LR 8 Ch 361; *Johnston v Arbitrium (Cayman Islands) Handels AG* [1997] CILR 36; *Argentine Holdings Cayman Ltd v Buenos Aires Hotel Corp SA* [1997] CILR 90.

23 *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134.

the *dominant purpose* for which the document was prepared was for submission to an attorney with a view to pending or anticipated litigation.[24]

An issue relating to legal professional privilege arose in the Cayman case of *Johnston v Arbitrium* (*Cayman Islands) Handels AG*.[25] Here, the claimant sought an account of moneys alleged to have been received by the defendant as trustee or agent of the claimant. Reference was made in the statement of claim to an affidavit sworn by the claimant, which gave particulars of dates and amounts of payments made to the defendant in the course of a joint business venture. The defendant served a notice on the claimant requesting production of the affidavit for inspection. The claimant objected to the inspection on the ground of legal professional privilege.

Smellie J accepted that the affidavit was, in effect, a statement of instructions and a witness statement which took the form of an affidavit only because the claimant had been so advised by his overseas attorney, and it was covered by legal professional privilege; further, that the privilege had not been waived by the claimant's reference to and apparent reliance upon the affidavit in his statement of claim. He said:[26]

> It is submitted on behalf of the [claimant] that the document is covered by legal professional privilege and is exempt from discovery . . . I did read the affidavit for the purpose of determining . . . whether it is privileged as claimed. I am satisfied that it clearly is, and for the reasons asserted by the [claimant]. In this regard, I only need further to add my express finding that the affidavit was intended to be a communication by way of instructions between the [claimant] and his legal advisers for the purpose of obtaining advice. These were instructions which . . . were also given in contemplation of litigation. The affidavit falls squarely within the first of the two classes of what Lord Denning MR described as privilege in aid of litigation in *Buttes Gas and Oil Co v Hammer (No 3)*:[27]
>
> > Privilege in aid of litigation can be divided into two distinct classes: the first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining advice. It exists whether litigation is anticipated or not.
> >
> > The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in *Waugh v British Railways Board* . . .[28] It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they come into existence at the instance of the party himself – with the dominant purpose of being used in the anticipated litigation.

24 *Waugh v British Railways Board* [1980] AC 521.

25 [1997] CILR 36.

26 [1997] CILR 36, p 39.

27 [1981] 1 QB 223, p 243.

28 [1980] AC 521.

Documents disclosed by mistake

Rule 28.16 of the Jamaican and Rule 28.15 of the OECS CPR provide that where a party *inadvertently* allows a privileged document to be inspected, the party who has inspected it may use that document or its contents only with the permission of the court, or with the agreement of the disclosing party. Further, it is noteworthy that in *Breeze v John Stacey and Sons Ltd*,[29] the English Court of Appeal has held that established principles applicable to cases of inadvertent disclosure of privileged documents had not been and should not be affected by the new CPR.

In *Al Fayed v Commissioner of Police*,[30] a case decided under the equivalent provisions of the English CPR (Rule 31.20), it was held that where privileged documents were mistakenly disclosed for inspection by one party to litigation, in circumstances in which it would not have been obvious to a reasonable solicitor that a mistake had been made, the disclosing party was not entitled to an injunction ordering the receiving party to return the documents. Clarke LJ said that the following principles could be derived from the cases:

(a) a party giving inspection of documents must decide before doing so which privileged documents he wishes to allow the other party to see and which he does not;

(b) although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority to waive privilege in respect of relevant documents;

(c) a solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege that might otherwise have been claimed for such documents has been waived;

(d) in those circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will generally be too late for him to claim privilege and to attempt to correct the mistake by claiming injunctive relief;

(e) however, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice so requires, as, for example, in the case of inspection procured by fraud;

(f) in the absence of fraud, all depends on the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake – that is, where it would have been obvious to a reasonable solicitor that inspection had been given by mistake – and where there are no other circumstances making it unjust or inequitable to grant relief;

29 (1999) *The Times*, 8 July. See generally, Kodilinye, V (1999) 9 Carib LR 246–61.

30 (2002) *The Times*, 17 June.

(g) where a solicitor gives detailed consideration to whether the documents have been made available for inspection by mistake, and honestly concludes that there has been no mistake – that is, a relevant pointer to the conclusion that it would not have been obvious to a reasonable solicitor that a mistake had been made, though it is not conclusive;

(h) since the court is exercising an equitable jurisdiction, there are no rigid rules.

Clarke LJ then went on to hold that the same approach should be adopted to the exercise of the discretion conferred on the court by Rule 31.20 of the CPR. In the instant case, which involved mistaken disclosure of documents by the defendant police authority, there had been a careful approach to disclosure and two experienced solicitors for the claimants genuinely believed that the documents were made available to the claimants on purpose. That was a significant factor in support of the conclusion that it was not obvious to the claimants' solicitors that there had been a mistake. It was accordingly held that the claimants should be permitted to make proper use of the documents as between the parties to the action, but that the court retained all its other case management powers, including those relating to the use and deployment of the documents and their contents.

'WITHOUT PREJUDICE' COMMUNICATIONS

Communications between parties or their advisers are *not* privileged. Thus, for instance, letters written by an opponent or his adviser may be produced in evidence by the party to whom they are addressed, for example to establish admissions or to use in cross-examination in order to show inconsistency in versions of facts put forward. An exception to this principle is the 'without prejudice' communication, the purpose of which is to enable the parties to negotiate in order to settle a dispute without the correspondence relating to the negotiations being used against them should the negotiations fail. In such circumstances, letters marked 'without prejudice', whether litigation was current or not, will be privileged and may not be put in evidence unless both parties consent.[31] So long as the correspondence is in the course of negotiations, it may be privileged, even if not expressly marked 'without prejudice'; conversely, the use of those words does not confer privilege if the correspondence was not in fact written *bona fide* for the purpose of negotiations.

31 *Rabin v Mendoza and Co* [1954] 1 WLR 271. Thus, in *UYB Ltd v British Railways Board* (2000) *The Times*, 15 November, it was held that because public policy encouraged the settlement of disputes before resorting to law, such negotiations were made without prejudice to any future litigation, and that meant that at a future trial no reference could be made to earlier draft 'without prejudice' documents.

Figure 12
'Without prejudice' letter

15th November 2007
Messrs Dickens, Thakeray and Scott
Attorneys-at-Law
25 Princeton Street
Montego Bay

Dear Sirs,

WITHOUT PREJUDICE

Re: Claim No HCV 01777 of 2007: *Glenford Burrows (Administrator of the estate of Lurlene Jones,dec'd) v Ricardo Howells*

We act for the Defendant in this matter through his insurers, Caribbean Motor and General Insurance Association Ltd, and we have filed an acknowledgment of service, courtesy copy of which should shortly be served on you.

We have received instructions from our client to approach you with a view to negotiating an amicable settlement here, and as such we ask that you let us have details of your client's claim with substantiating vouchers and receipts for our consideration, after which we will ask that you contact us with a view to setting up an appointment where we can finalise settlement in this matter.

We look forward to your early response.

Yours faithfully,

_____
Garner, Tatum & Peterson
Attorneys-at-Law.

In *Issar Group of Companies Ltd v West Indies Alliance Insurance Company Ltd*,[32] there was a dispute between the parties and, whilst negotiations were in progress, the defendant made an offer to settle by 'without prejudice' letter to the claimant. Part of the contents of the letter was subsequently pleaded by the claimant in the statement of claim and reply to the defence, on the basis that it constituted an admission on the part of the defendant.

32 (2004) Court of Appeal, Jamaica, Civ App no 74 of 2004 (unreported).

The trial judge struck out the reference to the alleged admission and Harrison JA agreed with that ruling, emphasising that whether or not the contents of the letter should be interpreted as an admission, there was an attempt on the part of the defendant to negotiate a settlement in the matter and the document was therefore privileged and its contents ought not to have been pleaded in the statement of claim or in the reply to the defence. The authorities all illustrated that the underlying purpose of the rule regarding non-disclosure of 'without prejudice' negotiations was to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Harrison JA also reminded the parties that, by Rule 11.3(1), all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review, and the evidence in support of the application must be contained in an affidavit. Further, by Rule 27.3(1) as a general rule the Registry must fix a case management conference immediately upon the filing of the defence. The Rules therefore provided that all applications in relation to objections, including those concerning the disclosure of 'without prejudice' correspondence, should take place before trial, and if an application were not made at the case management conference or pre-trial review, the court should order the applicant to pay the costs of the application unless there are special circumstances (Rule 11.3 (2)).

ACTION FOR DISCLOSURE: THE *NORWICH PHARMACAL* RULE

The court derives its power to order this form of disclosure not from the CPR or the RSC but from its inherent jurisdiction.[33]

Disclosure in this context requires a third party who has in some way, usually unwittingly, become implicated in the commission of a tort or a fraud to disclose the name of, or information about, an alleged tortfeasor. An order of this nature is discretionary and the court has power to restrict its application, particularly where it may involve a public interest element, such as breach of confidentiality.

The classic formulation of the circumstances in which a third party may be required to make disclosure is contained in *Norwich Pharmacal Co v Customs and Exercise Commissioners*.[34] In this case, the claimant was owner of a patent for the production and sale of a chemical fertiliser. The Customs and Excise figures for 1968–70 showed that a number of consignments of the chemical had been imported into the UK by firms other than the claimant, in breach

33 O'Hare, J and Hill, R, *Civil Litigation*, 10th edn, 2001, London: Sweet & Maxwell, para 30.041.

34 [1973] 2 All ER 943.

of the latter's monopoly. The claimant sought an order against the Commissioners to compel them to disclose the identities of the importers. The House of Lords held that the order should be made. Although the Commissioners had committed no tort, they had unwittingly assisted in the infringement of patent by giving the importers customs clearance to bring the products into the country. Lord Reid explained the principle thus:[35]

> [The authorities] seem to me to point to a very reasonable principle that if, through no fault of his own, a person gets mixed up in the tortious acts of others, so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did . . . But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration . . . I would therefore hold that the respondents must disclose the information now sought, unless there is some consideration of public policy which prevents that.

The *Norwich Pharmacal* principle may be particularly useful in the Caribbean, where the existence of several offshore jurisdictions attracting bank and trust business encourages movement of assets, occasionally in furtherance of fraud or other wrongdoing.

An example of an application for *Norwich Pharmacal* relief is the Cayman case of *Deutsch-Sudamerikanische Bank AG v Codelco*.[36] Here, the respondent company had brought actions in several jurisdictions to trace and recover money it had lost as a result of the alleged fraud of one of its senior employees and several other persons, some of whose identities were unknown. A *Norwich Pharmacal* order was made against the appellant bank on the ground that although the bank was in no way implicated in the fraud, it was in a position to identify the tortfeasors, and the respondent had a prima facie right to full information about the identity of all wrongdoers and about the extent of their wrongdoing. The court was satisfied, in making the order, that the bank had become involved, albeit innocently, in the wrongdoings of others, and there was clear evidence that some of the known tortfeasors had become clients of the bank. The bank did not seek to challenge the order, but applied for directions to enable it to comply with the order without 'disclosing confidential information about the affairs of innocent third parties or of the bank itself, [where] that disclosure might be prejudicial to the interests of those third parties or the bank'. The bank submitted that, on public policy grounds, it should be permitted to give the relevant information by affidavit, without producing the underlying documents, such as its transaction ledgers, from which that information was obtained. Furthermore,

35 *Ibid*, p 948.

36 [1996] CILR 1 (Grand Cayman Islands).

the bank argued that the respondent should be required to give an express written undertaking not to use the information for the purpose of any other proceedings.

Smellie J upheld the bank's submissions, stating that the extent of disclosure was a matter for the court's discretion. The bank was therefore permitted to give information by affidavit, and to receive the respondent's written undertaking not to use the information in any other proceedings. He said:[37]

> In this case, and at this stage of the proceedings, it is appropriate for the sake of preserving confidentiality that the disclosure should be full disclosure of all known information . . .
>
> The conditions were imposed notwithstanding the agreed principle that, ordinarily, by means of a proper *Norwich Pharmacal* application, a [claimant] would be entitled to the production of the supporting documentary or other real evidence, not only the sworn interpretation or extrapolation of that evidence by means of affidavit.
>
> Having noted that, I must also note that the evidence to be given by affidavit will be full and accurate and must be certain to serve the [claimant], to identify the wrongdoers, and to establish the necessary and appropriate course of action against them. In that respect also, the [claimant] is to be afforded the opportunity to discuss the affidavit in draft form in order to be able to address any areas of doubt or lack of clarity . . .
>
> Mr Ritchie also raised the concern that the condition requiring a written undertaking from the [claimant] to abide by the terms of the order is unnecessary and wrong in principle. He argued that it is sufficient to have the implied undertaking which puts the party getting [disclosure] and its counsel under an obligation to ensure that the information is used for no purpose other than that for which it is given. He cited *Home Office v Harman*,[38] the leading authority which establishes that there is an implied undertaking owed to the court that improper use will not be made of documents [disclosed] by order of the court. That undertaking is not only binding upon the party to whom the evidence has been disclosed, but also extends to his attorney and to anyone into whose hands the documents may come: see *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd*.[39]
>
> In *Alterskye v Scott*[40] and *Church of Scientology of California v DHSS* . . .[41] it was said that only in exceptional circumstances will the court require an express undertaking as a condition of providing [disclosure], as the implied undertaking is usually sufficient to protect the position of the party giving disclosure.

37 *Ibid*, pp 5–7.

38 [1983] 1 AC 280.

39 [1975] 3 WLR 728.

40 [1948] 1 All ER 409.

41 [1979] 3 All ER 97, CA.

> Mr Helfrecht, on behalf of the Attorney General, and Mr Jones cited the potential for abuse of confidential information allowed to be given overseas and beyond the jurisdiction of this court. This was not only as that potential is apparent from the circumstances of this case, but as well in many cases of the kind where [disclosure] in this jurisdiction is sought either for the purpose of advancing proceedings here, which are offshoots to foreign proceedings, or for the purpose of use directly in the foreign proceedings.
>
> For those reasons, both submitted it was also appropriate, as a matter of public policy, to require express undertakings to be given more as the rule than as the exception. I note that the cases cited and relied upon by Mr Ritchie derive from the English jurisdiction, where nearly all orders for [disclosure] are made for the purposes of local English proceedings, and where the parties and others who are likely to come into control of the [disclosed] information usually remain, throughout, directly amenable to the jurisdiction of the English court. Clearly, the difference in circumstances which often exists in the Cayman Islands will require, in appropriate cases, that written undertakings be given. Such cases are less likely to be exceptional than they are in England, and must be left to be recognised and dealt with in the discretion of the court. Having heard the concerns of the bank and of the Attorney General, I was persuaded that this is a case in which the written undertakings should be required by the order.

The 'mere witness' rule

Disclosure will not be ordered under the *Norwich Pharmacal* rule where the defendant was a mere witness or observer who was not implicated in the wrongdoing. The question as to whether the defendant was mixed up in the wrongdoing or whether he was a mere witness may be a difficult one to decide. In *Ricci v Chow*,[42] for example, the official journal of the Seychelles National Movement had published an article alleging that the claimant, in collaboration with others, had procured the assassination of a prominent member of the party. The claimant brought an action for damages for libel against the defendant, the secretary general of the party, on the ground that the defendant was responsible for the publication, or alternatively for an order that he should divulge the identities of the persons responsible. It was held that the case was not within the *Norwich Pharmacal* principle since the defendant had in no way facilitated the printing and publication of the article, unwittingly or otherwise, and the mere fact that he was aware of the identities of the alleged tortfeasors could not justify an order for disclosure at common law, even if his evidence was the only means by which they could be identified. The defendant was a mere witness or observer in relation to the publication and he had no involvement in the alleged libel; he was therefore not susceptible to an action for disclosure.

42 [1987] 3 All ER 534.

The *Bankers Trust* principle

An extension of the *Norwich Pharmacal* principle occurred in *Bankers Trust Co v Shapira*.[43] In this case, S and F had been paid US $1 m by the claimant bank under a forged cheque and had disappeared. S and F held accounts at a London bank to which the money was credited. The claimant obtained a freezing injunction restraining the London bank from disposing of any money S and F had paid into the bank, but the judge refused to order the bank to disclose the amounts standing in the accounts held by S and F, correspondence between the bank and S and F, and banking documents such as cheques drawn on the accounts and internal memoranda. The ground for refusal was that an order for disclosure should not be made so long as the true defendants to the action, S and F, had not been served with process. The English Court of Appeal, overruling the judge, held that disclosure could be ordered against the bank in order to give effect to a defrauded claimant's equitable right to trace his money, even though the bank had not incurred any personal liability. To justify the order, however, the evidence showing fraud on the part of the account holder had to be sufficiently strong to disentitle him from relying on the confidential relationship between him and his bank. Moreover, an order of disclosure would be on the terms that the claimant gave an undertaking in damages to the bank, paid any expenses incurred by the bank in making disclosure, and used the disclosed documents solely for the purpose of tracing the money. Lord Denning MR explained the position thus:[44]

> Discount Bank incur no personal liability; but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men; and they come under a duty to assist Bankers Trust by giving them and the court full information and disclosing the identity of the wrongdoers. In this case the particular point is 'full information'.
>
> This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer 's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the [claimant's] money, as for instance when the customer has got the money by fraud or other wrongdoing, and paid it into his account at the bank. The [claimant] who has been defrauded has a right in equity to follow the money. He is entitled, in Atkin LJ's words, to lift the latch of the banker's door: see *Banque Belge v Hambrouck*.[45] The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd v Putterill*.[46] If the [claimant's] equity is to be of any avail, he

43 [1980] 3 All ER 353.

44 *Ibid*, p 357.

45 [1921] 1 KB 321, p 335.

46 [1967] 3 All ER 145, p 148.

> must be given access to the bank's books and documents, for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Raffineria Siciliana Petroli SpA v Masabaft GmbH*.[47] So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their [disclosure].

A somewhat similar issue was before the Bahamas Court of Appeal in *Tiger Air Inc v Sumrall (No 2)*.[48] As part of a wider claim based on an allegation of fraud, the claimant sought a disclosure order against a bank and one of its officers, seeking the identity of one of the alleged conspirators who had opened an account with the bank into which certain moneys had been telexed from the United States, and information as to the state of the accounts of certain other persons. The judge declined to make the order, and the Court of Appeal upheld his decision. Luckhoo P expressed the view that the essence of the *Norwich Pharmacal* principle was that the person against whom disclosure is sought must have 'facilitated the wrongdoing' of the tortfeasors. In the instant case, the Bahamian bank could not be said to have facilitated the fraud, which had occurred in the United States; and its only connection with the wrongdoing was that the proceeds of the fraud had been channelled through a bank in the United States to an account at the Bahamian bank by way of a normal commercial transaction.

It is significant that no reference was made in Luckhoo P's judgment to *Bankers Trust Co v Shapira*, which had been decided two years previously, and which might have influenced the reasoning of the court, had it been cited. However, it seems that there was, in any event, a crucial difference between the *Bankers Trust* case and *Tiger Air* in that, in the former case, an equitable right to trace the fraudulently acquired money had been established, whereas in the latter it had been held that the claimant had no such right.

Procedure

A claim form must be issued by the claimant against the facilitator, claiming disclosure of the identity of the wrongdoer. An interim application seeking disclosure of the identity of the wrongdoer is then made, supported by an affidavit.[49] When disclosure is made, the proceedings against the facilitator are concluded, and fresh proceedings should be brought against the wrongdoer; alternatively, if there are wrongdoers as other parties, the facilitator should be released from the proceedings.[50]

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47 [1976] Court of Appeal Transcript 816.

48 (1982) 32 WIR 47.

49 See Inns of Court School of Law, *Civil Litigation Manual, 2002/2003*, Oxford: Oxford University Press, p 199.

50 See *Australia and New Zealand Banking Group Ltd v National Westminster Bank plc* (2002) *The Times*, 14 February.

Where disclosure will involve a breach of confidentiality with respect to innocent third parties, or is contrary to the public interest, the court may deny inspection of documents, and the evidence will then take the form of a full and frank disclosure on affidavit only.

Costs

The claimant will usually be required to pay the costs and expenses incurred by the facilitator in complying with the disclosure order. Such costs may ultimately be recovered from the wrongdoer, provided it was foreseeable that a *Norwich Pharmacal* order would be necessary before the substantive proceedings were brought.

NOTICE TO ADMIT FACTS

In order to ensure that the court's time at trial is not wasted and the costs of litigation increased by the need to determine issues and facts that ought reasonably to be admitted, Rule 29.13 provides that a party may serve on another party a notice requiring him to admit the facts, or the part of the case of the serving party, specified in the notice. Such notice must be served no later than 42 days before the trial.

If the other party makes an admission in response to the notice, such admission may be used against that party only by the party who served the notice and only in the proceedings in respect of which the notice was served.

If the party on whom the notice is served does not admit those facts within 21 days of service, he may be required to pay the costs of proving those facts.

The courts have always favoured notices to admit and it has been said that they should be more frequently used. However, the procedure should not be abused by issuing notices to admit *facts which are at the core of the dispute.* In such circumstances, the court would be unlikely to impose any costs penalty for failing to admit the specified facts.

CHAPTER 15

REQUESTS FOR FURTHER INFORMATION

Requests for information are used for three main purposes:

(a) to obtain clarification of points raised in an opponent's statement of case;

(b) to seek information about any matter in dispute, whether or not raised in a statement of case, including facts that might be expected to be contained in the witness statements; and

(c) on the court's own initiative, to ascertain material facts or to find out information for case management purposes.

PROCEDURE

A party seeking clarification or information (the 'first party') should first of all serve on the party from whom clarification or information is sought (the 'second party') a written request identifying the information sought,[1] stating a date by which the response to the request should be served (the time given to respond must be reasonable). If the second party does not, within such reasonable time, serve a response, the first party may apply to the court for an order compelling him to do so.

CPR Rule 34.2 [Rule 35.2 (T&T)] provides that an order may not be made unless it is necessary to dispose fairly of the claim or to save costs, and when considering whether to make an order the court must have regard to:

(a) the likely benefit that will result if the information is given;

(b) the likely cost of giving it; and

---

1 In *National Housing Development Corporation v Danwill Construction Ltd* (2007) Supreme Court, Jamaica, no 2004 HCV 000361 (unreported), the defendant applied for a court order for information on the claimant's particulars of claim, without having first made a request for information out of court as required by Rule 34.1(2). Brooks J held that 'a fair reading of Rules 34.1 and 34.2 would lead to the conclusion that the request for information and a refusal to comply are prerequisites for an application for an order to compel compliance with the request'. In the instant case there had been no such prior request. However, Brooks J held that it would not be consistent with the overriding objective to dismiss the application for particulars purely because of the procedural defect. Such a procedural error could be rectified by the court under Rule 26.9 and, in addition, the court was empowered in exercising its general powers of management to 'take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective'.

(c) whether the financial resources of the second party are likely to be sufficient to enable that party to comply with the order.

A party may use information obtained in response to a request or in compliance with an order only in the proceedings in which the request or order was made.

Any information provided must be verified by a certificate of truth.

REQUESTS RELATING TO STATEMENTS OF CASE

It was emphasised in *McPhilemy v Times Newspapers Ltd*[2] that particulars of claim and other statements of case should contain a *concise* statement of the facts relied on by the pleader, identifying the issues and the extent of the dispute between the parties, and that excessive detail in the statements of case tended to obscure rather than elucidate the issues. In any event, once there has been disclosure of documents and exchange of witness statements, statements of case usually become of only historical interest and, unless there is some obvious purpose to be served by disputing the statements of case, contests over their terms are to be discouraged.

In *King v Commissioner of Customs*,[3] particulars relating to the content of a defence were ordered, following the guidelines laid down by Rule 34.2. In this case, customs officers of the Contraband Enforcement Unit, in the purported execution of a special warrant, had removed various boats and other equipment belonging to the claimants. The defence contained an averment that the claimants had failed to provide the authority with proof that that they had obtained import entry documents and paid the requisite customs duties on the equipment. The claimants filed and served a written request for information within Rule 34.1, seeking particulars of the facts on which the reasonable suspicion of the customs officers that the equipment seized constituted uncustomed or prohibited goods was based. On the defendant's failure to respond to the request within a reasonable time, or to advance any explanation at the case management conference, the claimants applied to the court within Rule 34.2(1) for an order compelling the defendant to supply the information. The defendant argued that under the CPR the most suitable times for requests for information to be made would be after disclosure of documents and exchange of witness statements, since by such times a party would be in a position to know what would be needed to meet the opponent's case, and McDonald-Bishop J (Ag) accepted this argument 'as the formulation of a sound and useful principle'. However, as in the instant case, 'a person who sets up as his defence that he believed

2 [1999] 3 All ER 775.

3 (2006) Supreme Court, Jamaica, no 2005 HCV00120 (unreported).

a statement, and had reasonable grounds for so doing, can hardly say that it would be an intolerable burden to state the grounds for his belief', and 'if a defendant is unable to analyse the grounds of his belief he must say so'. Relevant case-law had established the principle that 'where a defendant, like that in the instant case, puts forward a positive allegation of acting with reasonable cause, it should be required to give particulars of it'. McDonald-Bishop J (Ag) opined that, notwithstanding the provision for exchange of witness statements under the CPR, the principle established in the earlier authorities to the effect that particulars of the factual basis for a reasonable suspicion 'ought properly to be given at the point of pleadings and not after the exchange of witness statements' was applicable to the instant case. After referring to Rule 34.2(2), which states that an order may not be made unless 'it is necessary in order to dispose fairly of the claim or to save costs', the learned judge concluded that in the instant case the order was necessary to dispose fairly of the claim since, 'if the claimants were to await the exchange of witness statements to ascertain the facts upon which the defence is based, they might be placed at a disadvantage in properly evaluating the merits of their case and in properly preparing to meet the defendant's case'.

In *Blair v Allied Protection Systems and Services Ltd*,[4] on the other hand, where, pursuant to an application by the defendant to set aside a judgment in default of acknowledgment of service, the claimant filed a 45 question request for further information, Sykes J refused to order particulars, on the grounds that:

> [Under CPR Rule 1.1(1)], 'dealing with cases justly' includes saving expense and ensuring that the case is dealt with expeditiously. This means that when the court is managing the case, it considers any application in the context of the overriding objective as set out in Rule 1, unless the rule under which the application is made has its own criteria for dealing with the application. It is true that Part 34 of the CPR (requests for information) does not restrict the time at which the request can be made but that does not mean that the lack of restriction means that the court will necessarily order that the questions are answered by this fact alone. It has to be shown how answering the questions at this very early stage of the proceedings furthers the aim of disposing of cases expeditiously and in a cost-effective manner. Were I to order the defendant to answer these questions, it would have the effect of imposing an additional cost without any apparent benefit. Additionally, if the defendant is successful in its application, then its defence and witness statements may well answer the questions asked. In other words, it would be disproportionate to order the defendant to answer the questions at this

4 (2007) Supreme Court, Jamaica, no 2004 HCV 000361 (unreported). Cf *National Housing Development Corporation v Danwill Construction Ltd*, above, fn 3, where Brooks J granted an application for further information, notwithstanding that witness statements had not yet been exchanged, on the ground that the application sought details of an alleged fraud which could not be inferred from the facts but had to be 'pleaded with the utmost particularity.'

Figure 13
Letter of request for further information

19th September 2006
Messrs Young & Odle
104–106 Beckwith Street
Montego Bay

Dear Sirs,

Re: Claim no 2006 HCV 00314: *Smollett v Commissioner of Customs and Attorney General of Jamaica*

Pursuant to Rule 34.1 of the Civil Procedure Rules, we request the following information in relation to your client's Defence:

Under paragraph 7:

In relation to the allegation that the items of equipment referred to in paragraph 12 of the Particulars of Claim were lawfully seized pursuant to section 203 of the Customs Act, stating, in respect of each and every item of equipment:

(1) Whether it is alleged that the First Defendant had reasonable cause to suspect that it was prohibited goods; and

(2) If so, stating what facts and matters are relied upon as grounds for the same suspicion.

Under paragraph 8:

In relation to the allegation that the boats referred to in paragraph 13 of the Particulars of Claim were lawfully seized, stating in respect of each and every boat:

(1) Whether it is alleged that the First Defendant had reasonable cause to suspect that it was uncustomed goods;

(2) If so, stating what facts and matters are relied on as grounds for the said suspicion.

We should be grateful if you would let us have your written response within the next 7 days.

Yours faithfully,

_____

McPhail & Doulton
Attorneys-at-Law for the Claimant.

stage of the proceedings. The application to set aside is supported by an affidavit. If the claimant wishes, she can apply to cross examine the deponent.

REQUESTS NOT RELATING TO STATEMENTS OF CASE

Such requests correspond to interrogatories under the RSC, where the courts have developed a restrictive set of guidelines for their application.[5] It has been suggested that it is highly unlikely that the courts will be any keener to order such information to be provided under the CPR regime, and that the restrictive guidelines developed under the RSC are likely to be of continuing validity when applying the overriding objective under the CPR.[6]

5 See Sime, S, *A Practical Approach to Civil Procedure*, 6th edn, 2003: Oxford: Oxford University Press, pp 195–7.

6 *Ibid.*

CHAPTER 16

SECURITY FOR COSTS

Security for costs is basically a fund paid into court, out of which an unsuccessful claimant will be able to satisfy, wholly or partly, any eventual award of costs made against him. Its purpose is to protect the defendant against the risk of being unable to enforce any costs order he may later obtain.

A defendant[1] may apply for an order requiring the claimant to give security for costs at any stage of the proceedings but, where practicable, application should be made at a case management conference or pre-trial review. Further, if an application is not made timeously, the court may doubt its genuineness and so dismiss it.[2] The application must be supported by affidavit evidence of, for instance, the circumstances grounding the application, such as the fact that the claimant is residing outside the jurisdiction. It is also a good practice for the defendant to give some idea of the level of costs likely to be incurred, including counsel's fees, and the level at which the applicant seeks to have security. This can be done by attaching to the affidavit a draft statement or estimate of costs.

A *defendant* should not be required to give security for costs, as he has no choice but to take part in the action, and the fact that he is resident abroad is irrelevant.[3] However, a *counterclaiming* defendant may be required to give security.[4]

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1 Rule 24.2 (Jam and OECS). 'Defendant' includes a claimant who has been made a defendant by counterclaim: see *Cates v Knowles Industries Co Ltd* (1998) Supreme Court, The Bahamas, no 885 of 1989 (unreported). However, the privilege does not extend to third parties.

2 *Hartnett, Sorrell and Sons Ltd v Smithfield Foods Ltd* (1987) High Court, Barbados, no 605 of 1986 (unreported), per Belgrave J. However, before application is made to the court, it is good practice for the defendant's attorney to first send a written request to the claimant's attorney asking that the claimant give security in a reasonable sum. Application should be made to the court only if the informal request is rejected or unanswered, or if an insufficient sum is offered: *Atkin's Court Forms*, 2nd edn, 2004 Issue, Vol 13, pp 98, 221.

3 *Re Hall* [1994–95] CILR N4 (Grand Court, Cayman Islands), per Smellie J; *Re Steadman Labier Investments Ltd* (1995) Supreme Court, The Bahamas, no 810 of 1994 (unreported), per Thorne J.

4 *Re Steadman Labier Investments Ltd, ibid.*

CIRCUMSTANCES IN WHICH AN ORDER FOR SECURITY MAY BE GIVEN

(a) Where the claimant is ordinarily resident out of the jurisdiction.

(b) Where the claimant is a company incorporated *outside* the jurisdiction.

(c) Where the claimant has failed to give his address in the claim form, or given an incorrect address, or changed his address since the claim form was issued.

(d) Where the claimant is acting as a nominal claimant, other than as a representative claimant, and there is reason to believe he will be unable to pay the defendant's costs if ordered to do so.

(e) Where the claimant has taken steps to place his assets beyond the jurisdiction of the court.

(f) Where the claimant is an assignee of the right to claim, and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor.

(g) Where some person other than the claimant has agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover.[5]

Additionally, under the companies legislation of the various jurisdictions,[6] where a limited company is claimant, the court may, if there is reason to believe that the company's assets will be insufficient to pay the defendant's costs if he is successful, require sufficient security to be given for such costs, and may stay the proceedings until such security is given.

FACTORS TO BE TAKEN INTO ACCOUNT

It is noteworthy that the fact that a claimant is impecunious or lacks funds is not in itself a ground for ordering security for costs, except under the companies legislation.[7] Furthermore, even if one or more of the above grounds is satisfied, the court is not bound to make an order, for an order for security for costs is always at the discretion of the court.[8] The factors

5 Rule 24.4.

6 Companies Act 2004, s 388 (Jamaica); Companies Act 1994, s 548 (Grenada).

7 Another instance where security for costs may be ordered on the ground of impecuniosity *simpliciter* is where there is an appeal.

8 *Ghanny v Citibank NA* (1985) High Court, Barbados, no 651 of 1981 (unreported); *Bitech Downstream Ltd v Rinex Capital Ltd* (2003) High Court, BVI, no 233/2002 (unreported), per d'Auvergne J.

which the court may take into account in exercising the discretion were listed in the leading case of *Sir Lindsay Parkinson and Co Ltd v Triplan*,[9] as follows:

(a) whether the claimant's claim is *bona fide* and not a sham;

(b) whether the claimant has a reasonably good prospect of success[10] (though the court should not normally embark upon a detailed examination of the merits of the case);[11]

(c) whether the defendant has made any admissions of the claimant's claim in his statements of case or elsewhere;

(d) whether the defendant has made any payment into court or open offer of payment in settlement;

(e) whether the claimant's lack of funds has been caused by the defendant's conduct;

(f) whether the application for security is being made oppressively and in order to stifle a genuine claim;[12] and

(g) whether there has been a delay in making the application (which should be made as early as possible).[13]

The generally accepted view is that the court should not go into the merits of the case unless it can be clearly demonstrated that there is a high degree of probability of success or failure of the claim.[14]

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9 [1973] 2 All ER 273, CA. Applied in *Morgan v Young* (2003) Court of Appeal, Jamaica, Civ App no 38/2003 (unreported), per Harrison P (Ag); *Janin Caribbean Construction Ltd v Wilkinson* (2002) High Court, Grenada, no GDA HCV 2001/0036 (unreported), per Benjamin J; *Vedatech Corporation v Seagate Software Information* (2001) LTL 29/11/01.

10 In *Fernandes v United Insurance Co Ltd* (1992) High Court, Barbados, no 919 of 1987 (unreported), King J (Ag) pointed out that a major factor for consideration was the likelihood of the plaintiff succeeding. If there were strong grounds for believing that the defence would fail, the defendant's application for security for costs should be refused. See *Crozat v Brogden* (1894) 2 QBD 30, p 33.

11 *Crozat v Brogden*, *ibid*, p 36, per Davey LJ.

12 See *Interoil Trading SA v Watford Petroleum Ltd* (2003) LTL 16/7/2003.

13 See *Hartnett, Sorrell and Sons Ltd v Smithfield Foods Ltd* (1987) High Court, Barbados, no 605 of 1986 (unreported).

14 *Swain v Hillman* [2001] IAII ER 91 *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074; *Republic of Costa Rica v Erlanger* (1874) 3 Ch D 62, p 64, per Malins VC; *Crozat v Brogden* (1894) 2 QBD 30, P 36, per Davey LJ; *Republic of Cuba v Attorney General (No 1)* (1987) 3 OECSLR 539(Court of Appeal, Eastern Caribbean States), per Haynes P; *Re Steadman Labier Investments Ltd* (1995) Supreme Court, The Bahamas, no 791 of 1984 (unreported); *JM Bodden and Son International Ltd v Dettling* [1990–91] CILR 220 (Grand Court, Cayman Islands); *External Trust Co Ltd v Bahamas International Trust Co Ltd* (1985) Supreme Court, The Bahamas, no 791 of 1984 (unreported), where Georges CJ declined to venture into a detailed assessment of the claimant's prospects of success, as there were difficult questions of law to be argued, and crucial facts were in contention.

FOREIGN CLAIMANTS

In Caribbean jurisdictions, the ground on which security for costs is most often ordered is that the claimant is 'foreign', in the sense of being resident out of the jurisdiction. In *Aeronave SPA v Westland Charters Ltd,* Lord Denning MR stated that:[15]

> It is the usual practice of the courts to make a foreign [claimant] give security for costs, but it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order.
>
> The onus is on the defendant to show that the claimant is ordinarily resident out of the jurisdiction. 'Ordinarily resident' refers to a [person's] abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.

A clear example is the Barbadian case of *Maragh v Comptroller of Customs*,[16] where a claimant, who was resident in Trinidad & Tobago and had no assets in Barbados, was ordered to give security for costs in an action to retrieve a quantity of United States currency that had been seized by customs officers at the Grantley Adams International Airport.

The court may consider an application for security for costs against a foreign claimant even where there is a co-claimant resident within the jurisdiction. This principle was applied by Malone Snr J in the Bahamian case of *Powell Bros Inc v Water and Sewage Corp*,[17] where it was held that the court had jurisdiction to make an order against the first claimant (a foreign company) under the RSC, and an order against the second claimant (a company registered in The Bahamas) under s 54 of the Companies Act, Chap 184. In the learned judge's words:

> . . . the fact that the first [claimant] is a foreign company and the second [claimant] a local company no longer operates as a fetter on the wide discretion conferred on the court.

Similarly, in *Manning Industries Inc v Jamaica Public Service Co Ltd*,[18] the defendant applied under Rule 24.2 of the Jamaican CPR for security for costs against a claimant foreign company whose co-claimant was a locally registered company. Brooks J confirmed that earlier cases which had

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15 [1971] 3 All ER 531, p 533.

16 (1994) High Court, Barbados, no 760 of 1991 (unreported), per King J (Ag). See also *Morgan v Young* (2003) Court Appeal, Jamaica Civ no 38/2003 (unreported).

17 (1988) Supreme Court, The Bahamas, no 312 of 1982 (unreported).

18 (2002) Supreme Court, Jamaica, no CL 2002/M058 (unreported). See also *Barnes v City of Kingston Co-operative Credit Union Ltd* (2006) Supreme Court, Jamaica, no CL2002/B-134 (unreported), per Mangatal J.

suggested that where one of two co-claimants was a foreigner and out of the jurisdiction, but the other was resident within the jurisdiction, there could be no order for security for costs, were no longer good law. Further, the post-CPR English case of *Nasser v United Bank of Kuwait*,[19] in which it had been held that, by virtue of the incorporation into English law of the European Convention on Human Rights, a prima facie ruling based on residence abroad was considered to be 'discriminatory and unjustifiable', was not applicable in Jamaica. Brooks J took the view that 'since our jurisdiction does not have to consider any equivalent of the matters which now bind the English courts, the law as explained in *Corfu Navigation Co v Mobil Shipping Co Ltd*[20] should be applied in Jamaica', and 'it may be that little guidance may now be gained from the post-2002 UK cases in this area'.[21] In the *Corfu* case, it had been stated[22] that:

> The basic principle underlying orders for security for costs is that it is prima facie unjust that a foreign plaintiff who, by virtue of his foreign residence, is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed.

Brooks J proceeded to apply these principles in the context of Rule 24.3 of the CPR, pointing out that although the wording of the Rule differed somewhat from Ord 23 of the RSC, 'the intent does seem similar, and it is that the court will seek to do justice by an examination of all the circumstances of the case, but that having done so, it may only exercise authority if [the claimant is a company incorporated outside the jurisdiction]'. And with regard to the question whether the claimant had assets within the jurisdiction which might be available to satisfy any award of costs against it, Brooks J found that the plaintiff had no assets within the jurisdiction that were clearly its own and not the subject of dispute. The court had to take into account the fact that 'the steps to be taken by the defendant, if successful, to enforce any judgment in the USA will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here'. It was therefore just to order the claimant to provide security for costs within Rule 24.2.

CORPORATE CLAIMANTS

Security for costs may be ordered against any limited company on the ground of impecuniosity alone, as provided by the companies legislation of several

19 [2002] 1 All ER 401.

20 [1991] 2 Lloyd's Rep 52, CA.

21 But see *Plaskett v Stevens Yachts Inc* (2003) High Court, BVI, no 2002/0001 (unreported), per Rawlins J.

22 *Ibid* [1991] 2 Lloyd's Rep 52, CA.

Caribbean jurisdictions. This may be contrasted with the CPR provisions, under which impecuniosity per se is not a ground for ordering security. Section 388 of the Companies Act 2004 of Jamaica provides:

> Where a company is [claimant] in any action, suit or other legal proceeding, any judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that, if the defendant is successful in his defence, the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

In *JM Bodden and Son International Ltd v Bodden*,[23] Harre J, in the Grand Court of the Cayman Islands, emphasised that the whole concept of s 71 of the Cayman Companies Law (s 73 under the 1995 Rev), which is very similar to the Jamaican Act, was contrary to the principle that poverty of a claimant was not to be made a bar to bringing any action. However, he commented that it was not surprising that there was a need for such a rule in order to 'prevent the manipulation of impecunious limited liability companies for the purposes of litigation'. In the instant case, Harre J found that there was no evidence of such manipulation. It was a case in which the claimant company had brought an action against the defendant, in her capacity as executrix of a deceased's personal estate, in order to recover money allegedly owed by the deceased. Harre J held that although the company was in fact impecunious and there was a risk that the defendant, if successful, might not be able to recover her costs against the company, in the circumstances an order of security for costs would be refused as it might have the effect of stifling what appeared to be a just cause of action.

On the other hand, in *JM Bodden and Son International Ltd v Dettling*,[24] Malone CJ made a security for costs order against the same company. In this action, the company brought a claim against the defendants for breach of contract and fiduciary duty. The defendants sought security for costs. One of the grounds on which the company attempted to resist the defendants' application was that its want of means had been brought about by the defendants' breaches of duty. In rejecting this contention, Malone CJ reasoned that until there was a trial, it could not be known whether the company's allegations were true or false. This was not a case where it could be 'clearly demonstrated one way or the other that there [was] a high probability of success or failure', and so it was not appropriate at this stage to go into the merits of the case. On the other hand, there had been an unexplained lapse of five years between the occurrence of the conduct complained of and the commencement of the action, and this raised 'a question as to the genuineness of the action', and a suspicion of manipulation of the company 'to litigate

23 [1990–91] CILR 214.

24 [1990–91] CILR 220.

a cause of no or little merit, at no risk in costs to the natural person' doing the manipulating.

The relevant principles concerning applications for security for costs made against corporate claimants were set out by Peter Gibson LJ in *Keary Developments Ltd v Tarmac Construction Ltd*,[25] and cited in subsequent Caribbean case law, including the post-CPR Grenadian case of *Janin Caribbean Construction Ltd v Wilkinson*.[26] They may be summarised thus:

(a) The probability that the claimant company will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security, as the legislature must have envisaged that the order might be made against a claimant company that would find difficulty in providing security.

(b) The court must carry out a balancing exercise, weighing, on the one hand, the injustice to the claimant if prevented from pursuing a proper claim by an order for security, against, on the other, the injustice to the defendant if no security is ordered and the unsuccessful claimant is unable, after the trial, to pay the defendant's costs.

(c) The court will be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous one; on the other hand, however, it should not be so reluctant to order security that it becomes a weapon whereby the indigent company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.

(d) The court should consider not only whether the claimant company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the claimant company, it is for the claimant to satisfy the court that it would be prevented by an order for security from continuing the litigation.

AMOUNT OF PAYMENT

The amount of security for costs to be ordered is entirely at the discretion of the court.[27] It is always helpful to the court if a statement of costs, past and future, is provided by the defendant.[28] The amount of security may be

25 [1995] 3 All ER 534, pp 539–42.

26 (2002) High Court, Grenada, no GDA HCV 2001/0036 (unreported).

27 *Procon Ltd v Provincial Building Co Ltd* [1984] 1 WLR 557, CA.

28 *T Sloyan and Sons (Builders) Ltd v Brothers of Christian Instruction* [1974] 3 All ER 715.

increased where a second application is made to the court. On the other hand, the claimant may apply to have the amount reduced or to have the order discharged altogether where there has been a significant change of circumstances since the making of the order.[29]

EFFECT OF THE ORDER

If the court decides to order security, it will state the time within which the sum is to be paid into court, and the action will normally be stayed, pending compliance by the defendant. If the defendant is successful at the trial, the amount paid into court can be used to satisfy his costs or part of them, any surplus being handed back to the claimant. If the claimant is successful, the money will be returned to him in full, even where there has been a stay of execution pending an appeal.

29 *Gordano Building Contractors Ltd v Burgess* [1988] 1 WLR 890, CA.

CHAPTER 17

OFFERS TO SETTLE AND PAYMENTS INTO COURT

It is fundamental to the ethos of the CPR that every encouragement should be given to the parties to bring their dispute to an end as early as possible, and the saving of costs is a primary consideration. The procedures for making offers to settle and payments into court are designed to 'put pressure' on an opponent to bring litigation to a speedy end. These procedural devices may be extremely effective in inducing a claimant to reach a compromise with the defendant, and vice versa, and they are an important aspect of the process of negotiation which is so central to the new litigation culture introduced by the CPR.

OFFERS TO SETTLE

An offer to settle can be made in any proceedings, whether or not there is a money claim.[1] Notwithstanding that the offer may be expressed to be 'without prejudice', the offeror reserves the right to make the terms of the offer known to the court, after judgment, when the question of allocation of costs or, in the case of an offer by the claimant, the question of interest on damages, falls to be decided.[2] An offer to settle may be made at any time before the beginning of the trial.[3]

PROCEDURE

(a) An offer to settle must be made in writing and served on the offeree. Copies of the document must be served on all other parties. Neither the fact that the offer was made nor the amount of the offer, nor any payment into court in support of the offer, must be communicated to the court before all questions of liability and the amount of damages to be awarded have been decided.[4]

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1 Rule 35.2 [Rule 36.2 (T&T)].

2 Rule 35.3 [Rule 36.3 (T&T)].

3 Rule 35.4 [Rule 36.4 (T&T)].

4 Rule 35.5 [Rule 35.4 (OECS and Belize); Rule 36.5 (T&T)].

(b) An offer to settle a claim for damages must state whether or not the amount offered includes (a) interest, or (b) costs, and where it does include interest or costs, it must state the amount of each.[5]

(c) The offer should state whether it covers the whole or part only of the claim. If the latter, it should identify the part or parts which it covers, and, if more than one, state what is offered in respect of each part.[6]

(d) Where there is a counterclaim, the offer must state, in the case of an offer by the claimant, whether or not it takes into account the counterclaim, and in the case of an offer by the defendant, whether or not it takes into account the claim.[7]

(e) The offer must (a) be open to acceptance for at least 21 days, and (b) be accepted before the beginning of the trial, otherwise the offer cannot be taken into account by the court when considering costs.[8]

(f) To accept an offer, the offeree must serve written notice of acceptance on the offeror, and send a copy of the notice to any other party.[9]

WITHDRAWAL OF OFFER

It was held by the English Court of Appeal in *Scammell v Dicker*[10] that an offer to settle made under Pt 36 of the English CPR could be withdrawn at any time prior to acceptance. Aldous LJ pointed out[11] that Pt 36 did not exclude the principle in the general law of contract that an unaccepted offer could be withdrawn. Whether the courts in Caribbean jurisdictions will take a similar view remains to be seen. One relevant factor is that whereas the English Rule 36.5(8) expressly mentions withdrawal of an offer, there is no such express reference in the Caribbean Rules. On the other hand, as Aldous LJ pointed out, if it were the intention of the draftsman that withdrawal should be precluded, Pt 36 'would have said so in clear terms' – which observation would apply equally to the Caribbean Rules.

EFFECT OF ACCEPTANCE

(a) Where an offer relating to the whole claim and/or counterclaim is accepted, the claim and/or counterclaim will be stayed upon the terms

5 Rule 35.6 [Rule 36.6 (T&T)].

6 Rule 35.8 [Rule 36.8 (T&T)].

7 Rule 35.6(3) [Rule 36.6 (T&T)].

8 Rule 35.6(3).

9 Rule 35.10 [Rule 36.10 (T&T)].

10 (2001) *The Times,* 14 February.

11 *Ibid.*

of the offer; in any other case, the proceedings will be stayed to the extent that they are covered by the terms of the offer.[12]

(b) Where the defendant makes an offer to settle, and the claimant accepts it within the period specified for acceptance and before the beginning of the trial, the claimant will be entitled to his costs up to the day of acceptance. Where the offer relates to only part of the proceedings, and the remaining parts of the proceedings continue, the claimant will be entitled only to his costs relating to the part of the proceedings that has been settled.[13]

(c) Where the claimant makes an offer which is accepted by the defendant, the claimant will be entitled to costs up to the time when notice of acceptance of the offer is served.[14]

EFFECT OF NON-ACCEPTANCE

(a) Where a defendant makes an offer to settle a *claim for damages* which is not accepted, and the court at the trial awards less than 85% of the amount offered, or where, in *any other type of claim*, the court considers that the claimant acted unreasonably in not accepting the defendant's offer, the claimant must pay any costs incurred by the defendant after the latest date on which the offer could have been accepted.[15]

(b) Where a claimant makes an offer to settle a claim for damages which is not accepted, and the court at the trial awards an amount which is equal to or more than the amount offered, the court may, in exercising its discretion as to interest, allow interest on the damages at a rate of 20 per cent per annum.[16]

PAYMENTS INTO COURT

A defendant who offers to settle the whole or part of proceedings may pay money into court in support of the offer. He must (a) certify that the payment is in support of an offer to settle, and (b) serve notice of the payment in on the claimant, and file a copy of the notice with a statement of the date (if any) until which the offer is to be open for acceptance.[17]

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12 Rule 35.11 [Rule 36.11 (T&T)].

13 Rule 35.13 [Rule 36.13 (T&T)].

14 Rule 35.14 [Rule 36.14 (T&T)].

15 Rule 35.15.

16 *Ibid*.

17 Rule 36.2 [Rule 37.2 (T&T)].

A claimant who accepts an offer to settle within the requisite period, if any, is entitled to payment of the sum paid in, without the need for a court order. The claimant, to obtain payment, must file a request for payment, certifying that the offer has been accepted within the requisite period, if any.[18]

Where a claimant accepts money paid into court by one or more, but not all, of several defendants, the money may be paid out only under an order of the court.[19]

18 Rule 36.3.

19 Rule 36.4.

CHAPTER 18

INTERIM PAYMENTS

An interim payment is a payment in advance on account of any damages which a claimant may ultimately be awarded at the conclusion of the trial. The purpose of such a payment is to ensure that a claimant is not 'kept out of his money' for an unduly long period. Interim payments are particularly important in personal injuries and clinical negligence cases, since an injured person might be in urgent need of funds to lessen the burden imposed on relatives and others who may be caring for him, and to satisfy his regular financial commitments, such as mortgage or rent payments. In such circumstances, it would cause serious hardship if he were bound to wait until the conclusion of the trial, which might be many months away.

GROUNDS FOR APPLICATION

By virtue of Rule 17.6, an application for an interim payment can be made to the court on any of the following grounds:

(a) that the defendant has admitted liability;

(b) that the claimant has obtained judgment against the defendant for damages or a sum of money to be assessed, or an order for an account to be taken between himself and the defendant;

(c) that the court is satisfied that if the action proceeded to trial, the claimant would obtain judgment for substantial damages against the defendant;[1] or

(d) that the claimant is seeking an order for possession of land and the court is satisfied that if the case went to trial, the defendant would be held liable to pay a sum of money as rent or for the use and occupation of the land.

Grounds (a) and (b) are straightforward. In ground (a), the defendant will have already admitted liability, either in his statements of case or in open correspondence. Ground (b) covers cases where summary judgment has been obtained against the defendant, or where an order for an account has been made. It is under ground (c) that most difficulties are likely to

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1 It is not sufficient for the claimant to point to the comparative strength of his case and the comparative weakness of the defendant's: *Dixon v Jackson* (2005) Supreme Court, Jamaica, no CLD 042/2002 (unreported), per Beswick J.

be encountered. It seems that the requirement that the court should be 'satisfied' that the claimant would obtain judgment connotes a standard of proof higher than the ordinary civil standard of balance of probabilities. In the words of Browne-Wilkinson VC, the court must 'be satisfied that the [claimant] *will* succeed, and the burden is a high one; it is not enough that the court thinks it *likely* that the [claimant] will succeed at the trial'.[2] On the other hand, in *Chang v Minott Services Ltd*,[3] where the claimant motorist had collided with a truck that had broken down and been left in a stationary position on the roadway, in an application for an interim payment, Straw J, in the Jamaican Supreme Court, stated that 'the court must be satisfied on a balance of probabilities that the claimant would obtain judgment'. Since, on the facts of the instant case, there were three possible results at the trial, viz (i) that the claimant could be found totally responsible for his personal injuries, (ii) that the defendant could be held liable, or (iii) that both parties could be held guilty of contributory negligence, with uncertainty as to the proper apportionment of damage, the claimant had failed to satisfy the court, even on the lower standard of balance of probabilities, that he would obtain judgment against the defendant. The application for interim payment was accordingly refused.

Ground (d) appears in both the Jamaican and the OECS CPR, but not in the English Rules.

PERSONAL INJURIES CLAIMS

In addition to satisfying the general grounds enumerated above, in personal injuries claims there is the further requirement that the defendant must be:

(a) *insured* in respect of the claim; or

(b) *a public authority*, that is, a government department, local authority or statutory undertaker; or

(c) *a person who has the means and resources* to make the interim payment.[4]

MULTIPLE DEFENDANTS

In personal injuries actions, where there are two or more defendants, the court may award an interim payment against any defendant (a) if satisfied that the claimant would obtain substantial damages against at least one of the defendants, even though it has not yet been determined which one is

2 *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, p 865.

3 (2004) Supreme Court, Jamaica, no HCV 0210/2003 (unreported).

4 Rule 17.6(2).

liable, and (b) if each defendant is either insured, or a public authority, or a person having sufficient means and resources.[5]

PROCEDURE FOR APPLICATION

At any time after the end of the period for entering an acknowledgment of service, the claimant may apply for an interim payment by application notice that must:

(a) be served not less than 14 days before the hearing of the application, and

(b) be supported by evidence on affidavit. The affidavit must:

- briefly describe the nature of the claim and the position reached in the proceedings;
- state the claimant's assessment of the amount of damages or other monetary judgment that is likely to be awarded;
- set out the grounds of the application;
- exhibit any documentary evidence relied on by the claimant in support of the application (such as evidence of special damage in the form of, for example, medical reports, employer's letters giving details of loss of earnings, and police accident reports); and
- if the claim is made under any fatal accidents legislation, contain particulars of the dependants on whose behalf the claim is brought.[6]

In *Quarrie v C&F Jamaica Ltd*,[7] the claimant had obtained a default judgment and then made an application for an interim payment. Meanwhile, however, the defendant had applied to set aside the judgment. Mangatal J (Ag) was 'of the view that [unlike the practice under the former Rules] the new Rules would suggest that a court faced with an application for an interim payment whilst an application to set aside a default judgment is pending should not as a matter of course adopt a practice of adjourning the application for interim payment. I find support for that view in Rule 17.9, where the court has power to vary or alter the order for interim payment'. The learned judge continued: 'Even if I am wrong as to how the tenure of the new Rules would suggest that one would deal with an application at hand for an interim payment, it seems clear to me that the balance of where justice lies shifts as the case marches on and parties take or omit to take varying steps. The target of dealing with a case justly is a moving one; it is not fixed.'

5 Rule 17.6(3).

6 Rule 17.5.

7 (2003) Supreme Court, Jamaica, no 2000/Q-001 (unreported).

The learned judge went on to hold that, even if it would be just under the CPR to adjourn a claimant's application for an interim payment at the stage of a first application to set aside a regularly obtained default judgment, it could not be just or a proper recognition of the principles of proportionality and relativity to adjourn such an application on the basis of a *third* application to set aside the judgment, even if costs could be said to be capable of compensating the claimant.

RESTRICTIONS ON AWARDS

Although neither the CPR nor the RSC restrict applications to cases of hardship or need, and it has been held that objections that the claimant may use the interim payment for wrong or extravagant purposes are irrelevant,[8] the claimant's affidavit should nevertheless include details of the reasons for his application for an interim payment, for example, that he needs the money to pay arrears of mortgage instalments, or for private medical treatment.[9] He should also suggest the amount he needs for each purpose.

In personal injuries actions, the courts are willing to order interim payments to cover special damages, such as loss of earnings and costs of medical treatment and nursing care, but they are reluctant to award large sums out of the prospective general damages, such as for loss of amenities or future earnings, unless the amount asked for is clearly below the likely amount the claimant will recover.[10]

MANNER OF PAYMENT

An interim payment should normally be paid to the claimant, but the court may order all or part of it to be paid into court, in which case the claimant may apply for all or part to be paid out. Notice of an application for the money to be paid out need not be given to the defendant unless the court so orders. The court may order the interim payment to be paid in instalments. Neither the fact nor the amount of any interim payment may be disclosed to the court until all issues of liability and quantum have been determined. The court may (a) order all or part of an interim payment to be repaid, (b) vary or discharge the order for interim payment, or (c) order a defendant to reimburse another defendant who has made an interim payment.

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8 *Stringman v McArdle* [1994] 1 WLR 1653.

9 In *Wittich v Twaddle* (1983) 32 WIR 172, Supreme Court, Bermuda, the claimant deposed that he needed the money to complete his university education and to set himself up in his chosen career.

10 See Rule 17.5.

CHAPTER 19

STRIKING OUT AND DISCONTINUANCE

STRIKING OUT

Rule 26.3 [Rule 26.2 (Trinidad & Tobago)] provides that the court may strike out the whole or part of a statement of case if it appears to the court that:

(a) there has been a failure to comply with a rule or practice direction or an order given by the court in the proceedings;

(b) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) the statement of case or the part to be struck out is prolix or does not comply with Pts 8 or 10 (rules concerning claim and defence respectively).

The traditional approach to striking out, as propounded by Lord Templeman in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd*,[1] is that striking out is appropriate only in plain and obvious cases, and those cases which require prolonged and serious argument are unsuitable for striking out. This approach has been confirmed in a post-CPR House of Lords case, *Three Rivers District Council v Bank of England (No 3)*.[2] Further, the CPR do not apply to interim applications, which may be struck out only in the court's inherent jurisdiction.[3]

Procedure

An application to strike out a statement of case should be brought by means of an application notice.[4] The application should normally be heard at the case management conference. If the statement of case is obviously badly drafted or the relevant point is one of law, then no evidence in support of the application will be needed. On the other hand, if certain facts need to be proved, then affidavit evidence in support will have to be filed and served.

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1 [1986] AC 368, HL.

2 [2001] 2 All ER 513, HL.

3 *Port v Auger* [1994] 1 WLR 862.

4 Under CPR Pt 11.

As is consistent with the objectives of case management, the court has the power to treat an application to strike out as one for summary judgment,[5] which will enable it to dispose of insubstantial claims or issues that do not merit full investigation at trial.

Disobedience to the Rules or to court orders

In *UCB Corporate Services Ltd v Halifax (SW) Ltd*,[6] it was held that, under the CPR, it was appropriate to strike out an action as an abuse of process where there was a wholesale disregard of the Rules or court orders, and it was just to do so. Lesser sanctions were available in less serious cases. There was no need, unlike in the *Birkett v James*[7] principle applicable under the RSC, to show prejudice to the defendant or that a fair trial was no longer possible. Striking out on the ground of disobedience per se would avoid much time and expense being incurred in investigating questions of prejudice, and would allow the striking out of actions whether or not the limitation period had expired. The question of whether a fresh action could be commenced would be at the discretion of the court when considering any application to strike out such action and any excuse given for the misconduct in the previous action. In the *UCB* case, the English Court of Appeal rejected the argument that, following *Biguzzi v Rank Leisure plc*,[8] a sanction other than striking out (for example, an order to pay money into court, a costs sanction or deprivation of interest on an award of damages) should be imposed. The court held that the correct approach in cases of wholesale disobedience of the rules or court orders was that established in the pre-CPR case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*,[9] which the trial judge had rightly applied. Lord Lloyd said:[10]

> The judge regarded the flouting of the rules and court orders as sufficiently serious to justify striking out. In his view, it was the course justice required . . . That approach is entirely in line with the underlying purpose of the new rules. It would be ironic indeed if the Civil Procedure Rules and *Biguzzi* led judges to treat cases of delay with greater leniency than under the old procedure. That could not have been the intention of the Master of the Rolls in *Biguzzi*. He was pointing out that there were lesser sanctions in less serious cases, but in more serious cases striking out was appropriate where justice required it.

5 Under CPR Pt 15.

6 (1999) *The Times*, 23 December. See, also, *Habib Bank Ltd v Jaffer* (2000) *The Times*, 5 April.

7 [1978] AC 297.

8 [1999] 1 WLR 1926.

9 [1998] 1 WLR 1426.

10 (1999) *The Times*, 23 December.

On the other hand, in *Grundy v Naqvi*,[11] a striking out order was set aside by the appellate court on the ground that this was a disproportionate response to a failure to comply with an order to disclose a witness statement. In this case, the defaulting party showed a valid reason for not having complied, in that she wished to amend her statement of case, which would have necessitated some changes in the content of the witness statement; albeit that she was at fault in delaying her application for permission to amend.

More recently, Smith JA in the Jamaican Court of Appeal in *McNaughty v Wright*[12] forcefully expressed the position of the Court regarding non-compliance with the Rules and with orders of the courts:

> I am constrained to repeat what the Court of Appeal has said *ad nauseam*, namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the court and compliance with the rules of the court are the foundations for achieving the overriding objective of enabling the court to deal with cases justly.[13]

Unless orders

Where a party has failed to comply with a rule or court order and no sanction for non-compliance has been imposed, any other party may apply to the court for an 'unless order'.[14] The application may be made without notice, but must be supported by evidence on affidavit stating the nature of the breach, identifying the rule or order which has not been complied with, and containing a certificate that the other party is in breach. The procedural judge may then, as appropriate:

(a) make an unless order, giving a reasonable time for compliance;

(b) seek the other party's views before making the order; or

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11 (2001) LTL 1/2/2001. In *Edwards v Quest Security Services Ltd* (2007) Supreme Court, Jamaica, no HCV 1124 of 2005 (unreported), Sykes J held that, in view of the right of access to the courts guaranteed by section 20 of the Jamaican constitution, a litigant should not be barred from litigation unless he has committeed 'some egregious sin'.

12 (2005) Court of Appeal, Jamaica, Civ App no 20/2005 (unreported); cited in *Lyle v Lyle* (2005) Supreme Court, Jamaica, no HCV 02246/2004 (unreported), per Sinclair-Haynes J, who held on the facts of the case that although the defendant's failure to comply with the requirements of Rule 10.3 concerning filing of a defence was not to be regarded lightly, it was 'not *per se* very serious'. The breach was not contumelious and the delay occasioned thereby was not inordinate. There was no evidence of prejudice to the claimant or that the breach amounted to an abuse of process.

13 In *Mossel (Jamaica) Ltd v Cable and Wireless Jamaica Ltd* (2005) Supreme Court, Jamaica, no 2004/HCV 02066 (unreported), Campbell J, referring to *McNaughty v Wright*, above, and earlier cases, commented that 'inordinate delay and disregard for the Rules have been identified as major contributing factors to the ailment that plagues the administration of justice'.

14 See Rule 26.4 [Rule 26.5 (T&T)].

(c) fix a date for a hearing to deal with the application, in which case seven days' notice of the hearing must be given to all the parties. The respondent will generally be ordered to pay the assessed costs of the application.[15]

The unless order under the CPR will identify the breach and require the defaulting party to remedy it by a certain time, failing which a sanction will automatically take effect.[16] For example: 'unless the claimant serves a list of documents by 4 pm on Friday 25 June 2004, his claim will be struck out and judgment entered for the defendant.'

The true nature of unless orders was described by Sykes J in *Forrester v Holiday Inn (Jamaica)*,[17] a case in which there was an application for extension of time for compliance with an unless order, as follows:

> An unless order is a peremptory order directing a party to the litigation to do a specified act, within a specified time, which, if not done, is visited by sanctions prescribed by the order. It is a fundamental principle that a litigant who fails to comply with such an order should suffer the penalty prescribed by the order unless he can show good reason why the stated consequences should not follow. A necessary corollary of this is that the litigant who seeks to extend the time within which to comply with an unless order must show good cause why this should be done.

On the issue regarding the application for an extension of time for compliance, the learned judge first of all took the view that the applicable rule of the CPR was not Rule 26.8 (relief from sanctions), because this was a case where the sanction had *not yet been applied*. Rather, the matter fell within Rule 26.1(7), which provides that 'a power of the court under these Rules to make an order includes a power to vary or revoke that order', and a variation of an order under this rule must include the power to extend the time to comply with an unless order. Sykes J pointed out that Rule 26.1(7) did not state any criteria to be taken into account by the court when considering an application under the rule; accordingly, such applications are governed exclusively by the overriding objective. He continued:

> It would seem to me that the applicant has to tender some explanation for the non-compliance and the explanation should establish, if possible, that the failure to comply with the unless order was not borne out of an obstinate

15 Rule 26.4. These requirements do not apply where the court makes an order of its own initiative under Rule 26.2. Under the latter rule, where the court proposes to make an order, such as an 'unless order', on its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations by such means as the court considers reasonable (Rule 26.2 (2)); *International Hotels Jamaica Ltd v New Falmouth Resorts Ltd* (2005) Court of Appeal, Jamaica, Civ App no 56 of 2003 (unreported), per McCalla J (Ag).

16 *Ibid*.

17 (2005) Supreme Court, Jamaica, no CL 1997/F-138 (unreported).

refusal to comply with the order, assuming he is in a position to do so. If he is unable to comply with the order, then no doubt the reason for this should be forthcoming. This is in keeping with the judgment of Browne-Wilkinson VC in *Re Jokai Tea Holdings Ltd*,[18] where the Vice Chancellor stated that 'the court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order, and that the failure to obey was due to extraneous circumstances, such failure is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.' Another principle to bear in mind is that expressed by Roskill LJ in *Samuels v Linzi Dresses Ltd*:[19] 'To say that there is jurisdiction to extend the time where an unless order has been made and not complied with is not to suggest – let this be absolutely plain – that relief should be automatically granted to parties who have failed to comply with the orders of the court otherwise than upon stringent terms either as to payment of costs or as to bringing money into court, or the like. Orders as to time . . . are not made to be ignored but to be complied with.' To this stringent approach to court orders generally and unless orders in particular is added the judgment of Barnard JA in the Trinidad & Tobago Court of Appeal in *Gordon v Elias*.[20] I understand the learned Justice of Appeal to be saying that in situations like this there are two principles that have to be harmonised: first, the need to see that court orders are not flouted, and second, that a litigant should not be lightly deprived of access to the courts. It is true that the last three cases cited were decided before the CPR. However, what I am extracting from them is the general approach to court orders generally and unless orders in particular. From these three cases and the CPR I believe that these are the applicable principles:

(a) court orders are to be obeyed by those to whom they are directed;
(b) an unless order, a species of peremptory order, is of particular significance and must be heeded by the party who is obliged to act in accordance with its terms, failing which the sanctions named in the order ought to follow;
(c) whenever there is an application for an extension of time to comply with an unless order, the applicant must set out, in an affidavit, the efforts made to comply with the order and why there has been non-compliance;
(d) the courts should be slow to 'find excuses' for failure to comply with an order;
(e) the applicant should demonstrate that he had no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, ie circumstances other than an intention to flout the order;
(f) the court should look at the possible impact on the management of the case, the impact on other litigants in the court system generally but particularly the impact on other litigants in the particular case. The court

18 [1992] 1 WLR 1196, CA.

19 [1980] 1 All ER 803.

20 (1985) 35 WIR 312.

is now under an affirmative obligation not to allow any case to consume a disproportionate share of the finite resources of the court;

(g) the court should have in mind, first, the principle that court orders are not to be flouted and that there is need to indicate strong disapproval of ignoring orders and, second, a litigant should not be deprived unnecessarily of access to the courts;

(h) if the court is minded to grant relief, it should do so in a manner that makes it clear to the offending party and like minded individuals that this type of behaviour is frowned upon, lest it be thought that the court is taking a benign view of such conduct.

Sykes J added that under the more flexible approach indicated by the CPR, the court could show its displeasure in many ways, for example, by (i) granting the extension subject to stringent conditions and penalties for future breaches, including striking out the statement of case and entering judgment for the innocent party without further order and/or (ii) making a summary assessment of costs payable immediately or in the near future, or (iii) staying part of the case of the guilty party. Applying these considerations to the instant case, Sykes J noted that the case was in its second year of case management, witness statements had not been exchanged and expert reports had not been prepared but, having regard to the size of the claim, it could not be said that the case had taken up a disproportionate share of the court's resources. He therefore decided to grant the extension sought, but ordered the defendant to pay the costs of the application, commenting that the flexible approach to costs introduced by Part 64 of the CPR enables the court 'to reflect its displeasure at the conduct of a party even if it is successful on a particular application'.

Abuse of process

The power in Rule 26.3(b) to strike out a statement of case which is an abuse of the court's process is one which 'any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'.[21] Examples[22] of striking out for abuse of process include:

(a) starting a claim with no intention of pursuing it;[23]

(b) issuing a claim after expiry of the relevant limitation period;[24]

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21 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, p 536, per Lord Diplock.

22 These examples were confirmed by Barrow JA (Ag) in a post-CPR case, *St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd* (2003) OECS Court of Appeal, St Kitts and Nevis, Civ App no 6 of 2002 (unreported).

23 *Grovit v Doctor* [1997] 1 WLR 640; *Barton Henderson Rasen v Merrett* [1993] 1 Lloyd's Rep 540.

24 *Riches v DPP* [1973] 1 WLR 1019; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398, pp 404, 405; *Girten v Andreu* (1998) Supreme Court, The Bahamas, no 692 of 1997 (unreported).

Figure 14
Unless order

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO CL2006/R985

BBETWEEN RIO BRAVO ENGINEERING LIMITED CLAIMANT

AND UTOPIAN HOTELS INCORPORATED DEFENDANT

ORDER

Before the Honourable Madam Justice Nora Browne in Chambers on the 14th day of February 2007.

UPON HEARING Counsel for the Claimant and Counsel for the Defendant and UPON READING the affidavit of Leroy Daniel Cox filed herein, IT IS ORDERED that unless within 21 days of the date of this order the Claimant serves its list of documents on the Defendant this action will stand dismissed without further order, with costs to be taxed and paid by the Claimant to the Defendant, and that the costs of this application be the Defendant's in any event.

Dated the 15th day of February 2007.

_____
Registrar

(c) issuing a claim where the description of the claimant does not disclose any entitlement to sue;[25]

(d) issuing a claim that is *res judicata*;[26]

(e) issuing a claim that is vexatious, scurrilous or obviously ill-founded;[27]

(f) subjecting a defendant to two or more identical actions simultaneously;[28]

25 *Arnold Berg Export Import v Ramsanahie* (1988) High Court, Trinidad & Tobago, No 2120 of 1987 (unreported).

26 *Wright v Bennett (No 2)* [1948] 1 All ER 227.

27 See *Koch v Chew* (1997/98) 1 OFLR 537.

28 *Demerera Bauxite Co Ltd v De Clou* (1965) 23 WIR 13.

(g) seeking redress against a public authority by bringing an ordinary claim instead of a claim for judicial review;[29] and

(h) destruction of evidence before proceedings are commenced, with intent to pervert the course of justice, or destruction of evidence after issue of proceedings, if a fair trial can no longer be achieved.[30]

Further, it was pointed out by Cross J in a Trinidadian case, *Sookdeo v Barclays Bank of Trinidad & Tobago Ltd*,[31] that the court also has an *inherent power* to stay or dismiss actions which are obviously frivolous and vexatious or an abuse of process, but this was a jurisdiction which 'should be exercised with great care, and only in cases where the court is absolutely satisfied that no good can come of the action'.

In *Securum Finance Ltd v Ashton*,[32] the English Court of Appeal had to consider whether a claimant whose first action had been struck out on the ground of inordinate and inexcusable delay could have a 'second bite at the cherry' by litigating in fresh proceedings issues that had been already raised, though not adjudicated upon, in the first action, or whether the second action should also be struck out as an abuse of process. It had been suggested in earlier cases under the RSC that a claimant could be allowed to proceed with the second action provided it was commenced within the limitation period. Chadwick LJ took the view that the proper approach under the CPR was that the court should have in mind the overriding objective and consider 'whether the claimant's wish to have a second bite at the cherry outweighed the need to allot its own limited resources to other cases'.[33]

No reasonable cause of action or defence

A statement of case may be struck out on the ground that it fails on its face to disclose a claim or defence that is sustainable in law.[34] A cause of action

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29 *O'Reilly v Mackman* [1983] 2 AC 237. Examples (a)–(g) were confirmed by Barrow JA (Ag) in a post-CPR case, *St Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/94 Ltd* (2003) OECS Court of Appeal, St Kilts and Nevis, Civ App no 6 of 2002 (unreported).

30 *Douglas v Hello! Ltd* [2003] 1 All ER 1087.

31 (1976) High Court, Trinidad & Tobago, No 2323 of 1976 (unreported).

32 (2000) *The Times*, 21 June.

33 *Ibid.*

34 Rule 26.3(1)(b). In the recent case of *S&T Distributors Ltd v CIBC Jamaica Ltd* (2007) Court of Appeal, Jamaica, Civ App no 112/04 (unreported), Harris JA emphasised that striking out is a severe measure to be exercised with extreme caution, and a claim will be struck out as disclosing no reasonable cause of action only where it is 'obvious that the claimant has no real prospect of prosecuting the claim'. See also *Sebol Ltd v Tomlinson* (2007) Supreme Court, Jamaica, no HCV 2526/2004 (unreported), per Sykes J. In *Dotting v Clifford* (2007) Supreme Court, Jamaica, no 2006HCV0338 (unreported), McDonald-Bishop J (Ag) stated that 'the ultimate question that should be considered in determining whether to strike out the statement of case on the basis that it discloses no reasonable cause for bringing the claim seems to be, essentially, the same as that in granting summary judgment, that is: is the claim against the defendant one that is not fit for trial at all?'

that is unknown to the law will be struck out, as will a defence which consists of a bare denial or otherwise fails to include the material facts, or which, assuming the facts which are set out to be true, does not reveal any defence in law. Rather than striking out, the court may allow a statement of case to be amended, provided that the circumstances are such that amendment would accord with the overriding objective.[35]

Striking out will be refused if the court would be required to conduct a protracted examination of documents. On the other hand, the documents may clearly show that there is no sustainable case. An example under the English CPR is *Taylor v Inntrepreneur Estates (CPC) Ltd*,[36] where the claim was for a declaration that a lease agreement had come into force, damages for breach of covenant, and damages for an alleged misrepresentation inducing the agreement. It was held that, since the parties had conducted all their negotiations 'subject to contract', there was clearly no concluded agreement and there were no reasonable grounds for bringing the claim.

Inordinate and inexcusable delay

In the heavily case-managed environment of the CPR, cases of inordinate and inexcusable delay on the part of a litigant should be rare. The whole purpose of the CPR regime is to ensure that the progress of litigation is controlled by the court and not by the parties themselves, and the system of sanctions is available to punish any dilatoriness on the part of the claimant. However, through human frailty or otherwise there are bound to be cases from time to time in which a party 'slips through the case management net' and the question will arise as to whether his claim should be struck out on the ground of inordinate delay or some other sanction imposed. Such a situation is most likely to arise where an action was started under the old Rules, but where the CPR applied to the case as from January 2003. An example is the Jamaican case of *Wright v Nutrition Products Ltd*,[37] where a writ claiming damages for negligence and breach of statutory duty was filed in 1997, and a statement of claim filed a year later. Interlocutory judgment in default of defence was granted in 1999, but later in the same year that judgment was set aside and a defence was filed. No further steps were taken by the claimant. In March 2003 the defendant applied to have the claimant's action dismissed for want of prosecution, arguing that the failure of the claimant since September 1999 to bring the matter to trial constituted inordinate delay. The reason for the delay given by the claimant was that he had been out of the island and this absence had resulted in a breakdown of communication between himself and his counsel. Now that the communication had been restored, he wished to proceed with the action.

35 Under Rule 20.1 [Rule 20.4 (Jam)].

36 (2001) LTL 7/2/2001.

37 (2003) Supreme Court, Jamaica, no CLW 371 of 1997 (unreported).

Straw J (Ag) pointed out that in *Nasser v United Bank of Kuwait*[38] Sir Christopher Slade had said that, notwithstanding the general inapplicability of pre-CPR authorities, he was sure that Lord Woolf in the *Biguzzi* case[39] 'was not intending to suggest that the factors regarded by the court in *Birkett v James*[40] as crucial, namely the length of relevant delay, the culpability for it, the resulting prejudice to the defendant and the prospects of a fair trial, are no longer relevant considerations when the court has to deal with an application for dismissal for want of prosecution'.[41] In the instant case, Straw J (Ag) found that the fault for the three years' delay was that of the claimant, and the question was whether there was 'any substantial risk of an unfair trial or prejudice to the defendant as a result of this inordinate delay'. The learned judge estimated that, were the court now to proceed to fix a date for trial, that date would probably not be until October 2004, which would be seven years after the statement of claim was filed and 13 years after the cause of action arose. It would be 'a great burden on the witnesses to remember circumstances which occurred long before 1997 when the writ was issued. I am of the view that the nature of the delay has exposed the defendant to the possibility of an unfair trial'. The application for dismissal for want of prosecution was therefore granted.

The factors which are relevant in determining applications to strike out for want of prosecution under the CPR were outlined by Neuberger J in *Annodeus Ltd v Gibson*,[42] as follows: the length of the delay; any excuses for the delay; the extent to which the claimant had complied with the rules and any orders of the court; the prejudice to the defendant; the effect on the trial; the effect on other litigants; the extent, if any, to which the defendant had contributed to the delay; the conduct of the defendant and the claimant with regard to the litigation; and any other relevant factors.

Sanctions

In cases of less serious breaches of the rules or of court orders, the court can, as an aspect of its case management powers and in order to ensure compliance with its directions, impose sanctions other than striking out.[43]

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38 [2001] EWCA Civ 1454.

39 *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926.

40 [1978] AC 297, p 318.

41 *Ibid*, para 27. See *Follett v Briscoe* (2006) Supreme Court, Jamaica, no CLF 076 of 1991 (unreported), per Sykes J: *Meade v Canadian Imperial Bank of Commerce (Jamaica) Ltd* (2004) Supreme Court, Jamaica, no CL1995/M-147 (unreported), per Sykes J.

42 (2000) *The Times*, 3 March. See *First Caribbean International Bank (Jamaica) Ltd v Meade* (2005) Court of Appeal, Jamaica, Civ App no 96/2004 (unreported), per McCalla JA (Ag).

43 Rule 26.7. Rule 26.1(2)(c) permits the court to extend or shorten time for compliance with any rule even where application for extension is made after time for compliance has passed.

For instance, it may require a party to give security for costs or to make a payment into court; it may stay an action; it may debar a party in default from adducing evidence in a particular form or from particular witnesses; it may limit or deprive a party, if successful, of interest on a money claim, or impose costs sanctions. Furthermore, there are several provisions in the CPR which impose automatic sanctions in the event of certain breaches; for instance, by virtue of Rule 32.16 (OECS), a party who fails to comply with a direction to disclose an expert witness's report may not use the report at the trial or call the witness, unless the court gives permission.

It was emphasised by Lord Woolf MR in *Biguzzi v Rank Leisure plc*[44] that, by a proper exercise of its case management powers under the CPR, a court should be able to ensure that the parties do not disregard timetables, whilst at the same time producing a just result. However, *Biguzzi* should not be interpreted as promoting an unduly lenient approach to the imposition of sanctions. Each case must be considered in the light of its own circumstances and the court must seek to do justice in accordance with the overriding objective.[45]

Avoiding sanctions

By virtue of Rule 26.1(2)(k), the court, under its general case management powers, can 'extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed'.[46] Accordingly, a party who finds that he will be unable to comply with an order or direction in time, or who is already in breach, and who has not been able to agree

44 [1999] 1 WLR 1926.

45 See the observations of *Sykes J in RBTT Bank Jamaica Ltd v Seaton* (2007) Supreme Court, Jamaica, no CL 1993/E083 (unreported).

46 Where an application is made for an extension of time *before* the time for doing the act has passed, the court should apply Rule 26.1(2)(c) in a common sense way to the facts of the particular case and bearing in mind the overriding objective. There is no need, and it would be undesirable, to develop a judicial checklist in these situations. On the other hand, if the application is made *out of time* and the rule breached has the practical effect of preventing the party in breach from proceeding without court approval, then Rule 26.8 (containing the checklist of matters to be considered by the court in deciding whether to grant relief from a sanction) would apply: *Carr v Burgess* (2006) Supreme Court, Jamaica, no CLC130/1997 (unreported), per Sykes J. As Neuberger J had stated in *Coll v Tattum* (2001) Ch D (unreported), the general thrust of the CPR is that 'if a party to litigation wants to do something after the prescribed time, then he must obtain the consent of the other side, if possible (unless the Rules forbid it), or he must obtain the leave of the court . . . It is a little difficult to see the point of the time limits for acknowledging service and filing a defence if they can be disregarded with impunity, at least without any sanction.' And as Lord Woolf MR had stated in *Arbuthnot Latham Bank v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, at 1436, 'Litigants and their legal advisers must . . . recognise that any delay that occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice.' See also *White v Grant* (2006) Supreme Court, Jamaica, no CL 1993/W127 (unreported), per Brooks J.

an extension with his opponent, may make an application at the case management conference to extend time for compliance. The court's discretion to grant an extension must be exercised in accordance with the overriding objective.

Relief from sanctions

Where a party is in breach of a rule, practice direction or order which imposes a sanction for non-compliance, the sanction will take effect unless he applies for and obtains relief from the sanction.[47] Under Rule 26.8, relief must be sought by way of application notice; the application must be made promptly, and it must be supported by evidence on affidavit. The court may grant relief only if it is satisfied that:

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions and orders.[48]

Further, the court, in deciding whether to grant relief, must have regard to:

(a) the effect which the granting of relief or not would have on each party;

(b) the interests of the administration of justice; whether the failure to comply has been or can be remedied within a reasonable time;

(c) whether the failure to comply was due to the party or the party's legal practitioner; and

(d) whether the trial date or any likely trial date can still be met if relief is granted.

An example of the approach of the courts to relief from sanctions under the equivalent provisions of the English CPR is *Woodward v Finch*.[49] There, the claimant had failed to serve his witness statements in accordance with directions of the court. The court made an unless order expiring on 29 July. On 2 August the claimant applied for relief from the striking out sanction, attributing his delay to a change of solicitors and problems in transferring his legal aid certificate. He served the witness statements the day before the application was to be heard. It was held that relief against the sanction should be granted, on the grounds that although there had been a history of delay and the excuse for non-compliance with the unless order was not a good one, the relief had been applied for promptly, the

47 Rule 26.7.

48 All three requirements must be satisfied: *Shtern v Villa Mora Cottages Ltd* (2006) Supreme Court, Jamaica, no CLS 224 of 1999 (unreported); *International Hotels Jamaica Ltd v New Falmouth Resorts Ltd* (2005) Court of Appeal, Jamaica, Civ App no 56 of 2003 (unreported).

49 [1999] CPLR 699.

default was the product of inefficiency rather than wilfulness, and the trial date could still be met.

In *R C Residuals Ltd v Linton Fuel Oils Ltd*,[50] the claimants sought relief from a sanction imposed on account of breach of an unless order by late service of certain expert evidence which was crucial to their claim. The sanction prevented the claimants from relying on the evidence at trial. In refusing relief, the judge had taken into account the fact that the claimants had previously been in breach of court orders, and he had been conscious of the need, in the interests of justice, to avoid giving the impression to litigants that the court would readily grant relief to those failing to comply with unless orders. Kay LJ, in the English Court of Appeal, considered that the judge had been right to attach importance to ensuring that the parties realised the necessity, in the furtherance of the efficient administration of justice, of complying precisely with unless orders, and 'the sooner parties and their advisers were disabused of the idea that an unless order meant doing something on the last day, the better. It was the obligation of the parties to comply with unless orders as soon as possible, and no later than the deadline provided'. However, the judge had failed to balance these factors against the list of other factors in CPR Rule 3.9(1) [Rule 26.8 (Jamaica and OECS)]. In particular, the aforementioned factors had to be weighed against the facts that the default was not going to cause failure to meet the trial date, that the default was not intentional and did not affect the parties, and that a fuller explanation for the delay had since been given to the court. 'Balancing the consequences of the order against all other matters [listed in Rule 3.9], the balance fell in favour of the experts giving evidence. If not, the claimant would be deprived of the chance of pursuing a substantial part of the claim.'

DISCONTINUANCE

A claimant may discontinue all or part of a claim without the permission of the court; however, permission to discontinue is required where:

(a) a party has given an undertaking to the court, or the court has granted an interim injunction;

(b) the claimant has received an interim payment and the defendant who made the payment has not consented in writing to the discontinuance; or

50 (2002) *The Times*, 22 May. Brooke LJ said that where, in an emergency, solicitors refused formal service by e-mail, as they were strictly entitled to do, they might have difficulty resisting an application for relief from sanctions by a defaulting party. Followed by Sykes J in *Findlay v Francis* (2005) Supreme Court, Jamaica, no F045 of 1994 (unreported).

(c) there is more than one claimant and the other claimants have not consented to discontinuance by one of them.[51]

By Rule 37.4 [Rule 38.4 (T&T)], where the claimant discontinues without the consent of the defendant or the permission of the court, any defendant who has not consented may apply to have the notice of discontinuance set aside. The circumstances in which a discontinuance may be set aside were considered in *Coffee Industry Board v O'Meilly*,[52] where Sinclair-Haynes J held that a notice of discontinuance duly served, where leave was not necessary, may be struck out if its purpose is an abuse of the court's process. As Lord Diplock had stated in *Hunter v Chief Constable of the West Midlands*,[53] the court has 'an inherent power . . . to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied . . . It would . . . be most unwise [to limit the discretion] to fixed categories.' In exercising the discretion in the instant case, Sinclair-Haynes J adopted a test suggested by Lord Denning in *Castanho v Brown*,[54] namely, to consider what the court's attitude would have been if its permission had been sought. In the circumstances of the present case, had leave been required it was unlikely that the court would have allowed the claimant to withdraw. Accordingly, the notice of discontinuance was held to be an abuse of process and was set aside.

Procedure for discontinuance

The claimant must serve a *notice of discontinuance* on every other party to the claim and file a copy of it, certifying that the notice has been duly served on the other parties. If the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the filed copy; if the claimant needs the permission of the court, the notice of discontinuance must contain details of the court's order granting permission.

If there is more than one defendant, the notice must specify against which one or ones the claim is being discontinued.[55]

Effect of discontinuance

Discontinuance of a claim or part of a claim takes effect when the notice of discontinuance is served on the defendant, and the claim or part thereof

51 Rule 37.2 [Rule 38.2 (T&T)].

52 (2004) Supreme Court, Jamaica, no HCV/1657/2004 (unreported).

53 [1982] AC 529 at 688.

54 [1981] All ER 143.

55 Rule 37.3 [Rule 38.3 (T&T)].

is brought to an end on that date; however, this does not affect any proceedings relating to costs or the right of the defendant to apply to have the notice of discontinuance set aside (on the ground that he has not consented or the court has not given permission to discontinue).[56]

By Rule 37.6 [Rule 38.6 (T&T)], unless the parties agree or the court makes a different order, a claimant who discontinues is liable for the costs incurred by the defendant on or before the date on which the notice of discontinuance was served.[57]

56 Rule 37.5.

57 See *Pacific International Sports Clubs Ltd v Comerco Commercial Ltd* (2005), High Court, British Virgin Islands, no BVIHCV 70 of 2005 (unreported).

CHAPTER 20

EXPERT WITNESSES

It is generally agreed that the employment of experts to prepare reports and to appear at a trial is a costly exercise, yet it would not be possible to dispense with such expert opinion on scientific and medical matters, where it may be needed in order to determine liability, causation and damage. With regard to the role of the expert, it has always been accepted that his main duty is to provide advice to the court on matters outside the court's competence *as impartially as possible*, rather than to act as a partisan agent of the party employing or paying him. Before the advent of the CPR, however, the reality was frequently very different, as is highlighted by the following quotation of an American commentator:[1]

> The idea is that the lawyer plays the tune, manipulating the expert as though he were a musical instrument on which the lawyer sounds the desired notes . . . I have experienced subtle pressures to 'join the team' – to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster . . . The result is our familiar battle of experts . . . The more measured and impartial an expert is, the less likely he is to be used by either side.

The CPR have attempted to remedy this state of affairs by expressly providing, inter alia, that an expert witness must give independent assistance to the court by way of objective, unbiased opinion in relation to matters within his sphere of expertise,[2] and that where two parties wish to submit expert evidence, the court may direct that evidence should be given by a single expert witness.[3]

The general common law rule is that witnesses must state facts, not opinions, since the court is a tribunal of fact and opinions are not admissible evidence. However, there are two broad exceptions to this rule of exclusion:

(1) A *non-expert* witness in civil proceedings may give a statement of opinion on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying facts personally perceived by him. Such statements of opinion are admissible as evidence of what he perceived, for example, statements as to the identity, condition or age of persons or articles, as to the state of the weather, or estimations of speed and distance.

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1 Langbein, 'The German Advantage in Civil Procedure' (1985) 52 UCLR 823.

2 Rule 32.4(2) [Rule 33.2 (T&T)].

3 Rule 32.9 [Rule 33.6 (T&T)].

(2) An *expert* witness can give opinion evidence that will be admissible provided four common law conditions are satisfied:

(a) the matter must call for expertise, normally in matters of art, medicine or science which are likely to be outside the experience and knowledge of the tribunal of fact;[4]

(b) the evidence must be helpful to the court in arriving at its conclusions;

(c) there must be a body of expertise in the area in question;

(d) the particular witness must be suitably qualified as an expert in the particular field of knowledge.

Part 32 of the CPR contains the following rules, inter alia, governing the use of expert witnesses in civil proceedings.

(a) Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly (Rule 32.2 [Rule 33.2 (T&T)]);[5]

(b) It is the duty of the expert witness to assist the court impartially on the matters relevant to his expertise; this duty overrides any obligations to the party by whom he is instructed or paid (Rule 32.3 [Rule 33.1 (T&T)]);

(c) No party may call an expert witness or put in an expert witness's report without the permission of the court, which should normally be given at a case management conference (Rule 32.6 [Rule 33.5 (T&T)]).[6]

In *Financial Institutions Services Ltd v Panton*,[7] the claimant sought an order of the court under Rule 32.6 for permission to rely on an expert report[8] to be prepared by one EA, a forensic and investigative accountant. According to the claimant, the issues in the proceeding involved 'extremely complicated

4 Typical examples are (i) medical evidence on the extent and prognosis of personal injuries, (ii) engineering evidence as to the state of an allegedly defective building, (iii) handwriting evidence as to the authorship of disputed writing, (iv) accountancy evidence on matters raised in accounts: see *Cigarette Company of Jamaica Ltd v Commissioner of Taxpayer Audit and Assessment* (2006) Supreme Court, Jamaica, Rev App no 1 of 2005 (unreported).

5 In deciding whether the issues could benefit from the views of an expert, the court must be at liberty to look at all the case record which has been so far laid before it, including, for instance, the statutory declarations and the affidavits of the parties that have been submitted: *Cigarette Company of Jamaica Ltd v Commissioner of Taxpayer Audit and Assessment*, above, per Anderson J.

6 In the *Cigarette Company of Jamaica* case, above, Anderson J held that although the general rule is that permission should be granted at a case management conference, such permission could be granted by the court at a later stage if no prejudice would be suffered by the other party.

7 (2004) Supreme Court, Jamaica, no CL 1995/B-228 (unreported).

8 Procedural failures with respect to a party's expert witness report (for example, failure of the expert to comply with Rule 32.13(2) which requires him to provide a statement attached to his report indicating that he understands his duty to the court as set out in Rules 32.3 and 32.4) do not in themselves justify excluding the expert evidence. Such procedural failures can be dealt with by way of court orders or, at the conclusion of the proceedings, by special costs orders: *Eagle Merchant Bank of Jamaica Ltd v Chen-Young* (2003) Supreme Court, Jamaica, no CL 1998/E 095 (unreported), per Anderson J.

financial statements and other records of such a nature that the court would be assisted by the expert report of EA'. The defendants objected to the application, on the ground that EA could not be considered unbiased, impartial and independent, on account of the fact that EA had previously been retained as an expert by the Jamaican Government and was, in effect, the 'hired gun' of the claimants. Rattray J concluded that the objection was unsustainable and that the claimant should be allowed to rely on the expert report of EA. He explained his ruling thus:

> The perceived relationship . . . between EA and [the claimant] is not sufficient to disqualify EA from giving evidence as an expert witness. The headnote in *Field v Leeds City Council*[9] reads: 'A properly qualified expert witness who understood that his primary duty was to the court was not disqualified from giving evidence by the fact that he was employed by one of the parties to the litigation.' [Counsel for the defendants] has relied on *Liverpool Roman Catholic Archdiocesan Trustees v Goldberg (No 3)*,[10] the headnote of which reads: 'Where there is a relationship between a proposed expert witness and the party calling him which a reasonable observer might think is capable of making the views of the expert unduly favourable to that party, his evidence should not be admitted, however unbiased his conclusions might probably be.' This case, however, was disapproved by the English Court of Appeal in *Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)*.[11] There it was the view of the Court of Appeal that 'the test of apparent bias is not applicable to an expert witness as it is to a tribunal. Although it is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, such disinterest is not automatically a precondition to the admissibility of his evidence'. I was greatly assisted by the unreported judgment of my brother Anderson J in *Eagle Merchant Bank of Jamaica Ltd v Young*.[12] In that case, which coincidently dealt with an application to exclude the expert witness report of the same EA, the learned judge said: 'I also hold that the test of apparent bias advocated by Evans-Lombe J in *Liverpool* has been overruled by the *Factortame* case, and although I am not bound by it, I hold that it represents a correct analysis for the purposes of this application.' Anderson J also referred to the recent case of *Helical Bar plc v Armchair Passenger Transport Ltd*,[13] a first instance decision of Nelson J. There the court found that 'it was settled that the test of apparent bias applicable to a court or tribunal was not the correct test in deciding whether the evidence of an expert witness should be excluded. It was not the existence of an interest or connection with the litigation or a party thereto, but the nature and extent of that interest or connection which determined whether an expert witness should be precluded from giving evidence.' I am of the view, therefore, that the mere fact that EA was previously contracted to [the claimants] does not prevent him being appointed an expert witness in this case.

9 (2000) *The Times*, 18 January.

10 [2001] 1 WLR 2337.

11 [2002] 3 WLR 1104.

12 (2003) Supreme Court, Jamaica, no CL 1998/E 095 (unreported).

13 [2003] EHWC 367.

CHAPTER 21

AFFIDAVITS

An affidavit is a sworn[1] (written or printed) statement by a deponent, normally drawn by the deponent's attorney and containing relevant, admissible evidence. Evidence included in an affidavit must correlate with the deponent's oral testimony given at the trial. Affidavits are also required by Rule 17.3 of the CPR to support applications for interim remedies, such as injunctions; and Rule 11.9(2) provides that any evidence in support of an application for a court order must be contained in an affidavit unless a rule, practice direction or court order provides otherwise. It can thus be seen that affidavits assume a position of major importance under the CPR.

FORMAL REQUIREMENTS

The formal requirements of a sworn affidavit in proceedings are contained in Part 30 of the CPR. An affidavit must:

(a) *be headed with the full title of the proceedings*.[2] Where there is more than one person in a class of parties (for example, where there are three defendants), it is sufficient to give the full name of one person for each class of party followed by the phrase 'and others'; and where there is more than one matter, it is sufficient to state the first matter followed by the phrase 'and other matters';

(b) *state the deponent's name, address and occupation*[3] together with the declaration as to the truth. For example: 'I, JOHN DUNN, of No 11 Highgate Street, Frankfield in the Parish of Clarendon, an unemployed person, MAKE OATH and say as follows.';

(c) *be expressed in the first person throughout*;[4]

(d) *be divided into consecutively numbered paragraphs*;[5]

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1 Where a witness, on religious grounds, is unable to give evidence by way of affidavit, he must instead make a solemn affirmation, such as: 'I, Mark Young, of No 30 High Street, San Fernando, Company Secretary, do solemnly and sincerely affirm and declare as follows:' See, eg, Oaths Act, Ch 7:01, ss 6–8 (T&T). See also, eg, Evidence Act 1994, s 21 (B'dos).

2 Rule 30.2(a) [Rule 31.2(a) (T&T)].

3 Rule 30.2(b) [Rule 31.2(b) (T&T)].

4 *Ibid.*

5 Rule 30.2(d) [Rule 31.2(d) (T&T)].

(e) *give figures, not words, for dates, sums and other numbers*;

(f) *be fully legible, normally typed on one side only of A4 paper, and bound securely in a manner which would not hamper filing* ;

(g) *contain a jurat and be signed by the deponent*.[6] The jurat, at the left-hand side and end of the body of the affidavit, is a signed indorsement by the Commissioner for Oaths or other official before whom the swearing was administered, together with the place and date of the swearing. In addition, where it appears to the Commissioner for Oaths that the deponent is illiterate or blind, he must further indorse in the jurat that (a) he has read the affidavit to the deponent; (b) the deponent seemed to understand it; and (c) the signature or mark of the deponent was made in his presence.[7]

(h) *contain properly marked 'exhibits'* (where referred to in the affidavit and which must be annexed thereto). The Commissioner for Oaths before whom the affidavit was sworn must identify exhibits by a certificate entitled in the same way as the proceeding;[8]

(i) *be indorsed with a note at the end showing on whose behalf it is filed and the date of swearing* (if not already in the jurat) *and filing at the court registry*.[9]

Although there is no formal requirement that the document should be named, it is normal to state 'AFFIDAVIT', or to give an additional description of the purpose of the affidavit, such as 'AFFIDAVIT IN SUPPORT OF APPLICATION FOR SUMMARY JUDGMENT' in the centre before the introductory averments.

An affidavit containing any alteration may not be used in evidence unless all such alterations have been initialled both by the deponent and by the person before whom it was sworn.[10]

BODY OF THE AFFIDAVIT

The body of the affidavit must contain relevant and admissible evidence in a logical, sequential and clear manner. Paragraphs that are irrelevant,

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6 Rule 30.5(1), (2) [Rule 30.4(1), (2) (Jam); Rule 31.4(1), (2) (T&T)]. An affidavit must not be sworn before an attorney who is acting for a party in the proceeding. In *Para Investments Ltd v Chestnut* (1985) Supreme Court, The Bahamas, no 850 of 1984 (unreported), per Gonsalves-Sabola J, an affidavit in support of an application for summary judgment was held bad as it had been sworn before the claimant's attorney.

7 Rule 30.5(4) [Rule 30.4(4) (Jam); Rule 31.5(3) (T&T)].

8 Rule 30.4 [Rule 30.5 (Jam); Rule 31.6 (T&T)].

9 If an affidavit is not so indorsed, it is not to be filed or used without the permission of the court: *Chamorro v Sandyport Development Co Ltd* (1991) Supreme Court, The Bahamas, no 855 of 1990 (unreported), per Sawyer J.

10 Rule 30.3(4) [Rule 31.3(4) (T&T)].

scandalous or otherwise oppressive may be struck out by the court. Matter is 'scandalous' if it is indecent or offensive or is included for the purpose of abusing an opponent. An oppressive affidavit is one that is unnecessarily long or complex and that is likely to prejudice an opponent in the continued preparation of his case.

In addition, an affidavit in support of an application for an *ex parte* injunction must include facts or evidence which support the defendant's position. This is part of the higher duty to make full and frank disclosure in *ex parte* applications.

An affidavit must contain only such facts as the deponent is able to state from his own knowledge.[11] In other words, it must not contain hearsay evidence, except that an affidavit sworn for the purpose of being used in an application for summary judgment under Part 15 or in any procedural or interlocutory application may contain statements of information and belief (that is, information not within the deponent's personal knowledge), in which case Rule 30.3(2)(b) provides that the affidavit must indicate (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information and belief,[12] and (ii) the *source* of such belief. With respect to the latter requirement, where, for example, there is an affidavit in support of an *ex parte* application to extend the validity of a claim form on the ground that it has not been possible to serve the claim form on the defendant, it is insufficient to state simply that, in the deponent's belief, the defendant has been evading service. Rather, the deponent must give the court more information on which to base the exercise of its discretion in his favour, such as by giving full particulars of previous attempts on the part of the process server to effect service.

Where hearsay is allowed, the deponent may even refer to 'second hand' hearsay (for example, 'I am informed by X and verily believe he has been informed by Y'), stating the persons who could give direct evidence.[13]

In *Fernandes v United Insurance Co Ltd*,[14] a case decided under the RSC, the defendant insurance company applied for security for costs on the ground that the claimant was resident outside the jurisdiction. In his affidavit in support, G, the company's claims manager, deposed that, according to his information and belief, the claimant had established a place of residence at a given address in New York, and permanently resided there. King J (Ag),

11 Rule 30.3(1) [Rule 31.3(1) (T&T)]. See *Re Steadman Labier Investments Ltd* (1995) Supreme Court, The Bahamas, no 810 of 1994 (unreported).

12 *National Insurance Corporation v Rochamel Development Company Ltd* (2006) High Court, St Lucia, no SLUHCV2006/0638 (unreported).

13 *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV Co Ltd* [1984] 1 All ER 296; *Fernandes v United Insurance Co Ltd* (1992) High Court, Barbados, no 919 of 1987 (unreported).

14 (1992) High Court, Barbados, no 919 of 1987 (unreported).

in the Barbados High Court, stated that a deponent should identify both his *sources*, that is, the person or persons through whom he acquired the information and who could give direct evidence, and the *grounds*, that is, methods by which the person or persons came by the information, and which led the deponent to come to his belief. CPR Rule 30.3(2)(b)(ii) specifically requires identification of sources of information and belief but makes no reference to grounds. It is unclear what significance, if any, should be attached to the omission of the requirement of 'grounds' from Rule 30.3(2)(b)(ii). It is submitted, however, that in any event the requirements of 'sources' and 'grounds' are so closely intertwined that they should be considered to be elements of the same principle.

The proper approach to the application of the rules of evidence and procedure to affidavits was outlined by Hall J in *Wilmington Trust Co v Rawat*,[15] as follows:

(a) an affidavit must comply with the ordinary laws of evidence; accordingly, it may exceptionally contain hearsay evidence only where the 'sources and grounds' are disclosed;

(b) an affidavit must not contain matter that is scandalous and/or irrelevant and/or oppressive. Irrelevant material includes opinions, conclusions and submissions.

(c) where an affidavit, which is filed, contains any matter that it ought not to contain, the court need only ignore the offending matter, unless the breach is egregious;

(d) where an objection is taken by a party to material contained in an affidavit filed by another party, the court may, instead of proceeding as at (c), order the offending material to be struck out, but should only do so in 'plain and obvious cases'. If the matter is inconsequential, the court would still proceed as at (c).

15 Cited in *Re Steadman Labier Investments Ltd* (1995) Supreme Court, The Bahamas, no 810 of 1994 (unreported).

CHAPTER 22

WITNESS STATEMENTS

A witness statement is defined succinctly in Rule 29.4 of the Jamaican CPR[1] as 'a written statement (a) signed by the person making it and (b) containing the evidence which it is intended that person will give orally'.[2] Whereas the statements of case will set out the facts clearly and concisely, and the case management conference will seek to identify the issues and consider broadly the nature of the evidence, the main purpose of witness statements is to avoid 'surprise' at the trial and to encourage early settlements, and this is accomplished by the mutual service by the parties, prior to trial, of *details of the actual evidence to be adduced*.

One important effect of the introduction of the procedure for filing and exchanging witness statements, as explained by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd*,[3] is that the need for extensive pleadings should be reduced. Once documents have been disclosed and witness statements exchanged, the details of the nature of a case should become clear and at that stage the pleadings 'will frequently become of only historical interest . . . Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged'.[4]

As a general rule, witness statements represent and stand as the witnesses' evidence in chief, thus dispensing with the need for oral evidence of those matters. However, there are three broad exceptions to this principle: (i) an advocate should be allowed to 'settle' his witness in the witness box; (ii) a witness should be allowed to amplify his statement, provided the amplification does not go beyond the boundaries of the witness statement; (iii) with the permission of the judge, a witness should be able to expand

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1 In the OECS Rules, the definition is contained in Rule 29.4(1) and (2). Where the witness is blind or illiterate, there must be compliance with Rule 29.4(2): see *Bryan v Harris* (2005) Supreme Court, Jamaica, no CL 2000/B 098 (unreported), per Sykes J.

2 In *Shtern v Villa Mora Cottages Ltd* (2006) Supreme Court, Jamaica, no CLS 224 of 1999 (unreported), McDonald J (Ag) pointed out that where counsel is unable to find the witnesses for the purpose of signing the prepared statements, witness summaries can be filed instead, pursuant to Rule 29.6.

3 [1999] 3 All ER 775, P 792; followed in *Chong v Jamaica Observer Ltd* (2007) Supreme Court, Jamaica, no CLC 578 of 1995 (unreported), per Mangatal J.

4 Lord Woolf also emphasised, however, at p 793, that pleadings are still required in order to mark out the parameters of a case and are still critical to identify the issues and the extent of the dispute between the parties. Pleadings should always make clear the general nature of the case of the pleader.

on a witness statement in order to deal with changes since the document was made or to deal with any particular points made by the other party's witnesses.[5]

The content of a witness statement is similar to that of an affidavit. Rule 29.5 provides, inter alia, that a witness statement must: (i) so far as reasonably practicable, be in the intended witness's own words; (ii) sufficiently identify any document to which the statement refers; and (iii) state the source of any admissible matters of information and belief. Any inadmissible,[6] scandalous, irrelevant or oppressive matter may be struck out by the court.

SERVICE OF WITNESS STATEMENTS

The timing of the service of witness statements is a matter to be decided at the case management conference. Normally, service should follow disclosure of documents and precede or be contemporaneous with the service of expert reports, where appropriate. Service should be by way of *mutual exchange*, unless the court orders otherwise.

By Rule 29.11, where a witness statement is not served within the time specified by the procedural judge, the sanction is that the witness may not be called unless the court so permits. Further, the court may not give permission for the witness to be called at the trial unless the party asking for permission has a good reason for not previously seeking relief from the sanction under Rule 26.8 [Rule 26.7 (T&T)]. Although Rule 29.11 of both the Jamaican and the OECS Rules speaks of 'serving' witness statements, the courts in the OECS appear to have accepted 'filing at the court office' as equivalent to 'serving'. This is because, unlike in the Jamaican Rules, where Rule 27.9(6) requires 'the claimant or such other party as the court may direct' to serve on the other parties orders containing directions made at the case management conference, Rule 27.5(5) of the OECS Rules places this responsibility on the court office. So much is clear from at least three decisions of the OECS courts, which also deal with some important issues concerning the relationship between Rule 29.11 and Rule 26.8 (relief from sanctions).

The first is *St Bernard v Attorney General of Grenada*,[7] where witness statements had been filed out of time and the party calling the witness had failed to apply for relief within Rule 26.8. Barrow J (Ag), finding no good reason for the failure to apply previously for relief, struck out the late witness

5 Greenslade, *Report on Civil Procedure* (Eastern Caribbean Supreme Court), October 1998.

6 There has been a tendency on the part of counsel in 'crafting and even drafting' witness statements to 'gild the lily' by including hearsay material. See the observations of Anderson J in *Reid v Cable & Wireless Jamaica Ltd* (2004) Supreme Court, Jamaica, no CLR037 of 2000 (unreported).

7 (2001) High Court, Grenada, no 84 of 1999 (unreported).

statements, the result of which was that the claimant was unable to prove his case and judgment was entered for the defendant. The Court of Appeal allowed the claimant's appeal, giving time for the filing of the witness statements, on the ground that the court office appeared to have been in default in not serving the witness statements on the defendant as required by Rule 27.5(5).

In *Hodge v Cable & Wireless (West Indies) Ltd*[8] there was a delay of a few days in the filing of the claimant's witness statements pursuant to an order made at the pre-trial review. George-Creque J stated that:

> what is being complained of here, however, is not so much the delay in filing the witness statements but the delay of eight months continuing up to the date of the trial in making the application for relief against sanction pursuant to Rule 26.8 as required under Rule 29.11. Not having previously sought relief under Rule 26.8, therefore, the claimant must under Rule 29.11 furnish the court with a good reason for not previously seeking relief in order that the court may exercise the limited discretion granted under this Rule and permit the impugned witness statements to stand and the witnesses to be called at this stage.

In the circumstances, however, the learned judge believed that the defendant's application for the striking out of the witness statements must have taken the claimant's attorney by surprise having regard to the fact that the core bundle, which included the impugned witness statements, had been agreed by the defendants and had been filed seven months previously.

> The claimant must have been led to believe, and so I find, that, notwithstanding the lateness of the impugned witness statements, such irregularity must be taken to have been waived by the defendants. Why else would they agree to the core bundle containing the said statements? If they objected to such witness statements being filed outside of the time limited for so doing, then surely in the spirit of Rule 1.3 of the CPR, which imposes a duty on the parties to help the court to further the overriding objective, there was ample time to raise this objection or to object to their inclusion in the core bundle.

In Van Den Brink v Shierson,[9] the English Court of Appeal had cited with approval a dictum of Millett LJ in *Mortgage Corporation Ltd v Sandoes*[10] to the effect that the court will not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits, and in *St Kitts Development v Golfview Development Ltd*,[11]

8 (2003) High Court, Anguilla, no 108 of 1998 (unreported).

9 CA, 12 May 1997.

10 *The Times*, 27 December 1996.

11 (2003) Civ App no 24 of 2003 (unreported).

Alleyne JA similarly had deprecated the practice of using tactical advantages in a case where the defendants had had ample notice of an irregularity and could and should have raised the issue ahead of the date of the trial, but sought instead to take advantage of a technical breach. Such conduct was a reversion to the technique of 'trial by ambush' that the CPR sought to discourage. George-Creque J commented that 'whilst the Rules of Court must not be flouted, by the same token they must not be used as whipping sticks to defeat the overriding objective of the said Rules', and accordingly held that the irregularity in the filing of the witness statements in the Hodge case should be deemed to have been waived by the defendants, and that the statements should be admitted and the witnesses permitted to give evidence at the trial.

The third case is the decision of the OECS Court of Appeal (British Virgin Islands) in *Treasure Island Co v Audubon Holdings Ltd*,[12] which is another example of a party seeking to take advantage of a failure to file a witness statement within the time fixed at the case management conference. Here the defendants' counsel, after commencement of the trial, made a submission to the effect that the claimant had neglected strictly to comply with the case management order with respect to the time limited for the filing of witness statements. Counsel argued that in order for the claimant to call the witnesses, the court's permission had to be given, and Rule 29.11 limited the grant of the court's permission to instances where the party in breach had a good reason for not previously seeking relief within Rule 26.8, and such good reason was lacking. The trial judge took the view that she had a discretion, in accordance with the overriding objective of the CPR and with her general case management powers, to dispense with strict compliance with the Rules and, finding that no delay or injustice had been caused by the breach, she held that the witness statements should be deemed to have been validly filed. The Court of Appeal essentially agreed with the view of the trial judge. Saunders JA said:

> This Court's view of the matter was never in doubt. There was no way that we could allow skilful advocacy to drive a dagger through the heart of fundamental precepts of the new Civil Procedure Rules . . . Rule 29.11 has such severe consequences for a litigant that, in keeping with the overriding objective, a court should liberally approach its second sub-rule. Did Audubon's (the first claimant's) solicitors have a good reason for not previously seeking relief? The special relationship among Treasure Island (the first defendant), Mr Sims (the second defendant) and Mrs Sims (the third claimant) cannot be discounted. The solicitors for Audubon were actually seeking to accommodate Mrs Sims. In the context of the length of time available before the trial date, the delay in filing or exchanging the witness statements was inconsequential. No prejudice whatsoever was occasioned by the delay. Most importantly, the solicitors for Audubon could not have

12 (2004) Court of Appeal, BVI, Civ App no 22 of 2003 (unreported).

> imagined that, in light of all these circumstances, they were going to be ambushed with this technical point sprung on them on the morning of the trial. Prior to that date, the other side had conducted themselves as though they were intent on proceeding with the trial. They had filed a pre-trial memorandum in keeping with Rule 38.5(3) and no indication was given that they intended to take the point of the failure strictly to comply with that aspect of the case management order. For all these reasons, it seems to me that the Audubon solicitors could establish a 'good reason' for not previously seeking relief under Rule 26.8.

Saunders JA also emphasized in this case, with regard to the relationship between the overriding objective and specific provisions of the Rules, that

> it must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by invoking the overriding objective . . . The overriding objective does not in or of itself empower the court to do anything or grant to the court any discretion. It is a statement of the principle to which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself.[13]

13 See *Vinos v Marks & Spencer plc* [2001] 3 All ER 784; *Godwin v Swindon Borough Council* [2002] 1 WLR 997; *Kaur v CTP Coil Ltd* [2001] CP Rep 34; *Totty v Snowden* [2002] PIQR P 17. See *Robinson v Clarendon Parish Council* (2005) Supreme Court, Jamaica, no HCV 02126 of 2004 (unreported), in which Sykes J referred to 'a flourishing and luxuriant fallacy that, where the CPR and CAR are very clear, the court is at liberty to ignore the plain text . . . The overriding objective cannot twist and distort rules to achieve what may be perceived to be the just result'.

CHAPTER 23

PRE-TRIAL REVIEW

Pre-trial reviews are most appropriate in complex cases. Their basic purposes are to check compliance with the directions given at the case management conference and readiness for trial, and to give final directions as to the trial itself. Accordingly, Rule 38.6 provides that, at the pre-trial review, the judge must give directions as to the conduct of the trial in order to ensure the fair, expeditious and economic trial of the issues. In particular, the judge may, inter alia:

(a) decide on the total time to be allowed for the trial;
(b) direct how that time should be allocated between the parties;
(c) direct either party to provide further information to the other;
(d) direct the parties jointly to prepare core bundles of documents, an agreed statement of facts, or an agreed statement of the basic technical, scientific or medical matters in issue;
(e) give directions as to the procedure to be followed at the trial and as to the extent to which evidence may be given in written form; and
(f) give directions for the filing and service of a chronology of relevant events, lists of authorities and skeleton arguments.

The judge at the case management conference must consider whether a pre-trial review should be held. If the judge does not order a pre-trial review, any party may apply for one at least 60 days before the trial date. The registry must give each party at least 14 days' notice of the date, time and place of the review.[1]

PRE-TRIAL MEMORANDUM

Rule 38.5 [Rule 39.4 (T&T)] provides that the parties must seek to agree and file a pre-trial memorandum containing a concise statement of the nature of the proceedings, a statement of the issues to be determined at the trial, details of any admissions made, and the factual and legal contentions of the parties filing it. The memorandum must be filed not less than seven days before the pre-trial review.

If the parties are unable to agree on a memorandum, each must file his own memorandum and serve a copy on all other parties not less than three days before the date fixed for the pre-trial review.[2]

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1 Rule 38.2 [Rule 39.2 (T&T)].
2 Rule 38.5 [Rule 39.4 (T&T)].

CHAPTER 24

TRIAL, JUDGMENTS AND ORDERS

TRIAL

The vast majority of civil actions never reach the trial stage. This is due to many factors, but in particular it may be said without hesitation that the main purpose and effect of the new civil procedure regime is to dispose of cases before they reach trial, either by encouraging the parties to settle their dispute by mediation or other forms of ADR, or by the liberal use of summary judgment and default judgment procedures, and by striking out or discontinuance. The great advantage of disposing of a claim without a trial is, of course, the saving of the heavy costs associated with a trial, which will normally far exceed the costs of the interlocutory proceedings.

On the topic of trial, Pt 39 [Pt 40 (T&T)] is short. Rule 39.1 provides that the claimant must prepare (with pagination and index) a bundle including all the documents that any party wishes to make use of at the trial, and in order to assist that purpose all parties must inform the claimant of the documents they wish to be included in the bundle, at least 21 days before the date fixed for the hearing. The claimant must file at the registry, 10 days before the hearing date, two bundles: the first bundle should contain copies of the claim form, statements of case, any requests for information and the replies, the pre-trial memoranda, and, where there has been a pre-trial review, any skeleton arguments, chronologies and summaries of legal propositions and lists of authorities to be relied upon; the second bundle should contain copies of witness statements, expert reports and, where there has been a pre-trial review, any agreed statements as to facts, technical, scientific or medical matters, or law.

Other Rules in Pt 39 deal with matters such as the right of the court to limit cross-examination, the power of the trial judge to allow the parties to file written submissions, and the right of a party who was not present at the trial to set aside any judgment or order made in his absence (the party must show by affidavit evidence that (a) there was a good reason for his non-attendance, and (b) if he had attended, it is likely that some other judgment or order would have been made).

Regarding the power of the court within Rule 39.6 to set aside a judgment[1] or order given at a trial where the applicant was not present, in *Watson v*

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1 Application must be made within 14 days after the date on which the judgment or order was served on the applicant. Rule 11.18 contains a similarly worded provision relating to interlocutory orders. See *Wyndham v Terrilonge* (2005) Supreme Court, Jamaica, no CL 1994/W124 (unreported), per Brooks J; *St Lucia Coconut Growers Association v Park Estates (1962) Ltd* (2003) High Court, St Lucia, no SLUHCV0005 of 1984 (unreported), per Hariprashad J.

Roper[2] K Harrison JA in the Jamaican Court of Appeal comprehensively examined the question, emphasising that the predominant consideration for the court in deciding whether to set aside the judgment was not the existence or otherwise of a defence on the merits but rather the reason for the applicant's absence from the trial. If the absence were deliberate and not due to accident or mistake, the court would be unlikely to allow a re-hearing. Other relevant considerations included the prospects of success of the applicant in a retrial; the delay, if any, in applying to set aside; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. These principles had been established in the Jamaican case of *Edwards v Robinson's Car Mart*[3] and had been applied from time to time. The learned Justice of Appeal continued:

> Rule 39.6 therefore gives the absent party the opportunity of explaining why he did not attend and that he has a reasonable prospect of success. It also gives the party, in whose favour the judgment was given, the chance of not having to prove his case all over again, with all the attendant expense that this will involve, if a court is satisfied that there is in truth no reasonable prospect that the judgment would be reversed.

K Harrison JA also stated that the conditions in Rule 39.6 were similar to those enunciated in *Shocked v Goldschmidt*[4] but that under the CPR they were cumulative and there was no residual discretion in the trial judge to set aside the judgment if any of the conditions were not satisfied. In the instant case there was no evidence that satisfactorily explained the reason for the defendant/applicant's absence at the trial; nor had it been shown that, had the defendant attended, some other judgment might have been given, since, as the trial judge, Mangatal J, had found, there 'was in reality no defence at all'.

JUDGMENTS AND ORDERS

Under CPR Rule 42.5(2) [Rule 43.5(1) (T&T)], all judgments and orders must be drawn up and sealed by the court unless:

(a) a party, with the permission of the court, agrees to draft it;
(b) the court dispenses with the need to draw it up;
(c) the court directs a party to draft it, subject to checking by the court before it is sealed; or
(d) it is a consent order.

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2 (2005) Court of Appeal, Jamaica, Civ App no 42 of 2005 (unreported).

3 (2001) Court of Appeal, Jamaica, Civ App no 81 of 2000 (unreported).

4 [1998] 1 All ER 372.

A party who is required to draw up a judgment is allowed seven days to file the relevant document, together with sufficient copies for all relevant parties, failing which any other party may draw it up and file it for sealing.[5]

Every judgment or order (apart from consent orders, default judgments and judgments on admissions) must state the name and judicial title of the judge who made it.[6]

After a judgment or order has been drawn up, the registry (OECS) or the party filing the draft judgment or order (Jamaica) must serve sealed copies on the applicant and respondent, and on any other person ordered to be served.[7]

A judgment or order takes effect on the day it is given or made (not from the time it is drawn up, sealed or served), unless the court specifies that it is to take effect on a different date.[8] A party must comply with a judgment or order immediately, unless the court (or, in the case of a request for a default judgment or judgment on an admission, the claimant) specifies another time for compliance.[9]

CPR Rule 42.10(1) [Rule 43.10 (T&T)], the 'slip rule', enables the court at any time (without an appeal) to correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission. It was held in *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc*,[10] decided on the equivalent English Rule (Rule 40.12(1)), that the slip rule did not enable a court to have second or additional thoughts; once an order was drawn up, any mistakes had to be corrected by an appellate court. However, the Rule did enable the court to amend an order so as to give effect to its original intention. Further, as Sykes J held in *Mighty v Wilson*,[11] it was a fundamental principle that, in appropriate circumstances, a superior court of record has an inherent power to set aside its own order or judgment *ex debito justitiae*,[12] such as where a party has not been served with documents notifying him that a suit has been filed against him. He said:

> While it is true that we are under a new code and, as such, the old case law should be viewed with great suspicion, it is my view that there are certain

5 Rule 42.5(3)(4) [Rule 43.5(4)(5) (T&T)].

6 Rule 42.4 [Rule 43.4 (T&T)].

7 Rule 42.6 [Rule 43.6 (T&T)].

8 Rule 42.8 [Rule 43.8 (T&T)].

9 Rule 42.9 [Rule 43.9 (T&T)].

10 (2001) *The Times*, 28 March. See also *Stonich v Stonich* (2002) High Court, BVI, no 23A of 2001 (unreported).

11 (2005) Supreme Court, Jamaica, no CLM 188 of 1999 (unreported).

12 *Craig v Kanssen* [1943] KB 256, at 262–263, per Lord Greene MR. The court also has an inherent power to amend its order so as to make it *clear and free from ambiguity: Thynne v Thynne* [1955] 3 All 129; *Royal Bank of Trinidad and Tobago v Wears* (1989) Court of Appeal, Trinidad & Tobago, Civ App no 119 of 1979 (unreported), per Corbin JA.

> fundamental concepts that must apply, unless restricted by statute or rules of court, to the new Rules . . . There is nothing in the CPR to indicate any restriction or modification of the inherent power of this court to set aside a judgment obtained where the affected party has not been served.

Another inherent power of the court is its jurisdiction to make a supplemental order. In *Vassell v Tennant*,[13] Brooks J stated that in a number of cases predating the CPR it had been held that although a court had no jurisdiction to vary its orders, it was entitled to make a supplemental order directing additional relief; for instance where the court orders an enquiry into damages as supplementary to an initial order for specific performance. This power is available, however, only where the supplemental order is grounded on facts that were not available at the time when the original order was made, and where it does not alter the original order.

On the other hand, *before* an order is drawn up, it seems the court has jurisdiction to review and change its mind on a conclusion reached in a judgment. In *Kirin Amgen Inc v Transkaryotic Therapies Inc*,[14] Neuberger J was asked to reverse himself on the ground that the conclusion he had reached in his judgment was inconsistent with binding authority that he had overlooked. Counsel argued that the principle in *Stewart v Engel*,[15] where the Court of Appeal had held that a court had jurisdiction to review and change its mind on a conclusion reached in a judgment at any time before the order was drawn up, had been altered by Rule 52.4 of the CPR. Counsel's argument was that under the old RSC the power of a court of first instance to review at any time until the order had been drawn up was consistent with the Rule that the case was not subject to an appeals regime until the order had been drawn up, but now that, under the CPR, the appeals regime started to apply from the moment *judgment was given*, the power to review after that point no longer existed. Neuberger J did not accept this argument. He took the view that, given that the CPR were intended to give legal procedures a more flexible and less technical flavour, it would be surprising if the power to review that existed under the RSC no longer existed under the new Rules.

Consent order

The function of a consent order is to record the agreement of the parties with respect to certain interlocutory matters, or to record the terms of a compromise on settlement of an action. Since the order is founded on a

13 (2005) Supreme Court, Jamaica, no CL 1994/V010 (unreported).

14 (2001) *The Times,* 9 May.

15 [2000] 1 WLR 2268.

contract between the parties,[16] the necessary elements of a contract must be present.[17] A consent order must be (a) draw in the terms agreed, (b) expressed to be 'by consent', (c) signed by the parties' attorneys, and (d) filed at the registry for sealing.[18]

In the case of an *interlocutory* consent order, the court has an inherent power to vary its terms;[19] in the case of a *final* consent order, so long as it has not been drawn up, a party may apply to the court to have it set aside if he can show good grounds such as mistake, misrepresentation or fraud.[20] On the other hand, once a final consent order has been perfected, the court has no power to vary it. Any challenge to such an order must be by way of appeal, or by bringing a fresh action.[21]

Tomlin order

A Tomlin order is a consent order staying proceedings upon terms, agreed between the parties, which are scheduled to the order.[22] Such an order is particularly useful (a) where complex terms of settlement are agreed,[23] (b) where the parties wish to avoid publicity of the agreed terms, or (c) where they wish to agree terms which extend beyond the boundaries of the action.

The order should be drawn thus:

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16 Thus, where a party agrees to the terms of a settlement and all that remains to be done is to execute a consent order, the court will regard the settlement as an implied agreement which cannot be avoided, unless the party can show that grave injustice would result from allowing the settlement to stand: *Ebanks v Morritt Properties (Cayman) Ltd* [2002] CILR 490.

17 *Channel Ltd v FW Woolworth and Co* [1981] 1 WLR 485.

18 Rule 42.7(5); Rule 43.7(5) (T&T).

19 *Mullins v Howell* (1879) 11 Ch D 763; *Baldeosingh v Sankerlall* (1971) 18 WIR 375; *Joseph v Cummings* (1977) High Court, Trinidad & Tobago, no 1414 of 1973 (unreported); *Swim-Quip Inc v Magnus and Associates Ltd* (1975) 13 JLR 124 (Supreme Court, Jamaica), where it was held that a consent order that the defendant should file further and better particulars within 21 days could be varied by the granting of an extension of time to file such particulars. *In H Ltd v J Ltd* [1990–91] CILR 53 (Grand Court, Cayman Islands), Malone CJ held that the court could grant an extension of time for the provision of security for costs by the claimant as contained in an undertaking in a consent order, in the absence of any provision in the consent order excluding the court's discretion to grant such extension of time. See also *Liva v Harbour Island Bay Holdings Ltd* (2001) Supreme Court, The Bahamas, no 926 of 1999 (unreported), in which the principles applicable to variation of a consent order were considered. It was also stated in this case that, in setting aside a compromise or declining to enforce an agreement, the court has a general discretion to ensure that its own procedures are not a source of injustice.

20 *Dietz v Lenning Chemicals Ltd* [1969] 1 AC 170.

21 *De Lasala v De Lasala* [1980] AC 546; *Re Grants to the Beneficiaries of Deed No 129 of 1940* (1969) High Court, St Vincent and the Grenadines, no 151 of 1969 (unreported).

22 The name is derived from a Practice Note [1927] WN 290, per Tomlin J.

23 Eg, where a building contractor undertakes to carry out certain scheduled work and the building owner undertakes to pay at certain agreed rates. A formal court judgment would be inappropriate in such a case because the court would not be in a position to enforce complex terms.

> And, the claimant and the defendant having agreed to the terms set out in the annexed schedule, it is ordered that all further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect.

The effect of a Tomlin order is to stay the action whilst at the same time keeping it alive as between the parties for the sole purpose of enabling any party to apply to the court to enforce the agreed terms.[24] It is not part of the judge's function to approve or disapprove the terms of the agreement, and he has no power to make such an order in terms other than those agreed,[25] though the court has an inherent power to rectify a Tomlin order which, by mistake, does not reflect the parties' true agreement.[26]

In the event of breach of the agreed terms, the action can be restored under the 'liberty to apply',[27] and an order obtained requiring compliance by the defaulting party.[28] Provisions in the schedule can be enforced even if they extend beyond the boundaries of the original action.

Administrative consent orders

In order to save time and costs, Rule 42.7[29] [Rule 43.7 (T&T)] enables certain types of consent order to be entered administratively, without the need to obtain the approval of the court, provided that none of the parties is a litigant in person, a minor, or a patient. The kinds of orders include, for example, judgments or orders for the payment of damages or a debt; orders setting aside default judgments; orders for stays on agreed terms which dispose of the proceedings, including Tomlin orders; and orders for the discharge of any party from liability. The order must be drawn up in the agreed terms and bear the words 'By consent'. It must be signed by the parties' attorneys and be filed at the registry for sealing.

24 *Dashwood v Dashwood* [1927] WN 276.

25 *Noel v Becker (Practice Note)* [1971] 2 All ER 1186.

26 *Islam v Aktar* [1994] LS Gaz R38.

27 *EF Phillips and Sons Ltd v Clarke* [1970] Ch 322, p 325, per Goff J.

28 If this order is not complied with, and it is desired to seek enforcement by committal, an injunction or a further court order must be obtained since the terms of the schedule are not an order of the court which can be enforced directly by contempt proceedings: *Dashwood v Dashwood* [1927] WN 276.

29 Rule 42.7 (OECS) differs in several respects from Rule 42.7 (Jamaica).

Figure 15
Consent order

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO 2006 HCV 7544

BETWEEN RED FOX (JAMAICA) LIMITED CLAIMANT

AND BARNEY AND SON (A FIRM) DEFENDANT

ORDER

Entered the 26th day of October 2007

Before His Lordship Acting Justice Paul Jenkins

UPON HEARING Delisle B Ronson, Attorney-at-Law for the Claimant, and UPON READING the affidavit of James Cameron filed herein on the 17th day of September 2007 and the agreement for sale dated the 9th day of July 2007 and executed by the Claimant and the Defendant, UPON HEARING Olive Cramp, Attorney-at-Law for the Defendant, and UPON READING the affidavit of Gerald Barney filed herein on the 26th day of July 2007.

IT IS HEREBY ORDERED BY CONSENT:

1. That the Defendant do pay to the Claimant on or before the 14th day of December 2007:
   (a) the deposit of $225,000 paid by the Claimant to the stakeholder on account of the purchase price of the property the subject matter of these proceedings;
   (b) the sum of $203,750 in respect of general damages for breach of contract and the sum of $78,297 in respect of special damages;
   (c) costs of $32,588.
2. That the Claimant do return to the Defendant on or before the 14th day of December 2007 all documents of title in respect of the said property submitted to the Claimant and/or his Attorney-at-Law by the Defendant and/or his Attorney-at-Law.
3. Liberty to apply.

Dated the 26th day of October 2007

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Registrar

CHAPTER 25

COSTS

Rule 64.6[1] establishes the general Rule that if the court decides to make an order as to costs, it must order the unsuccessful party to pay the costs of the successful party. However, the court has a wide discretion to order otherwise, having regard to all the circumstances and, in particular, having regard to such matters as the conduct of the parties before and during the proceedings, any payment into court or offer to settle made by a party, and whether it was reasonable for a party to pursue a particular allegation or raise a particular issue.

The application of the aforementioned general Rule under the new CPR regime was comprehensively examined in *Thompson v Goblin Hill Hotels Ltd*,[2] where the question was as to the appropriate costs order in a case where the claimants, in addition to raising, inter alia, the issue of the proper construction of a lease, had persisted with an allegation of fraud, notwithstanding that they had 'not provided one shred of evidence capable of raising fraud'. The claimants ultimately succeeded on the point of construction of the document, but they abandoned the fraud aspect of their claim after approximately 14 days of trial. Sykes J held that it was wholly unreasonable for the claimants to have pursued the fraud claim when the prospect of success had been remote from the beginning. This had resulted in a disproportionate amount of the court's resources being spent on the matter, thereby depriving other litigants of 10 days which would have been available had the claimants made a careful assessment of their case. The learned judge clearly and in colourful language explained the modern approach to litigation under the CPR:

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1 Rule 63.6 (Bel); Rule 66.6 (T&T).

2 (2007) Supreme Court, Jamaica, no CLT005 of 2002 (unreported). See also *Campbell v Bennett* (2005) Supreme Court, Jamaica, no CLC248 of 1995 (unreported), per Sykes J. In *Rochamel Construction Ltd v National Insurance Corporation* (2003) OECS Court of Appeal (St Lucia), Civ App no 10 of 2003 (unreported), Byron CJ stated that a number of concepts were relevant to an award of costs, such as that claimants should be discouraged from bringing proceedings or making allegations which were spurious in the sense that they were unsupported by evidence; persons should not be forced to waste expense to defend claims that were not being prosecuted; and defendants should be encouraged to admit, at an early stage of the proceedings, allegations or claims that they were unable to rebut. In *Finecroft Ltd v Lamane Trading Corporation* (2006) High Court, BVI, no BVIHCV2005/0264 (unreported), Hariprashad-Charles J considered that the principles regarding the award of costs were correctly enunciated in *Scherer v Counting Instruments Ltd* [1986] 2 All ER 529, at 537–537, where Buckley LJ had stated that the judge was required to exercise his discretion judicially, ie, in accordance with established principles and in relation to the facts of the case on relevant grounds connected with the case, which included any matter relating to the litigation, but nothing else.

> In the modern form of litigation in civil trials, the bad old days of pleading a formidable case with the defendant waiting in suspense for the damning-yet-unknown-till-trial witness to deliver salvo after salvo of devastating evidence are gone, hopefully, for ever. Each party knows well before the trial, not only who the witnesses are to be called by the other side, but also their likely testimony. One of the intended consequences of this new style of litigation is that litigants are to assess their case constantly as they know more about their opponent's case. They need to determine which issues they are likely to succeed or fail on as the case progresses through case management and pre-trial review and, when that assessment is made, determine how their case is affected, and ultimately ask themselves, 'Do I have a real prospect of success?' Under the new Rules there is progressive revelation and there is, as it were, knowledge of the opponent's case from its genesis to final revelation ... There is not much excuse today for pursuing hopeless claims. Litigation today is no longer the Columbus-type voyage of exploration, which saw the intrepid explorer returning to Europe ignorant of where he had been. The route is now clearly demarcated by the claim form, the particulars of claim, witness statements, disclosure of documents (including documents unfavourable to one's case), requests for further information, case management conferences where the judge is under a duty to identify the real issues in dispute, and pre-trial review where the issues are further narrowed after full disclosure of documents and witness statements.

Sykes J also commented that since the CPR was intended 'to change our legal culture', the general principle in Rule 64.6(1) could be easily displaced, as it was simply a default Rule that could be readily departed from, as the circumstances of the case required. Accordingly, in the instant case it was held that the claimants should recover costs only for the first four days of the trial.

WASTED COSTS ORDERS

Rule 64.13 of the Jamaican CPR provides that the court may make a 'wasted costs' order, the effect of which is that the court may order a *party's attorney* to pay any costs incurred by his client or by another party as a result of '*any improper, unreasonable or negligent act or omission*' on the part of the attorney or his employee. Wasted costs orders are not restricted to conduct in court, but extend to the attorney's involvement in advising, drafting and settling documents in relation to proceedings.

Alternatively, wasted costs may simply be disallowed on taxation.

A wasted costs order may be made pursuant to an application by a party, or it may be made by the court on its own initiative. Where an application is made, notice must be given to the attorney, supported by an affidavit setting out the grounds for the application; where a court is considering making an order without an application, it must give the attorney notice of its intention, stating the grounds on which the court is minded to make the order. The notice must also state a date, time and place at which

the attorney may attend to show cause why a wasted costs order should not be made, and seven days' notice of the hearing must be given to the attorney and all parties to the proceedings.[3]

Two recent cases seem to suggest that the courts in Jamaica will not readily grant wasted costs orders. In *Gregory v Gregory*,[4] the court on its own motion initiated an inquiry into whether a wasted costs order should be made against the defendant's attorney in the context of a fixed date claim under the Married Women's Property Act. The defendant, who lived in Canada, was served on 16 November 2003, and the matter was fixed for hearing on 11 February 2004. An acknowledgment of service was not filed by the defendant until 10 February 2004, one day before the hearing, and when the matter came before the judge on 11 February, the defendant had not filed any affidavit in response. The matter was adjourned to 9 June 2004 for the whole day. On that day, the claimant was ready to proceed but had not yet been served with the defendant's affidavits. On inquiry by the court as to the reason for the delay, the defendant's attorney stated that there had been a breakdown of communication between his office and his client, and that he accepted full responsibility for the breakdown. The judge thereupon decided to invoke Rule 64.14(3) since it appeared that it was the tardiness of the defendant's attorney that had resulted in a wasted day. At the hearing to determine whether a wasted costs order should be made, the attorney put forward other information which had not been placed before the court on 9 June, to the effect, inter alia, that his client had failed to follow instructions in having his affidavit properly notarised and returned in time for the 9 June hearing.

Sykes J exhaustively examined the principles on which the court may make a wasted costs order against an attorney, adopting first of all the views of Bingham MR in *Ridehalgh v Horsefield*,[5] where the Master of The Rolls had laid down a three-question test to determine such cases:

(1) Has the attorney acted improperly, unreasonably or negligently?
(2) If yes, did the conduct cause the applicant or any party to the proceedings to incur unnecessary costs?
(3) If yes, is it in all the circumstances just to order the attorney to compensate the party for the whole or any part of the costs?

To these three questions Sykes J added two further questions of his own, one of them based on the recognition that the restrictions imposed by legal professional privilege may impede an attorney in his own defence:

(4) Can the inquiry be conducted without breaching legal professional privilege?

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3 Rule 64.14 [Rule 64.9 OECS and B'dos; Rule 63.9 (Bel); Rule 66.9 (T&T)].

4 (2004) Supreme Court, Jamaica, no HCV 1930 of 2003 (unreported).

5 [1994] Ch 205.

(5) Are the facts necessary to establish that the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable?

The learned judge also emphasised that although a wasted costs order 'has the effect of compensating one party, that is not the true purpose of the power. The power is invoked because of a failure of the attorney to fulfil his duty to the court'. This was the view of Lord Hope in *Harley v McDonald*.[6] Lord Hope had also 'strongly urged that unless the facts are too clear for dispute or easily verified, the court ought to refrain from embarking upon a wasted costs hearing, particularly if the court is the accuser. Sykes J accordingly declined to pursue the instant matter further since it would entail hearing from the defendant who had since returned to Canada, and the cost of pursuing the matter might exceed the cost of the wasted day.

In the other Jamaican case, *Thorpe v United Estates Ltd*,[7] the defendant applied for a wasted costs order against the claimant's attorneys on the ground that the latter had unreasonably refused to consent to an extension of time to file the defence, and had then proceeded to enter judgment in default. It was contended that the need for an application to set aside the default judgment could have been avoided if the claimant's attorneys had consented to the extension. Brooks J refused to make a wasted costs order. In the view of the learned judge, although the stance of the claimant's attorneys might be described as 'unusual', they had not acted unreasonably, bearing in mind that they had indicated to the defendant's attorneys that they intended to proceed to judgment on behalf of their client, and yet the defendant's attorneys proceeded to file a late defence without an application for the necessary leave to file the defence out of time.

QUANTIFICATION OF COSTS

The quantification or assessment of costs under the CPR of Jamaica differs in some fundamental respects from the position under the CPR of the OECS. The most significant difference is that whereas the Jamaican Rules retain the process of taxation of costs, the OECS Rules have adopted a system of 'fixed', 'prescribed' and 'budgeted' costs to replace taxation. Prescribed and budgeted costs are not included in the Jamaican Rules. On the other hand, the Jamaican Rules provide for 'basic costs' as an alternative to taxation.

Rule 65.3 of the OECS Rules describes the ways in which costs are to be quantified and states that if neither fixed costs, nor prescribed costs nor budgeted costs apply, then costs are to be quantified by *assessment* in accordance with Rules 65.11 and 65.12. Rule 65.11[8] deals with costs in procedural applications (defined as any application except one made at a

6 [2001] 2 WLR 1749.

7 (2006) Supreme Court, Jamaica, no 2005 HCV 00257 (unreported).

8 Cf Rule 65.8 (Jam); Rule 64.11 (Bel); Rule 67.11 (T&T).

case management conference or pre-trial review), whereas Rule 65.12 is concerned with proceedings other than procedural applications, and a major difference between the two Rules is that under Rule 65.11, unless the court decides that there are special circumstances of the particular case justifying a higher amount, assessed costs of a procedural application are limited to one tenth of the amount of the prescribed costs appropriate to the claim, whereas under Rule 65.12 there is no such limit.

Fixed costs

Under the Jamaican Rules,[9–10] fixed costs within Appendix A are payable (a) on commencement of a claim, (b) on entry of judgment, or (c) in respect of enforcement proceedings. Under the OECS Rules, fixed costs are payable according to scales set out in Appendix A in claims for specified sums of money, for possession of land or delivery of goods, and in respect of proceedings for attachment of debts. Additional fixed costs may be added on the entry of a default judgment.

Prescribed costs

Prescribed costs are provided for by Rule 65.5 of the OECS Rules, which states that where Rule 65.4 (fixed costs) does not apply and a party is entitled to the costs of the proceedings, those costs must be determined in accordance with the scales in Appendices B and C, which relate to (a) the value of the claim, and (b) the stage reached in the proceedings.[11] Prescribed costs, according to Rule 65.7, include all work that is required to prepare the proceedings for trial including, in particular, the costs involved in instructing an expert and in considering and disclosing any expert's report, arranging the expert witness's attendance at trial, and advocacy at the trial and at any case management conference or pre-trial review.[12]

Prescribed costs are not adopted by the Jamaican Rules.

9–10 Rules 65.4, 65.5 and 65.6.

11 A claimant who discontinues is liable for the costs incurred by the defendant on or before the date on which notice of discontinuance was served (Rule 37(6) OECS). Discontinuance costs are determined in accordance with the scale of prescribed costs: *Pacific International Sport Clubs Ltd v Comerco Commercial Ltd* (2005) High Court, BVI, no BVIHCV70 of 2005 (unreported), per Joseph-Olivetti J.

12 In *Donald v Attorney General* (2004) OECS Court of Appeal (Grenada), Civ App no 32 of 2003 (unreported), Saunders JA observed that it was not the intendment of the Rules that, once a claim was to be concluded after trial, the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the Rules would indicate that opportunities were afforded parties to vary the consequences of a mechanical application of the prescribed costs regime. For instance, Rules 65.5(4) and 64.6(3) entitled the court to award a proportion only of the costs detailed in the Scale of prescribed costs, and Rule 65.6 provided for a party at a case management conference to apply to the court for an order that prescribed costs should be calculated on a higher or a lower figure than the likely value of the claim. In any event, it was always open to a party to apply to the court to set a costs budget.

Budgeted costs

Budgeted costs give the parties an opportunity to prepare a budget for the costs of the case, which will be presented to the court at the case management conference. Once the budget has been accepted, the successful party cannot recover costs in excess of the budget, unless he can show that unforeseeable circumstances increased costs beyond the budget. Under Rule 65.8 (OECS), an application for a costs budget must be accompanied by a statement setting out such matters as the anticipated fees for expert witnesses or counsels' opinions, the hourly rate charged by the applicant's legal practitioner, and the number of hours already spent and likely to be spent on the case by such legal practitioner.

Basic costs

Rule 65.10 of the Jamaican Rules provides that where a court has made an order for costs in favour of a party and has not summarily assessed those costs, the receiving party may elect to recover basic costs, instead of seeking a taxation. Tables of basic costs, itemising work that could be done by the legal practitioner at various stages in the proceedings, are set out in Appendix B of the Jamaican Rules.

Taxation of costs

Taxation of costs under the Jamaican CPR is governed by Rules 65.14–65.29. Taxation proceedings are commenced by the receiving party filing a bill of costs at the registry and serving a copy of the bill on the paying party. The bill must be filed and served not more than three months after the date of the order or event entitling the receiving party to costs. It need not be in any particular form, but it must contain a general description of the work done in respect of which the costs are claimed. A bill of costs may indicate the time spent by the receiving party's attorney-at-law on each item, or category of work, and the hourly rate claimed; alternatively, it may indicate that the total sum claimed in the bill of costs or any part of the bill is a stated multiple of a sum indicated in Appendix B, on the basis of one or more of the factors set out in Rule 65.17(3).

Reasonableness of the amount of costs

Under the Jamaican CPR, where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount deemed by the court to be (a) *reasonable*, and (b) *fair to both paying and receiving parties*.

Where the costs to be taxed are claimed by an attorney-at-law from his client, they are presumed:

(a) to have been reasonably incurred if they were incurred with the express or implied consent of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client; and

(c) to have been unreasonably incurred if they are of an unusual nature or amount *and* the attorney-at-law did not inform his client that the client might not recover them all from the other party.[13]

Rule 65.17(3) provides that, in deciding what is 'reasonable', the court must take into account all the circumstances, including such factors as (inter alia) the importance of the matter to the parties; the time reasonably spent on the matter; whether the matter or item is appropriate for a senior attorney or an attorney possessing specialised knowledge; the novelty or complexity of the matter; and the care, speed and economy with which the matter was prepared.

Bullock and *Sanderson* orders

A claimant who is in a dilemma as to which of two potential defendants is responsible for a tort may decide to sue both of them in the alternative. For example, C is a passenger in a vehicle driven by D1 which collides with another vehicle driven by D2. D1 and D2 blame each other for the accident. C sues both D1 and D2. If, at the trial, D1 is found to have been solely responsible for the accident and D2 is exonerated, C will be ordered to pay the costs of D2, the successful defendant, but where it was the intransigence of D1 in not admitting liability that had led C to join D2 in the action, the court may order D1 to indemnify C for the costs he has to pay to D2. This is known as a *Bullock* order (from *Bullock v General Omnibus Co*).[14]

Alternatively, where C is legally aided or insolvent and D1 is insured in respect of the claim or has the resources to pay, the court may order D1 to pay D2's costs directly. This is the *Sanderson* order (from *Sanderson v Blyth Theatre Co*).[15]

In *Harris v Hall*,[16] the Jamaican Court of Appeal held that a *Bullock* order will not be made where the claimant's dilemma is not as to the facts surrounding the accident but as to the law, nor where the causes of action are based on separate and distinct sets of facts. In Downer JA's words:

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13 Rule 65.17(2).

14 [1907] 1 KB 264, where AB was injured when a bus collided with a cart. The bus company and the cart owner blamed each other for the accident. At the trial, the bus company was held solely liable. AB was ordered to pay the cart owner's costs, but was entitled to recover both those costs and her costs from the bus company. See, also, *Morgan v Belmont Taxi Car Ltd* (1967) 10 WIR 519, High Court, Barbados, per Douglas CJ; *Ashby v Hunte* (2003) Court of Appeal, Barbados, Civ App no 33 of 2000 (unreported), per Peter Williams JA.

15 [1903] 2 KB 533.

16 (1997) 34 JLR 190, p 210, Court of Appeal, Jamaica.

> The [claimant's] doubt was as to the law on the effect of the Motor Vehicles Insurance (Third Party Risks) Act. It was those doubts why [*sic*] Elaine Hall was sued. Further, the claims were based on separate and distinct sets of facts. The [claimant's] claim against Elaine Hall was for breach of statutory duty, which failed. The other claims against McIntosh and Morgan were for negligence and vicarious liability, which succeeded. Consequently, Reckord J exercised his discretion correctly in refusing to grant a *Bullock* order.

In *Mitchell v Mason*,[17] on the other hand, Duffus J, in the Jamaican Supreme Court, held that a *Bullock* order was appropriate 'where the [claimant's] doubt would have been not only on the law but also on the facts'. He continued:[18]

> The first named defendant persisted in his claim that the second and third named defendants were the responsible parties. My findings indicate that the second and third defendants escaped liability to the [claimant] on two grounds only, based entirely on the negligence of the first defendant Mason, and in these circumstances it seems reasonable that the first defendant should reimburse the [claimant] the costs which she has to pay to the second and third defendants; but counsel for the first defendant submitted that it was not proper to make such an order where the [claimant's] doubt is as to the law and not the facts. He relied on *Poulton v Moore*[19] and also on the judgment of the Court of Appeal in *Mulready v JH and W Bell Ltd*,[20] where Lord Goddard CJ, in delivering the judgment of the Court said:[21]
>
> > A *Bullock* order is appropriate where a [claimant] is in doubt as to which of two persons is responsible for the act of negligence which caused his injury, the most common instance being, of course, where a third person is injured in a collision between two vehicles and where the accident is, therefore, caused by the negligence of one or the other, or both. It does not appear to us that it is an appropriate order to make where a [claimant] is alleging perfectly independent causes of action against two defendants, where the breaches of duty alleged are in no way connected the one with the other.
>
> It is my view that, in the instant case, the [claimant's] doubt would have been not only on the law but also on the facts. The circumstances were such that there must have been real doubt as to whether the negligence of the first or of the third defendant or of both was the cause of the [claimant's] personal injuries and the loss of baggage, etc. It is true that the second and third defendants have succeeded mainly on points of law, but in order to arrive at these it was first necessary to ascertain the facts. The causes of action against all the defendants were based on negligence and it cannot be said that the breaches of duty alleged were in no way connected the one with the other. Therefore, in the exercise of my discretion, I think that a *Bullock* order is appropriate.

17 (1962) 8 JLR 5.

18 *Ibid,* p 24.

19 [1915] 1 KB 400.

20 [1953] 2 All ER 215.

21 *Ibid,* p 219.

CHAPTER 26

ENFORCEMENT OF JUDGMENTS

Before taking the decision to start legal proceedings against a defendant, a potential claimant should ask himself the very practical question, 'Is the defendant worth suing?', as it would be foolish to undertake the expense of an action if ultimately any judgment that the claimant might obtain were unsatisfied because the defendant turned out to be a 'man of straw'. In order to answer that question, the prospective claimant might be advised to employ an inquiry agent to investigate the proposed defendant's financial circumstances, before filing his claim form.

If the claimant does decide to commence proceedings, he may prevent the defendant from disposing of his property before judgment by (a) obtaining an order under summary judgment proceedings that the defendant be permitted to defend only on condition that he pays the whole or part of the sum claimed into court to abide the event; (b) obtaining a freezing injunction restraining the defendant from removing his assets from the jurisdiction so as to evade judgment; or (c) appointing a receiver to manage property in which both claimant and defendant have an interest (for example, partnership property) until judgment.

Methods of enforcement

Having obtained a judgment in his favour, the successful party may need to consider how such judgment can be enforced. If the defendant is an insurance company, bank or other large and reputable institution, it will almost invariably satisfy the judgment promptly, and enforcement proceedings will not be necessary. However, in other cases, enforcement will be necessary where there is a failure to obey the ruling of the court. The methods of enforcement available to judgment creditors under the CPR can be used simultaneously, depending on the nature of the defendant's assets. Once a judgment or order has become enforceable, the court must issue an enforcement order after the judgment creditor has filed the appropriate form of request. The judgment creditor must produce with the request the judgment or order to be enforced and, where permission to enforce is required, the order giving such permission.

Oral examination

Where the judgment creditor knows little about the judgment debtor's assets, he may apply, without notice, for an order that the judgment debtor appear before the registrar or other officer of the court to be examined as to his means.[1] The order may direct the debtor to produce any relevant documents in his possession. He must be served personally with notice of the appointment not less than seven days before the date fixed,[2] and should be provided with 'conduct money', that is, the reasonable cost of travel to and from the court. The judgment creditor must also file an affidavit of service not less than three days before the examination.[3]

The examination must be on oath or affirmation, and any statement made by the examinee must be put in writing and signed by him.[4] The examinee must answer all questions fairly directed to ascertaining his financial circumstances, including information as to bank accounts, policy numbers and so forth. It has been said that 'the examination is not only intended to be an examination, but to be a cross-examination, and that of the severest kind'.[5] The judgment creditor's attorney should attend and ask probing questions.[6]

If the judgment debtor fails to attend, refuses to be sworn or affirm, or refuses to answer any question, or if the examiner considers a freezing order to be appropriate, the examination may be adjourned to a judge.[7] In such a case, the judgment creditor must serve the examinee personally with notice of the adjourned hearing not less than seven days before the date fixed, and file an affidavit of service.[8] A judgment debtor who disobeys an order to attend for an oral examination as to his means may also be committed to prison for contempt.

Writ of execution against goods

Execution against a judgment debtor's goods for enforcement of a money judgment may be carried out by means of a writ of execution (defined in

1 Under Pt 44 [Pt 45 (T&T)].

2 Rule 44.4(2).

3 Rule 44.4.

4 Rule 44.4.

5 *Republic of Costa Rica v Stronsberg* (1880) 16 Ch D 8, p 13, per James LJ.

6 For example, if the judgment debtor denies owning a car, the judgment creditor's attorney may ask: 'In that case, can you tell me who owns the Nissan Sentra car, LN 6489, which is parked outside your home most nights?' Ability to ask such a question presupposes that the judgment creditor or his inquiry agent has done some investigation in advance of the oral examination.

7 Rule 44.5.

8 Rule 44.5.

the CPR to include, inter alia, an 'order for the seizure and sale of goods')[9] which will be issued by the registry on production of a draft order and a copy of the judgment and payment of the prescribed fee.

Permission to issue the writ is not required, except where, inter alia:

(a) six or more years have elapsed since the date of the judgment;

(b) the judgment debtor has died and the judgment creditor wishes to enforce against assets in the hands of his personal representatives;

(c) the judgment was made subject to conditions; or

(d) any goods sought to be seized are in the hands of a receiver or confiscator provided by the court.[10]

Manner of execution

The actual process of execution is the responsibility of a court bailiff or marshal who, armed with the writ, will call at the judgment debtor's premises between the hours of 6 am and 6 pm and seek to gain entry. He must not break open an outer door, nor must he put his foot inside an open door and attempt to push his way in against the debtor 's resistance. Once he gains lawful entry, he may seize any type of goods, including cars, money, furniture, cheques, bonds, etc.

However, certain goods are exempt from seizure under the CPR, such as clothing and bedding of the debtor and his family, and tools and implements of the debtor's trade.

If there is any doubt as to the ownership of the goods seized, the bailiff or marshal may protect himself by interpleading.[11]

In executing the writ, the bailiff or marshal may seize sufficient goods to realise the amount of the judgment debt plus expenses. He will then arrange to have them sold through an appointed broker by public auction,[12] unless the court permits sale in some other manner. A purchaser of the goods will acquire a good title to them.[13] The proceeds of sale will be applied to (a) paying the expenses of execution, (b) paying the amount due to the judgment creditor, and (c) handing over any surplus to the judgment debtor. Written accounts and details of the application of the proceeds of sale must be provided for the judgment debtor.

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9 Rule 46.1(b).

10 Rule 46.2.

11 See above, pp 44–5.

12 See *Hutchinson v Attorney General* (1993) High Court, Barbados, no 82 of 1993 (unreported); *Whittaker v Caribbean Sea Island Cotton Co Ltd* (1991) High Court, Barbados, no 19 of 1990 (unreported).

13 *Ibid.*

Where several judgment creditors have delivered writs against the same debtor for execution, each of the writs binds the goods from the date of its delivery to the bailiff or marshal, and the judgment creditors will rank in order of priority. No separate seizure in respect of the several writs is necessary, but the bailiff or marshal must follow the order of priority of the writs. If he neglects to follow the proper order and sells under a writ which should have been postponed, the sale is valid and the proceeds must be handed to the judgment creditor under whose writ the sale was made.[14] However, the bailiff or marshal will remain liable in damages to the creditor who was entitled to priority, should the amount realised be insufficient to satisfy both judgments.

In *Whittaker v Caribbean Sea Island Cotton Co Ltd*,[15] S Ltd entered a default judgment against the defendant in August 1990 and under a writ of execution various items of equipment belonging to the defendant were seized by the chief marshal, who arranged to have them sold in November. However, no sale took place as the court ordered a stay of execution pending an appeal by the defendant. Meanwhile, in October of the same year, the claimant obtained judgment against the defendant and the same items, which had been seized under the earlier writ, were attached under the claimant's writ. The chief marshal took no steps to sell the goods under the claimant's writ, because he was aware that the levy under S Ltd's writ ranked in priority to the claimant, and he was alert to the possibility that the proceeds of sale might be insufficient to satisfy both judgments. S Ltd's judgment was for $2 m, whereas the claimant's was for $100,000. On these facts, Williams CJ refused to order the chief marshal to sell the goods under the claimant's writ in order to satisfy her judgment, on the grounds that (a) where a stay of execution had already been granted in relation to one judgment, it would be unfair to allow a subsequent judgment creditor to proceed with the execution of his judgment; the stay should not be used to give preference to one creditor over another earlier one; either the stay on the first should be removed, or a similar stay applied to the second; and (b) if the chief marshal were to enforce the claimant's judgment and sell goods sufficient to satisfy it, he would be bound to hand the proceeds over to the claimant, which might cause him to be liable to S Ltd for the amount paid over, should the proceeds be insufficient to satisfy both claims.

ATTACHMENT OF DEBTS

Attachment of debts under the CPR (called 'garnishee proceedings' under the RSC) is a procedure whereby a judgment creditor can obtain payment

14 *Halsbury's Laws of England*, 3rd edn, Vol 16, p 41.

15 (1991) High Court, Barbados, no 19 of 1990 (unreported).

of a judgment debt from a person within the jurisdiction (the 'garnishee') who owes money to the judgment debtor.[16] The effect of the order is to transform the debt payable to the judgment debtor into one payable to the judgment creditor. For example, where a judgment debtor has an account at a bank, an attachment of debts order may be obtained against the bank, under which the money in the account will become payable to the judgment creditor;[17] similarly, rent payable by a tenant/garnishee to a landlord/judgment debtor may become payable to the landlord's judgment creditor. A future debt (such as salary not yet earned) cannot be the subject of an attachment of debts order.

Procedure[18]

Attachment of debts is a two stage process. The first stage is for the judgment creditor to apply to the court (without notice, in the appropriate practice form, and with affidavit in support) for a *provisional order.* The affidavit should contain details of the judgment being enforced, and a statement that, in the deponent's belief, the garnishee is indebted to the judgment debtor in a specified amount. If a provisional order is granted, it must be served on the garnishee at least 21 days before the date fixed for the hearing to determine whether the provisional order should be made final, and on the judgment debtor not less than seven days after service on the garnishee and seven days before the hearing.

Service of the provisional order on the garnishee has the effect of binding the garnishee to freeze the debt due to the judgment debtor up to the amount of the judgment debt. The hearing, which is between garnishee and judgment creditor, is the second stage, at which the judge will decide whether to make a *final order*. The garnishee will often assume a neutral role, but if he disputes his liability at the hearing, the judge may determine the matter summarily, or he may give directions for the resolution of the dispute. Where the judge refuses to make a final order, he will direct the provisional order to be discharged. Where he makes a final order, the effect is to require the garnishee to pay the amount of the judgment debt to the judgment creditor. Such payment operates as a valid discharge of the garnishee's liability to the judgment debtor, even where the court later sets aside the attachment of debts order or the original judgment or order.

In *Coastal Diving Services Ltd v Petro-Ind Engineering Services Ltd*,[19] two questions arose for determination: (a) whether a final order could be set

16 See Pt 50.

17 A joint bank account is not attachable in respect of a judgment debt owed by one of the two account holders, even where each has authority to draw on the account: *Hirschorn v Evans* [1938] 2 KB 801.

18 See Rules 50.3, 50.8, 50.9 and 50.10.

19 (1996) High Court, Trinidad & Tobago, no 3312 of 1995 (unreported).

aside on the ground of mutual mistake; and (b) whether an application to set aside a final order made by consent and to stay the execution of the order were properly brought in the original action, or whether it was necessary to file a new action as in other types of consent orders. In this case, the garnishee through its general manager was under the erroneous impression that the funds in question were owed to the judgment debtor, whereas in fact they had been legally assigned to a third party. Sealey J, in the Trinidad & Tobago High Court, held that this was a case of mistake of fact on the part of both garnishee and judgment creditor and, on the authority of *Moore v Peachey*,[20] the order should be set aside; further, there was no need to file another action.

CHARGING ORDERS

A judgment debt may be enforced by obtaining an order imposing a charge on specified property belonging to the judgment debtor for the purpose of securing the amount of the debt.[21] Property affected by a charging order may consist of (a) *land*, (b) *stock*, including shares, securities and dividends arising therefrom, and (c) *other personal property*.[22]

Procedure

An application for a charging order is made without notice but should be supported by an affidavit which must, inter alia, identify the judgment or order to be enforced and certify the amount remaining due under it, identify the land or personal property and, where stock is to be charged, identify the company and the person responsible for keeping a register of the stock. In addition, in the case of stock or other personal property, the affidavit must state whether any person other than the judgment debtor has any interest in the property.[23]

Charging orders are made in two stages.[24] First, the court will deal with the application without a hearing and may make a *provisional* charging order, which must state the date, time and place when the court will consider making a final order. Where the court makes a provisional charging order, the judgment creditor must serve the order together with a copy of the affidavit in support on the judgment debtor not less than 28 days before the hearing; also, a copy of the order must be served on all 'interested

20 (1892) 8 TLR 406.

21 Part 48 [Part 49 (T&T)].

22 Rule 48.1(1) [Rule 49.1(1) (T&T)].

23 See Rule 48.3 [Rule 49.3 (T&T)].

24 See Rules 48.5–48.9 [Rules 49.5–49.9 (T&T)].

persons', as listed in Rule 48.6(2). The judgment creditor must file an affidavit of service not less than seven days before the hearing.

Any objections to a provisional charging order must be filed not less than 14 days before the hearing. At the hearing, the court may (a) make a *final* charging order, (b) discharge the provisional order, or (c) give directions for the resolution of any objections that cannot be fairly resolved summarily. Copies of the order must be served by the judgment creditor on the judgment debtor, any person who has filed an objection and, in the case of stock, the company and the person responsible for keeping the register; the copies must also contain a stop notice.[25]

Effect

The effect of a provisional charging order, once served, is to prevent dealings with the property charged until the final hearing, and to invalidate any disposition by the judgment debtor of an interest in the property subject to the order. Transfer of any stock specified in either a provisional or a final order is prohibited, and no interest or dividend may be paid while the order remains in force. A person responsible for keeping the company's register or a trustee holding stock who, after being served with a copy of the charging order, makes any prohibited transfer or payment, will be liable to pay to the judgment creditor an amount equivalent to the value of the stock, or so much as is necessary to satisfy the judgment debt and costs. Where a judgment creditor wishes to enforce a charging order by sale of the property, he must apply to the court for an order of sale. The application must be supported by evidence on affidavit, and notice must be served on the judgment debtor. The court may give such directions as may seem appropriate to ensure the expeditious sale of the property, whether land, stock or other property charged, at a price that is fair to both judgment creditor and debtor.

APPOINTMENT OF A RECEIVER

A judgment creditor may apply for the appointment of a receiver to obtain payment of the judgment debt from the income or capital assets of the judgment debtor. An application for such appointment must be supported by evidence on affidavit. The judgment creditor may also apply for an injunction to restrain the judgment debtor from assigning, charging or otherwise dealing with any property referred to in the application.[26]

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25 See Rule 48.8 [Rule 49.8 (T&T)].

26 Rule 51.2 [Rule 52.2 (T&T)].

In deciding whether to appoint a receiver, the court must consider (a) the amount of the judgment debt, (b) the amount likely to be obtained by the receiver, and (c) the probable cost of appointing and remunerating the receiver.[27]

Normally, before being appointed, a receiver will be required to give security in the form of a guarantee, but this requirement may be dispensed with by the court.[28]

A receiver's powers operate to the exclusion of the powers of the judgment debtor for the duration of the receiver's appointment.[29]

A receiver must file accounts on the dates specified in the order appointing him and such accounts must be verified by affidavit, unless the court orders otherwise. The passing of such account must be verified by a registrar. Any balance shown on the accounts as due from the receiver must be paid into court within seven days of the passing of the account.[30]

27 Rule 51.3 [Rule 52.3 (T&T)].

28 Rule 51.4(4) [Rule 52.4(4) (T&T)].

29 Rule 51.6 (Jam).

30 Rule 51.6 [Rule 51.7 (Jam); Rule 52.6 (T&T)].

CHAPTER 27

APPEALS

PROCEDURE

Under Rule 1.9 of the Jamaican Court of Appeal Rules, an appeal from a decision of the Supreme Court or a resident magistrate's court is made by filing a *notice of appeal* at the registry, and takes effect on the day it is received at the registry.

CONTENTS OF NOTICE OF APPEAL

The notice of appeal must:

(a) contain details of the decision or the part of the decision being appealed;

(b) identify any findings of fact or of law which the appellant wishes to challenge; and

(c) state the grounds of the appeal concisely, without any argument or narrative, in consecutively numbered paragraphs and under distinct heads.

In addition, under Rule 2.2(1) a notice of appeal must give details of:

(a) the precise form of the order sought by the appellant;

(b) any power which the appellant wishes the court to exercise; and

(c) if the appellant seeks a new trial or to adduce fresh evidence, the grounds on which such application is made.

SERVICE OF NOTICE OF APPEAL

A notice of appeal must be filed and served within the following time limits:

(a) in the case of a procedural appeal, within seven days of the date of the decision appealed against;

(b) in a case where permission to appeal is required, within 14 days of the date of the grant of such permission;

(c) in any other case, within 42 days of the date when the order or judgment appealed against was served on the appellant.[1]

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1 Rule 1.11(1).

The court may in any case extend the above time limits.[2] Further, on the application of any party, a single judge may dispense with any procedural requirement in the Rules if satisfied that:

(a) the appeal is one of exceptional urgency;

(b) the parties agree; or

(c) the appeal relates to specific issues of law and can be heard justly without the production of the full record.[3]

COUNTER-NOTICE

Any party on whom a notice of appeal is served may serve a counter-notice, which must similarly comply with the requirements of Rule 2.2. A counter-notice must be filed at the registry within 14 days of service of the notice of appeal.[4]

RE-HEARING

Rule 1.16(1) provides that 'an appeal shall be by way of re-hearing'.

Rule 1.16(2) goes on to provide that at the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal unless it was relied on by the court below or the court gives permission.

On the other hand, by Rule 1.16(3), although the court is not confined to the grounds set out in the notice of appeal, it may not make its decision on any ground not set out in the notice of appeal unless the other parties to the appeal have had sufficient opportunity to contest such ground.

It was established in *Ladd v Marshall*[5] that a Court of Appeal may receive fresh evidence only if it is satisfied that such evidence;

(a) could not have been obtained with reasonable diligence for use at the hearing;

(b) would probably have an important influence on the result of the case;

(c) is apparently credible.

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2 Rule 1.11(2).

3 Rule 1.14.

4 Rule 2.3.

5 [1954] 1 WLR 1489.

It has been held in England that these principles remain relevant under the CPR regime as matters which must necessarily be considered, although not as strict Rules.[6]

SKELETON ARGUMENTS

The appellant must file with the registry and serve on all other parties a *skeleton argument* within 21 days of receipt of notice by the registry that copies of the transcript of the proceedings in the court below are available.[7] Within 21 days of service of the appellant's skeleton argument, any other party wishing to be heard on the appeal must file his skeleton argument and serve copies on all other parties.[8] The appellant may then file and serve a skeleton argument in reply within 14 days of service of the skeleton argument by any other party.[9]

In *CVM Television Ltd v Tewarie*,[10] the respondent had been late in serving his skeleton arguments within Rule 2.6(2). His attorney's affidavit stated that the reason for the delay was 'oversight and heavy workload' and that no disrespect was intended and no prejudice occasioned. P Harrison JA in the Jamaican Court of Appeal stated that the wording of Rule 2.6 (2) suggested that non-compliance would result in the 'sanction' that the respondent would not be allowed to advance any arguments in the appeal. However, by Rule 2.15 the Court of Appeal had, in addition to the powers set out in Rule 1.7, 'all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26', and it could therefore grant relief against sanctions under CPR Rule 26.8, if satisfied that the failure to comply was not intentional, that there was a good explanation for the failure, and the party in default had complied with all other relevant Rules. CPR Rule 26.8(3) enjoined the court, in considering whether to grant relief, to have regard, inter alia, to whether the failure to comply was due to the party or that party's attorney-at-law, and whether the trial date or any likely trial date could still be met if relief were granted. Finally, CAR Rule 1.7(2)(b) gave the court the power to 'extend . . . the time for compliance with any Rule . . . even if the application for an extension is made after the time for compliance has passed'. P Harrison JA granted an extension of

6 *Hamilton v Al Fayed (No 1)*, *The Independent*, 25 January 2001; *Banks v Cox*, unreported, 17 July 2000, Court of Appeal (Civil Division) Transcript no 1476, per Morritt LJ; *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, p 2325, per Hale LJ.

7 Rule 2.6(1).

8 Rule 2.6(2).

9 Rule 2.6(3).

10 (2005) Court of Appeal, Jamaica, Civ App no 46 of 2003 (unreported).

time to the respondent to file skeleton arguments within two days of the date of the order, explaining the situation thus:[11]

> CAR Rule 1.7(2)(b) is alike Ord 3, Rule 35 of the RSC. The latter was considered in *Finnegan v Parkside Health Authority*,[12] which concerned a notice of appeal against dismissal of the plaintiff's claim for want of prosecution filed out of time. In allowing the appeal the court took the view that the 'mechanistic approach was inappropriate . . . dismissal did not follow . . . failure to show good reason for procedural fault'. The overriding objective to deal with cases justly must be given effect to by this court in the exercise of any discretion or the interpretation of any Rule.
>
> The aim of dealing fairly with the parties, avoiding prejudice, saving expense and proceeding with expedition, are some of the factors which must be considered by a court in the exercise of such discretion. In the instant case, although the reason given for the delay . . . was good but not altogether adequate, it is not entirely nugatory. The delay was not that of the respondent. The interest of the respondent not to be excluded from the appeal process due to the fault of his counsel[13] is an aspect of doing justice between the parties. The delay, being significant, may have created some prejudice to the appellant. However, an expedited date of hearing of this appeal is a helpful cure. The respondent . . . has complied with the other procedural steps and has sought to remedy his non-compliance with respect to the filing of his skeleton arguments. One can therefore properly say that 'the party in default has generally complied with all other relevant Rules'.

Contents of skeleton argument

A skeleton argument must:

(a) set out concisely the nature of the party's arguments on each ground of appeal;

(b) in the case of a point of law, state the point and cite the principal authorities in support with appropriate page references;

(c) in the case of questions of fact, state briefly the basis on which it is contended that the court can interfere with the particular finding of fact, with cross-references to the passages in the transcript or notes of evidence which bear on the point.[14]

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11 See also the very similar reasoning of Harris JA in *Auburn Court Ltd v Town and Country Planning Appeal Tribunal* (2006) Court of Appeal, Jamaica, Civ App no 70 of 2004 (unreported).

12 [1998] 1 WLR 411.

13 *In Auburn Court Ltd v Town and Country Planning Appeal Tribunal* (2006) Court of Appeal, Jamaica, Civ App no 70 of 2004 (unreported), Harris JA (Ag) said that the just disposal of the case and the interest of the appellant were of manifest importance, and that 'the appellant should not be made to suffer by reason of his attorney-at-law's dereliction of duty'.

14 Rule 2.6(4).

Further, the appellant's skeleton argument must be accompanied by a written chronology of events relevant to the appeal, and must be cross-referenced to the core bundle or record.[15]

THE RECORD: APPEALS FROM THE SUPREME COURT[16]

Within 14 days of receipt of notice from the registry that copies of the transcript of the proceedings in the court below are available, all other parties must inform the appellant of the documents that they wish to have included in the record or the core bundle; within 28 days of such notice from the registry, the appellant must prepare and file with the registry four sets of the record for the use of the court,[17] comprising a copy of each of the following documents:

(a) the documents required by CPR Rule 39.1(6) to be lodged with the Supreme Court (including any core bundle);

(b) any affidavits and exhibits that were put in evidence before the court below;

(c) a transcript or other record of the evidence given in the court below, and the judgment;

(d) the notice of appeal and any counter-notices that have been served on the appellant; and

(e) an index of the record.

The appellant must serve one copy of the record on every respondent. Further, within seven days after the filing of the last skeleton argument, the appellant must file a supplementary record containing all skeleton arguments and chronologies.

CASE MANAGEMENT[18]

When the record has been filed, it must be referred to a single judge in chambers who may either give written directions or direct that a case

15 Rule 2.6(5).

16 See Rule 2.7.

17 In *Auburn Court Ltd v Town and Country Planning Appeal Tribunal* (2006) Court of Appeal, Jamaica, Civ App no 70 of 2004 (unreported), the respondents had not informed the appellant of the documents they wished to include in the record. Harris JA (Ag) said that this fact did not excuse the appellant's failure to file the record within the time limited by the Rules, since 'an onus rests on the appellant's attorney, and not the respondent, to file the record of appeal. He failed to take the requisite step in this regard'.

18 See Rule 2.9.

management conference be fixed. The judge has wide powers to give directions on a wide variety of matters concerning, for example, agreed statements as to the issues for the appeal, the contents of the core bundle for use at the appeal, the filing of written submissions, and the time to be allowed for oral argument. The judge must also fix a date for the hearing of the appeal.

A single judge also has power to order, inter alia, the giving of security for the costs of an appeal, and a stay of execution, and to grant an injunction restraining a party from dealing with or disposing of the subject matter of an appeal.

STAY OF EXECUTION

Rule 2.14 of the Court of Appeal Rules (Jamaica) and Rule 62.19 of the CPR (OECS) provide that, except so far as the court below, or the Court of Appeal, or a single judge otherwise directs, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below. In *Thomas v Innis*,[19] K Harrison JA pointed out that, unlike under the old rules, the new rues contained no requirement that a stay must first be applied for in the court below before an application can be made to a judge of the Court of Appeal. In his view, 'although Rule 2.14 uses the words "except so far as the court below or a single judge directs", it does not mean that an applicant must first exhaust his remedies below before he seeks the assistance of the Court of Appeal . . . Rule 2.11(1)(b) makes it quite clear that a single judge of the Court of Appeal may make orders for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal.'

As to the grounds on which the court will exercise its discretion to order a stay of execution pending an appeal, K Harrison JA stated that the modern authorities on the question were (a) *Linotype-Hell Finance Ltd v Baker*,[20] where it was held that it was a legitimate ground for granting the application that the defendant was able to satisfy the court (i) that, without a stay, he would be ruined and (ii) that he had an appeal with some prospect of success, and (b) the more recent case of *Hammond Studdart Solicitors v Agrichem International Holdings Ltd*,[21] where it had been emphasized that the essential factor was the risk of injustice. In the instant case, both of the *Linotype* requirements were satisfied and a stay was accordingly granted.

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19 (2006) Court of Appeal, Jamaica, Civ App no 99 of 2005.

20 [1992] 4 All ER 887, followed in *Flowers Foliage and Plants of Jamaica v Jamaica Citizens Bank Ltd* (1997) 34 JLR 447; also applied in *Walker v Jamaica Public Service Company Ltd* (2004) Supreme Court, Jamaica, no CLW 186 of 1995 (unreported), per Anderson J; *Pfizer Ltd v Medimpex Jamaica Ltd* (2005) Supreme Court, Jamaica, no CL 2002/P040 (unreported), per Brooks J, *Olint Corporation Ltd v Financial Services Commission* (2006) Supreme Court, Jamaica, no 2006 HCV 01365 (unreported), per Mangatal J.

21 [2001] EWCA Civ 1915.

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