

no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. 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 the 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."

- [4] There is no injustice if the other side can be compensated in costs: See also **Clarapede v Commercial Union Association [1883] 32 WR262 and Grupo Torras v Butterfield Bank [2001] CILR 9.**
- [5] In this case the present Attorney for the First Defendant became involved in this matter and filed a Notice of Change of Attorney as well as a Further Amended Defence and Counterclaim on the 9th April, 2009. This was followed about a month later on 7th May, 2009 with a Summons seeking leave to amend the previous Amended Defence of 30th September 2004, in accordance with Further Amended Defence and Counterclaim filed on 9th April, 2009. This was filed together with an Affidavit in Support of the same date.
- [6] Counsel for the Plaintiff applied under Order 20 Rule 4 to disallow the amendment.
- [7] But Rule 4(2) provides that the Court should only strike out that amendment if the circumstances are such that if an application were made, it would have been refused.
- [8] Thus even although the Plaintiff's application is first in time, it makes more sense to first hear the Defendant's application for leave to amend and to first hear the Plaintiff's counsel on **why** the Court should **not** grant leave to amend.
- [9] Counsel for the Plaintiff raised three reasons why the application should be refused. None of the three fell within those exceptional circumstances in which leave will not be granted (namely, where the amendment will be futile, or is frivolous or proposed in bad faith; where the amendment is to withdraw admission consciously made; where the amendment is to add a plea of fraud, where fraud had not been pleaded in the first instance, save in exceptional circumstances; where the amendment is sought at a very late stage in the proceedings or where the amendment raises a cause of action which accrued to the Plaintiff only after the action commenced: see **Commonwealth Caribbean Civil Procedure at P.114**).
- [10] Counsel for the Plaintiff's three submissions were that the action on the Counterclaim was statutebarred the Defence had already been amended by the First Defendant's former Attorney-at-law and, that it would be prejudicial to the Plaintiff to grant leave because a material witness was now out of the island.
- [11] It is important to note that the Counterclaim arises out of the claim and defence and is NOT a new or separate cause of action. In other words, the counterclaim is material to the facts in the existing claim. The witness who is no longer present is merely one of two (or possibly more) police officers called to the scene AFTER the accident occurred.
- [12] This Court sees no prejudice to the Plaintiff that cannot be cured by an order in costs.
- [13] Accordingly IT IS ORDERED as follows:-
1. Leave is granted to the First Defendant to amend the Amended Defence filed herein on 30th September 2004 in accordance with the Further Amended Defence and Counterclaim filed herein on 9th April 2009.
 2. The Plaintiff is granted leave to file a Reply and Defence to Counterclaim within 21 days of the making of this Order;
 3. The costs of this Application are the Plaintiffs to be agreed or taxed.
 4. This matter to be set down for pre-trial review in the month of
May 2011.

Margaret A. Reifer

Judge of the High Court