BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1798 of 2015

BETWEEN:

MICHAEL BOURNE	**FIRST CLAIMANT**
ANDREW BOURNE	**SECOND CLAIMANT**

AND

GLORIA JOYCELYN FIELD	**DEFENDANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 27 January 2017

Mr. Corey C. Greenidge for the Claimants.

Mrs. Duana M. Peterson in association with Mrs. Charmaine Delice-Hunte for the Defendant.

DECISION

INTRODUCTION

[1] On 21 December 2015, the claimants filed a "Notice of Application" by which they intimated an intention to seek the following orders:

> "1. That the Defendant GLORIA JOYCELYN FIELD of Grazettes Main Road in the parish of Saint Michael in this

> Island, the Executrix of the Will dated the 11th day of April 1997 of the above named testator KATHLEEN BOURNE deceased, may be ordered to furnish proper particulars and accounts of the administration of the estate.
>
> 2. If and so far as may be necessary, administration of the Estate of the said KATHLEEN BOURNE, deceased.

[2] It was set out on the face of the "Notice of Application" that the claimant was seeking relief on the following grounds:

> "(a) Section 46 of the Succession Act CAP 249 ***(sic)*** gives the court the power to require personal representatives to give an account of the estate of the deceased.
>
> (b) A legatee, having a beneficial interest, is entitled to inspect the accounts of the estate. If he is denied this entitlement, he can apply to the court for relief requiring the Executrix to furnish and verify the accounts. See CPR, 2008 Rules 67.2(c), 67.4 (1)(b) and 67.4 (3)(a).
>
> (c) The Grant of Probate for the above named estate was issued on March 27, 2006. From that date up to and including the date of this application, specific legacies and devices have not been distributed in accordance with the wishes of the testator to the benefit of the Claimants.
>
> (d) Several request ***(sic)*** have been made both verbally and in written (sic) as to the status of the estate, and in particular the specific devise in clauses 4 and 7 of the Will. No account of the estate or the specific devise has been forthcoming.

[3] When the application first came on before me, Mrs. Duana Peterson who appeared for the defendant in association with Ms. Charmaine Delice-Hunte,

made an ***in limine*** submission that the application was not properly before the Court and that it ought to be struck out.

[4] Mr. Corey Greenidge who appeared for the claimants indicated his intention to oppose Ms. Peterson's application and, since I had a burdensome list, I ordered the parties to file written submissions and deferred consideration of the matter.

[5] It was evident from the preliminary exchanges of Counsel that two issues fell for determination by this Court. These were (i) whether the claimants had properly commenced their claim by the "Notice of Application"; and (ii) in the event that the answer to (i) above is in the negative, whether their procedural misstep is fatal.

THE RELEVANT PROCEDURAL RULES

(i) Administration and related claims

[6] ***Part 67*** of the ***Supreme Court (Civil Procedure) Rules, 2008*** (***"the CPR"***) provides a useful starting point not least because paragraph (b) of the claimant's grounds refer to ***CPR 67.2(c), 67.4(1)(b) and 67.4(3)(a).*** However, before turning to those provisions, I will set out ***CPR 67.1(1)*** which defines the scope of the application of ***Part 67*** and indicates how affected claims may be brought.

[7] ***CPR 67.1(1)*** reads:

> 67.1 (1) "This Part deals with
>
> (a) claims (referred to as "administration claims") for
>
> (i) the administration of the estate of a deceased person; or
>
> (ii) the execution of a trust under the direction of the court; and
>
> (b) claims for the determination of any question or to obtain any relief relating to the administration of the estate of a deceased person or the execution of a trust.
>
> (2) Claims referred to under sub-rule (1) must be brought by a fixed date claim in Form 2.

[8] ***CPR 67.2(1)(c)*** provides:

> 67.2 (1) An administration claim or a claim under rule 67.4 may be brought by any
>
> (a) ...
>
> (b) ...
>
> (c) person having or claiming to have a beneficial interest in the estate of a deceased person or under a trust.

[9] ***CPR 67.4 (1) (b)*** is in these terms:

> 67.4 (1) An executor, administrator or trustee may issue a claim form for
>
> (a) the determination of any question; or
>
> (b) any relief.
>
> without bringing an administrative claim.

[10] ***CPR 67.4 (3) (a)*** reads:

> (3) "relief" includes an order
>
> (a) requiring an executor, administrator or trustee to furnish and verify accounts;
> …

(ii) Commencement of proceedings

[11] ***CPR 67.1(2)*** requires that administration claims must be commenced by fixed date claim form. The fixed date claim form is one of two types of claim forms recognised by ***the CPR***. ***CPR Part 8*** regulates the purpose and use of these two types of claims forms**.** ***CPR 8.1 (1)*** provides:

> **8.1** (1) A proceeding is started by filing in the Registry the original and one copy for sealing of
>
> (a) the claim form;
>
> (b) subject to rule 8.2, the claimant's statement of claim; or
>
> (c) where any rule or practice direction so requires, an affidavit or other document.
> .....
>
> (4) A claim form must be in Form 1, with or without variation, except in circumstances set out in sub-rule (5).
>
> (5) Form 2 (fixed date claim form) must be used
> .....
>
> (c) whenever its use is required by a rule or practice direction;
>
> ...

[12] ***CPR 8.4(1)*** details what must be included in a claim form. For present purposes, it suffices to note ***CPR 8.4(1)*** and ***CPR 8.4(5)***. The former requires that the claim form includes "a short description of the nature of the claim". The latter reads:

> (5) Where the defendant is being sued in a representative capacity under Part 21, the Claimant must state what that capacity is.

(iii) Documents to be served with claim form

[13] ***CPR 8.12 (1)*** provides that when a claim form is served, it must be accompanied by:

> "(a) a form of acknowledgement of service (Form 3 or 4);
>
> (b) a defence form (Form 5);
>
> (c) the prescribed notes for defendants (Form 1A);
>
> (d) ....
>
> (e) ....

(iv) Interlocutory applications

[14] ***CPR 11*** provides for "interlocutory applications ... for court orders being applications made before, during or after the course of proceedings. Such is the scope of ***CPR 11*** as delineated by ***CPR 11.1***. ***CPR 11.4 (1)*** provides that, as a general rule, an applicant must give notice of the application to each

respondent. Provision for the use of Form 10 is expressed in ***CPR 11.4(4)*** which reads:

> (4) Notice of the application must be included in the form used to make the application (Form 10).

IS THE CLAIM PROPERLY COMMENCED?

[15] Quite sensibly, Mr. Greenidge resiled from his initial position that these proceedings were properly commenced by Form 10. That position was informed by a consideration of the ***English Civil Procedure Rules*** relating to administration claims, the corresponding form in ***Atkins Court Forms Volume 2, Form b*** and the view taken by Counsel that the English form closely approximated our Form 10.

[16] The moral of this tale is simple indeed. Civil procedure in Barbados is regulated by ***the CPR*** and other relevant Barbadian laws. It is to these that we must first look. It is these that we must carefully analyse and apply, turning only to foreign sources where they may usefully shed light on what might be intended by our provisions.

[17] The true position was submitted by the defendant's Counsel with clinical precision. It is self-evident, they submitted, that the claimants intended to commence proceedings of the type identified in ***CPR 67.1 (1)***, and ***67.1(2)***

requires that such proceedings be commenced by a fixed date claim form. They submitted further that nothing on the application indicates that this was an interlocutory application for orders before, during or after proceedings.

[18] Those submissions are unassailably correct and, in light of the concession made by Mr. Greenidge, I need say no more on this issue.

IS THE PROCEDURAL MISSTEP CURABLE?

[19] The debate as to the fate of the claimants' application was pursued more robustly. Broadly speaking, Counsel for the defendant submitted that the notice of application ought to be struck out since the claimants had failed to comply with the requirement for the use of a Fixed Date Claim Form as required by ***CPR 8.1(5)(c)*** and ***CPR 67.1(2)***.

[20] Counsel cited ***Hannigan v Hannigan [2000] 2 FCR 650***, ***Woodbank Investments Limited et al v. First Caribbean International bank (Barbados) Limited et. al. High Court Suit no. 1489 of 2012, date of decision 11 March 2014***, and ***Vendryes v Keane et. al. Civ. App. No. 101 of 2009 (Court of Appeal of Jamaica, date of decision 15 April 2011)*** in support of their contention.

[21] On the other hand, Mr. Greenidge submitted that the matter should be allowed to proceed. He urged that the use of an incorrect form to commence proceedings need not be detrimental where the defendant is aware of the

error and has been satisfactorily informed of the case that he or she has to answer. Counsel relied on ***Hannigan*** and ***Ablack v Ablack et al Claim No. CV2007-01019, High Court of Trinidad and Tobago***.

[22] Mr. Greenidge made some reference to the overriding objective of ***the CPR*** as contained in ***CPR 1***. However, he did not identify the procedural rules by which this Court may be empowered to override the error conceded and allow the claimants to proceed with their intended claim. It seems to me, though, that ***26.4*** may be helpful.

[23] ***CPR 26.4*** is in these terms:

> 26.4 (1) This rule applies in relation to a matter in respect of which an order has not been sought or if sought, has not been made under 26.3 striking out a statement case or part of a statement of case.
>
> (2) An error of procedure or failure to comply with a rule ... does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule ... the court may make an order to rectify the error or failure.
>
> (4) ....

[24] ***CPR 26.4(1) refers to CPR 26.3. CPR 26.3 (1***) empowers the Court to strike out a statement of case where there has been a failure to comply with a rule. ***CPR 26.3(3)(c)*** specifically provides that the Court may strike out a statement of case which does not comply with the requirements of ***CPR 8.***

[25] In this case, the defendants have made an application that the claimants' Notice of Application be struck out for a failure to comply with ***CPR 8.1(5)(c)*** and ***CPR 67.1(2)***. As I understand it, this Court has a discretion to strike out the application under ***CPR 26.3 (1)*** or ***CPR 26.3 (3) (c)***. If, however, the Court determines not to exercise a discretion to strike out the statement of case, it may make a rectification order to override the procedural misstep.

[26] Having examined those provisions, I think it appropriate at this stage to address a submission made by Counsel for the defendant to the effect that because the provisions of ***CPR 8.1(4)***, ***8.5(1)(c)*** and ***67.1(2)*** are expressed in obligatory terms, remediation of any breach is beyond the Court's curative powers.

[27] Adopting, in part, the terms of their written submissions, Mrs. Peterson submitted that (i) the employment in those provisions of the word "must" creates a mandatory requirement; (ii) that a litigant has no option but to follow the specified procedure; and (ii) that a breach of such a requirement "cannot be waived by the court's exercise of discretion".

[28] Counsel submitted further that the exercise of the court's curative discretionary power in such a circumstance "may … constitute a breach of the separation of powers doctrine, since the court's role is to apply the law

and not create law or depart from the law where the wording of the statute or rule is clear and imposes a mandatory obligation on a party".

[29] I disagree entirely with Counsel that the engagement by a court of its power to cure a breach of a procedural rule that is expressed in mandatory terms, amounts to any encroachment by that court on the province of any state agency that may be empowered to make law.

[30] ***CPR 26.3(3)*** itself gives this Court power to make a rectification order and nothing in the language of that sub-rule suggests that the court's remedial power is limited because the rule infringed is expressed in mandatory terms. Indeed, I have difficulty contemplating what other purpose such a curative provision could have been intended to serve other than to provide an escape valve from a procedural misstep wrought by the breach of an obligatory rule.

[31] It may well be that Counsel had in mind the old approach of classifying steps arising from procedural breaches as nullities or irregularities, with the latter being considered curable and the former beyond remedial relief. If so, I must rejoin that our procedural landscape has long been brightened by the existence of a rule which mandates a disregard for the automatic nullification of proceedings on the basis of non-compliance with procedural rules.

[32] A recourse to the pre-existing procedural regimes is often unnecessary for an exposition of our existing code. Nonetheless, it is to be noted that in ***Hannigan***, Brooke LJ usefully traces the development of this more liberal approach to the violation of procedural rules and, at paragraph 25, chronicled the introduction into the ***English Rules of the Supreme Court***, in 1965, of a new ***Order 2, r. 1(1)*** which expressly precluded automatic nullification. That rule was replicated in ***Order 2, r. 1(1)*** of the ***Rules of the Supreme Court, 1982*** (***"the RSC"***) which ***the CPR*** revoked and replaced.

[33] I will return to the present but demonstrate the usefulness of the past. In ***James Wyllie v David West Civ App. 120/07, Court of Appeal of Jamaica, date of decision 13 August 2008***, Morrison JA, at paragraph 9, provided a useful comment on ***Rule 26.9 (2) – (4)*** of the ***Civil Procedure Rules of Jamaica*** which is in ***pari materia*** with ***CPR 26.4 (2) - (4)***:

> This rule makes it plain, it seems to me, that ordinarily speaking non-compliance by a party with rules of court will not be treated by the court as fatal, and that the court has a wide discretion to remedy errors in procedure ... As the editors of **Halsbury's** observance of an earlier English version of rule (RSC Order. 2.r.1(i):
>
> > 'This is one of the most beneficient rule of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-complaince must be treated as irregularity and must not be treated as a nullity" (4th edition, volume 37 paragraph 36).

[34] But I need not look beyond this jurisdiction for pronouncements as to the wide scope of the discretion granted by ***CPR 26.4 (2) – (4)***. The Court of Appeal spoke to it in ***Auto-Guadeloupe Investissement S.A.* v. *Columbus Acquisitions Inc. et al Civ. App. No. 11 of 2011, date of decision 19 October 2012***. In that case, the Court was required to determine whether an appeal before it that had been incorrectly commenced by a Fixed Date Claim Form instead of a Form 20 Notice of Appeal pursuant to ***CPR 62.3*** was an incompetent appeal. The Court accepted the Appellant's submission that, mindful of the overriding objective, the procedural error could be rectified under ***CPR 26.4.***

[35] Granted that in determining to exercise its discretion in the manner that it did, the Court of Appeal was influenced in no small measure by the fact that there was no clearly set out procedural roadmap for the type of matter that was before it. Nonetheless, Gibson CJ and Mason JA, at paragraphs 34 to 37 and Williams JA, at paragraphs 55 to 62 acknowledged the breadth of the scope of ***CPR 26.4*** even in the face of an obvious violation of a prescriptive procedural rule.

[36] This is not to suggest that there are no limits to the discretionary power contained in ***CPR 26.4***. There may be occasions when it is obvious from the particular rule that ***CPR 26.4*** cannot be invoked to get around a particular

requirement. This position was articulated recently with admirable brevity by Mendonça JA in ***Gomez v Nunes Civ App No. P123 of 2016, Court of Appeal of Trinidad and Tobago date of decision 7 November 2016.*** With respect to ***CPR 26.8*** of the Trinidad and Tobago rules, the equivalent curative rule in that jurisdiction, he stated at paragraph 22:

> "… although r. 26.8 is to be given wide effect there are limits to its application. It cannot be utilised to achieve something which another rule prohibits or to achieve something, such as for example an extension of time, which specific rules dealing with extensions of time do not permit."

[37] The authorities to which Counsel for the defendant referred me do not support any principle that a breach of a mandatory rule is beyond the curative reach of the Court. It is evident from paragraph 67 of ***Woodbank*** that I left the issue untouched in that case while opting not to allow the application to stand, even if I had a discretion to do so.

[38] In ***Vendryes***, the Jamaica Court of Appeal upheld the decision of Sykes J to set aside a default judgment entered against a defendant who had not been served with the forms required to accompany a claim form by ***rule 8.16(1)*** of the ***Jamaica Civil Procedure Rules, 2002*** ("**the Jamaican Rules**"). Delivering the judgment of the Court, Harris JA opined that the claim form would have been a nullity which could not be restored by a curative order of

the court. Commenting on rule 26.9, the curative provision in ***the Jamaican Rules***, he stated, at paragraph 34:

> The general words of rule 26.9 cannot be extended to allow the learned judge to do that which would not have been possible. A judge can only apply a rule so far as he is permitted. The claim form was a nullity. It cannot be restored by an order of the court. The service of the requisite documents accompanying the claim form is a mandatory requirement.

[39] A careful reading of ***Vendryes*** demonstrates that there was no issue before the court as to the effect of the failure to serve the required documents on the validity of the claim form. Summarily put, the issues were whether the trial judge was right to have set aside the default judgment as having been irregularly obtained; and whether he had correctly granted summary judgment in favour of the claimant in view of the fact that an amended claim form had been filed but not yet served on the defendant.

[40] Morrison JA correctly analysed ***Vendryes*** in ***B J Equipment v Nanco [2013] JMCA Civ 2.*** He stated at paragraphs 37 and 38:

> … it is difficult to see why, as a matter of principle, it should follow from a failure to comply with rule 8.16 (1), which has to do with what documents are to be served with a claim form, that a claim form served without the accompanying documents should itself be a nullity. While the purported service in such a case would obviously be irregular … I would have thought that the validity of the claim form itself would depend on other factors, such as whether it was in accordance with Part 8 of the CPR which governs how to start proceedings. It is equally difficult to see why a claimant, who has failed to effect proper service of a claim form because of non-compliance with rule

> 8.16(1), should not be able to take the necessary steps to re-serve the same claim form accompanied by the requisite documents and by that means fully comply with the rule ...."
>
> Accordingly, given that the validity of the claim form as such was not an issue before the court in **Vendryes**, I can only regard the statements that the claim form served in breach of rule 8.16(1) was a nullity as obiter, and not part of the court's reason for its decision in that case...."

[41] My analysis points to a conclusion that a document filed pursuant to ***the CPR*** may be irregular but not invalid unless so ordered by a court that refuses to exercise its curative powers. This approach differs notably from that adopted by the Jamaican Court of Appeal in ***Stewart OJ v Sloley et al Civ App No. 68 of 2010, date of decision 29 July, 2011***.

[42] In ***Stewart OJ***, the Court of Appeal had occasion to consider whether Anderson J was right in striking out a notice of application by which the applicant intended to bring contempt proceedings where a Fixed Date Claim Form was required by rule ***53.10(1)(b)*** of the Jamaican procedural rules. Having reviewed ***Hannigan, Hertsmere Primary Trust et al v. The Estate of Rabindra-Anandh et al [2005] EWHC 320***, ***Medical and Immuniodiagnostic Laboratory Ltd. v Nelson [2010] JMCA Civ 42***, ***Vinos v Mark & Spencer p/c [2001] 3 All ER 784 and Trott v Snowden; Hewitt v Wirrall and West Cheshire Community NHS Trust [2001] 4 All E.R. 577***,

Morrison JA with whom Dukharan JA and McIntosh JA agreed, stated at paragraphs 54 to 55:

> On the basis of these cases, it therefore seems to me to be clear that, although it is the duty of the court … to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under the rules, the court is nevertheless bound, in cases in which the language of a particular rule is sufficiently "clear and jussive", to give effect to its plain meaning, irrespective of the court's view of what the justice of the case might otherwise require.
>
> So the question which naturally arises in the instant case is on which side of the line does the requirement in rule 53.10(1)(b) fall? It appears to me that, by the use of the word 'must', the framers of the rules intended to prescribe a mandatory requirement, which it is not open to the court to evade by reference to the overriding objective of the CPR. In other words, the court cannot sanction something which the rule plainly does not permit, by allowing an application for committal for contempt to be made by notice of application under Part 11, otherwise than as permitted by the express terms of rule 53.10.(1)(b).

[43] I agree entirely with Morrison JA that the overriding objective cannot be invoked to give a different interpretation to the plain and obvious meaning of a rule. But, in my view, that is not the end of the matter. The fact that a rule is expressed in jussive terms does not, by itself, put non-compliance of its contents beyond the curative powers of the court contained in ***CPR 26.4***. It is for the court on a consideration of all the factors to determine whether or not to exercise those powers unless otherwise restrained by the contents of the offended rule. Furthermore, the approach in ***Stewart OJ*** appears to be

inconsistent with that of the Court of Appeal in ***Auto-Guadeloupe Investissement S.A.*** and, to that extent, I must be guided by the latter.

THE FATE OF THE APPLICATION

[44] That being so, it is self-evident that the claimants have committed a gross procedural irregularity by purporting to commence proceedings by a Form 10 where a fixed date claim form was required. Should I in the exercise of the discretion afforded me by ***CPR 26.3*** let the filed document stand and somehow allow the matter to continue as if proceedings had been commenced by use of the correct form? I think not.

[45] In determining how I should exercise my discretion, I must seek to give effect to the overriding objective. Taking ***CPR 1.1*** as a whole, that objective is that cases be dealt with justly. As far as practicable, that includes having regard to notions of equality, frugality, and proportionality in regard to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of the parties. It also includes ensuring that cases are dealt with expeditiously and fairly and that a case is allotted an appropriate share of the court's resources.

[46] Sometimes, a determination that proceedings should be recognised as existing and allowed to continue may save costs and amount to an efficient utilisation of time. This may be an appropriate course where it is clear from

the document filed what the claim against a defendant is and that the latter would not be prejudiced if continuance were permitted by the Court.

[47] Nonetheless, this approach is not always feasible. In this case, the document filed, structured as it is, in terms of a classic form 10 application, lacks the look and feel of a claim form. Though it betrays the order sought against the defendant in no veiled way, it lacks many of the essential features which are required of a claim form. It contains no "short description of the nature of the claim" as required by ***CPR 8.4(1)(a)***. As submitted by Counsel for the defendants, it bears no indication that the intended action is against the defendant in her executorial capacity, though it describes her as a person to whom that role attaches. Additionally, I have observed that it bears no certificate of truth, thus betraying a failure on the part of the claimants to comply with ***CPR 3.12(1)*** which requires every statement of case to be so verified. There is no indication that the acknowledgement of service form and other documents that a claimant is required to serve on a defendant have been served.

[48] It would be pointless to direct the claimants to remedy these obvious defects in the framework of the ill-suited existing document when with little added time and effort, the required originating document could be prepared. I must add that this is a case in which the procedural road map as to how to

commence the type of proceedings intended by the claimants is set out in ***the CPR*** with absolute pellucidity.

[49] Though there may be aspects of ***the CPR*** that await judicial exposition, or desire legislative adjustment, this procedural code can no longer be regarded as new or unfamiliar. It has been operational now for some seven (7) years. There is little by way of acceptable excuse to be proffered for a disregard of its clear provisions or a slavish adherence to foreign precedents in its application.

DISPOSAL

[50] In the circumstances, the claimants' application is struck out.

[51] I will hear the parties as to costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT