BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1526 of 2016

BETWEEN:

GRENVILLE WINSLOW PHILLIPS **CLAIMANT**
(Receiver/Manager)

AND

RCTD HOLDINGS LIMITED **FIRST DEFENDANT**
SILVER POINT VILLA HOTEL INC **SECOND DEFENDANT**

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

Date of Decision: 31 July 2018

Sir Henry Forde Q.C. in association with Ms. Wendy Straker and Mr. Graeme Brathwaite for the Claimant

Mr. Amilcar Branche in association with Ms. Sherise King for the Defendants

DECISION

THE APPLICATION

[1] It is a regular feature of modern civil litigation that courts may order parties to serve on each other a statement of the evidence of any witness on which they intend to rely at the trial. That is provided for in ***Part 29.4 (1)*** of the

***Supreme Court (Civil Procedure) Rules, 2008 (the CPR)*.** Typically, such an order will include a date by which the statements must be filed.

[2] For various reasons, after a party has filed witness statements, he may determine that it will be necessary to adduce additional evidence at the trial. One means by which this may be achieved is through the filing of supplemental witness statements. ***CPR 29.5(3)*** facilitates this procedure. That rule provides that "[a] party may apply for permission to file supplemental witness statements".

[3] The Claimant filed such an application on 19 January 2018. He seeks an order for permission that "the witness Jeff Young file a witness statement supplemental to his Witness Statement filed herein on the 12th day of December 2017 …". Having heard the application, my considered opinion is that it ought to be refused. My reasons for so holding are contained below.

BACKGROUND

[4] Some background details are necessary to set the context of the application.

[5] By a claim form filed on 23 December 2016, the Claimant seeks, among other things, a declaration that he is "the duly appointed Receiver/Manager" over "the property, assets and undertakings" of the First and Second Defendants ("the Defendants"). He claims to have been appointed to that position by WM Capital Partners 57, LLC ("WM Capital"), on 14 November 2016. He avers

that on 16 November 2016 the Defendants prevented him from entering on their premises to carry out his duties. In addition to the declaration, he also seeks various facilitative orders including one prohibiting the Defendants from hindering him in the exercise of those duties.

[6] The Defendants deny the validity of the Claimant's asserted status. They counter-claim for a declaration that he was not entitled to take possession of their assets. They also claim damages for trespass. At the heart of their objection is an assertion that the transactions which underpinned WM Capital's apparent authority to so appoint the Claimant are invalid for want of permission from the Exchange Control Authority of the Central Bank of Barbados.

[7] The Claimant alleges that WM Capital acted pursuant to a power contained in a debenture dated 18 November 2005; and that the creditors' interest in that security had been transferred to WM Capital by deed dated 19 October 2016 ("the deed of transfer") by two local financial entities which he refers to as Republic. I shall do likewise.

[8] WM Capital's address as shown on various documents attached to the Claimant's statement of claim is in the United States of America. The parties have proceeded on the assumption that the permission of the Exchange Control Authority of the Central Bank of Barbados is required for the transfer

of any security interest to that entity because of the provisions of the ***Exchange Control Act Cap 71***.

[9] It is important that I set out how this exchange control permission issue has been dealt with by the parties in their respective statements of case. At paragraphs 11 to 14 of his statement of claim, the Claimant pleads to the sequence of events surrounding the transfer to WM Capital in this way:

> 11. On or about June 2016, Republic and WM Capital … entered into negotiations, for Republic to sell the debt of the 1st and 2nd Defendants to WM Capital … .
>
> 12. Commencing the 31st day of August, 2016, WM Capital, pursuant to the Exchange Control Act Cap 71 of the Laws of Barbados, sought the permission from the Central Bank of Barbados, Exchange Control Authority (hereinafter referred to as the "Exchange Control Authority"). The permission comprised of inter alia to use certain properties as itemised in the said missive of the 31st day of August, 2016 as collateral for a loan facility. A request was made by the Exchange Control Authority further documentation (*sic*), the 2005 Debenture which allowed for the appointment of a Receiver, was sent amongst the documents sent. In response to these documents, the Exchange Control Authority, by letter dated the 7th day of October 2016, granted approval for the transaction and the documents submitted therein … .
>
> 13. On the 28th day of September, 2016 all interests, rights and title to the loan … held by Republic were sold to WM Capital.
>
> 14. On the 19th day of October, 2016 Republic and WM Capital entered a Deed of Transfer and Assignment of Debenture in order to complete the sale … to WM Capital."

[10] At paragraphs 9 and 10 of the defence, the Defendants state:

9. Paragraphs 11 to 14 of the Statement of Claim are not admitted.

10. The First and Second Defendants … deny that the Deed of Transfer and Assignment of Debenture is a valid document.

[11] Paragraph 9 of the Counterclaim reads:

> The First and Second Respondent/Defendants repeat paragraphs 2,3,4 and 5 of the matters set out in the Affidavit of Roger Briggs Collins and Damian Samuel Luke as filed and sworn to on the 7th day of December 2016. In essence, the First and Second Respondent/Defendants deny that the Applicant/Claimant has been validly appointed as Receiver/Manager for failure of the appointor WM Capital … in obtaining the requisite Exchange Control Permission for the transfer of the security (Debenture) dated the 18th day of November 2005.

[12] Paragraphs 2 to 5 of the affidavit referred to by the Defendants are in these terms:

> [2] …. the … Claimant has not been validly appointed as Receiver/Manager … the appointment under the name and/or authority of WM Capital … is void and/or invalid for the reason that no Exchange Control Permission appears to have been granted by the Central Bank of Barbados for the transfer to WM Capital … of the Debenture … .
>
> [3] We are advised by Amilcar Branche our Attorney-at-law and do verily believe that by virtue of the provisions of Section 12(1) and in particular Section 12(1)(c) of the Exchange Control Act Cap. 71 of the Laws of Barbados, a security registered in Barbados shall not be transferred without the permission of the Exchange Control Authority unless neither the transferee nor the person, if any, for whom he is to be a nominee is resident outside Barbados. We are advised by said our Attorney-at-law and do verily believe, that WM Capital … is a company which is

> resident outside of Barbados and one which has failed to obtain the permission of the Authority for the transfer of the said Debenture as is evidenced by the Deed of Transfer …
>
> [4] … the said exhibit "GWP 9" speaks to the Deed being made in pursuance of a sale agreement and in consideration of the sum now paid by WM Capital Partner … and Republic Bank Barbados Limited ("Republic Bank"), whereby an assignment and transfer and transfer of the benefit of the Debenture and all interest and other monies henceforth to become due under the same and the benefit of all covenants, powers of sale and other powers and provisions contained in the Debenture and all the right title and interest of RFTBC and Republic Bank therein absolutely was transferred to WM Capital … . From an examination of the document it is seen, that a sum of money was paid in consideration of the transfer but the transfer as exhibited has failed to disclose the presence of the permission which was granted for the purpose of effecting the said transfer.

[13] Finally, at paragraph (a) of their prayer for relief, the Defendants seek a declaration that the Claimant was not entitled to take possession of the property, "given the invalidity of his appointment by virtue of ***Sections 12(1)c*** (*sic*) of the ***Exchange Control Act***." At paragraph 8 of his defence to the Counterclaim, the Claimant maintains that his asserted appointment was and is valid.

THE CASE MANAGEMENT ORDERS

[14] On 26 July 2017, this Court made a series of case management orders in relation to the proceedings with the consent of the parties. They included

orders for (i) the filing and serving of a list of documents by 15 August 2017; (ii) inspection of documents by 23 August 2017 and mutual exchange by 30 August 2017; (iii) the filing and exchanging of witness statements by 16 October 2017; and (iv) the filing of a statement of agreed facts by 30 October 2017, or individual statements by 7 November 2017.

[15] On 29 November 2017, the Court extended the period in respect of some of those events. Time for the filing and service of witness statements was extended to 15 December 2017. The Claimant filed the witness statement of Jeff Young on 12 December 2017. The Defendants have not yet filed any witness statements, and so, the ordered exchange of witness statements have not occurred.

[16] At a hearing on 25 January 2018, Ms. Wendy Straker who appears for the Claimant with Sir Henry Forde Q.C. and Mr. Graeme Brathwaite disclosed that the claimant was in possession of additional documents that might be relevant to the Exchange Control Permission issue. I made an order with the consent of the parties for the filing and service of a supplemental list by the Claimant on 31 January 2018, and inspection by the Defendants on 15 February 2018.

[17] The Claimant's supplemental list reads:

1. Copy letter from Sir Henry de. B. Forde, Q.C. to Exchange Control Authority, Central Bank of Barbados dated 17 July 2017.

2. Letter from Exchange Control Authority, Central Bank of Barbados to Sir Henry de. B. Forde, Q.C. dated 17 August 2017;

3. Copy letter from Sir Henry de. B. Forde, Q.C. to Exchange Control Authority, Central Bank of Barbados with e-mail attached dated 23 August 2017.

4. Copy letter from Sir Henry de. B. Forde, Q.C. to Exchange Control Authority, Central Bank of Barbados with e-mail attached dated 23 August 2017.

5. Copy letter from Wendy P. Straker to Exchange Control Authority, Central Bank of Barbados dated 22 September 2017.

6. Letter from Exchange Control Authority, Central Bank of Barbados dated 22 September 2017.

7. Central Bank of Barbados Certificate of Validation in respect of Loan Sale and Assignment Agreement from Republic Bank (Barbados) Limited and Republic Finance and Trust (Barbados) Corporation to WM Capital Partners 57, LLC dated 6 December 2017.

THE GROUNDS OF THE APPLICATION

[18] I come now to the grounds of the application. The Claimant sets them out on the notice as follows:

1. Prior to the filing of the Witness Statement of Mr. Young, the Claimant had applied to the Central Bank of Barbados seeking clarification as to whether or not the Loan Sale and Assignment Agreement between Republic Bank Barbados Limited and Republic Finance and Trust

(Barbados) Limited and WM Capital Partners 57, LLC (the LSAA) had been approved by the Exchange Control Authority pursuant to Section 12(1) of the Exchange Control Act Cap 71 of the Laws of Barbados.

2. The Central Bank issued a Certificate of Validation with respect to the LSAA, which is dated the 6th day of December 2017 and which was received by the Claimant's Attorney-at-law, Sir Henry de B. Forde, QC on January 5th, 2018, subsequent to the filing Mr. Young's Witness Statement.

3. The Claimant has been advised by his Attorneys-at-law and verily believes that the evidence with relation to the Certificate of Validation is relevant to the issues arising in the Claim.

THE AFFIDAVIT IN SUPPORT

[19] The Claimant filed an affidavit in support of his application. It was sworn by his Counsel Mr. Brathwaite. At paragraphs 3 to 6 Counsel deposed as follows:

> 3. One of the issues arising for determination in this matter is whether or not WM Capital … obtained permission from the Central Bank of Barbados pursuant to section 12(1) of the Exchange Control Act Cap 71 of the Laws of Barbados for the purchase of the Mortgage Debenture from [Republic] …
>
> 4. In the circumstances the Attorneys for the Claimant advised the Claimant and WM Capital to seek clarification from the Exchange Control Authority on the matter.
>
> 5. Following that advice the Claimant and WM Capital instructed us to write to the Central Bank of Barbados seeking such clarification. Sir Henry de B. Forde, Q.C. wrote to the Central Bank on July 17, 2017 and a Certificate of Validation with respect to the LSAA was issued by the Central Bank on

> December 6th 2017 and received by Sir Henry on January 5th 2018, after the Claimant's Witness Statements were filed.
>
> 6. We have therefore advised the Claimant that permission should be sought for the filing of a supplemental Witness Statement by Mr. Young to address the communication between the Claimant's Attorneys-at-law and the Central Bank and the issuing of the Certificate of Validation by the Central Bank.

SUBMISSIONS AND DISCUSSION

[20] I will now consider the application and the various submissions made by Counsel. They pointed me to no local authorities that examined the application of ***CPR 29.5(2)***. However, their submissions raised a number of issues. These include (i) what factors ought the Court to consider in determining an application under that rule?; (ii) can the proposed statement of Mr. Young be characterised as a supplemental witness statement?; (iii) does the proposed evidence which the Claimant intends to adduce by means of the statement supply particulars of existing allegations raised on the statements of case or does it represent a new allegation and a change in the Claimant's case?; and (iv) if it comes to this, how ought this Court to exercise its discretion in the matter?

Some "preliminary issues"

[21] Before I turn to those issues, I will consider some submissions raised by Mr. Amilcar Branche who appeared for the defendants with Ms. Sherise King. Though not made at the outset of the hearing, I regard them as being

preliminary in nature. I do not think that any of them ought to be decisive of the application.

[22] I will consider two of those submissions together. They are (i) that the application only sought permission to put in a statement in respect of the Certificate of Validation and not the other items listed on the Claimant's supplemental list of documents; and (ii) that the Claimant had not provided a draft of the proposed witness statement.

[23] The first of those submissions arose in response to Ms. Straker's indication to the Court that the purpose of the intended witness statement is to enable the production into evidence of the items on the supplemental list. Ms. Straker sought to buttress her position in that respect by referring to paragraph 6 of Mr. Brathwaite's affidavit. As to the second, it is a truism that the Claimant has not provided a draft of the intended statement.

[24] An applicant who seeks an order pursuant to ***CPR 29.5(3)*** must make clear the nature of the evidence he hopes to adduce by means of the supplemental statement. This is necessary in order to enable the Court to properly consider the application. While this is best done by the provision of a draft of the proposed witness statement, this may not always be necessary. It may sometimes be enough to indicate the purpose of the intended statement as, for example, where the mere purpose is to produce identified documents.

[25] However, neither the application nor Mr. Brathwaite's affidavit are very helpful. The application merely seeks permission for the filing of a supplemental witness statement by Mr. Young. The grounds assert that "the evidence with relation to the Certificate of Validation is relevant to the issues arising in the Claim". It is unclear from the application what evidence Mr. Young intends to adduce in relation to the Certificate of Validation and whether the proposed evidence will extend to the correspondence. As for the affidavit, Mr. Brathwaite merely deposed that the Claimant's legal team had advised the Claimant that permission should be sought to file the supplemental witness statement "to address" the communication and the issuing of the Certificate. The affidavit does not indicate how the witness statement intends "to address" the documents identified.

[26] Hence, I think there is merit in Mr. Branche's submission. However, having heard Ms. Straker as to the intended purpose of the witness statement, I did not think that the application should have failed on that account only. I considered that to be a matter that might have been addressed by an appropriate amendment. There would have been no prejudice to the Defendants since Mr. Branche was prepared to mount substantive arguments against the application. Indeed, he went on to do so, as it turned out, with success.

[27] Mr. Branche's next submission was that the application ought to be disallowed because Mr. Young could not "speak to" the Certificate of Validation or the correspondence. Ms. Straker accepted this to be so. She explained that it was merely intended that he would produce them. She submitted that the documents speak for themselves. I find Mr. Branche's submission to be without merit. If Mr. Young is permitted to produce the documents, it would be open to both parties to seek to call any witnesses they may consider necessary to "speak to" the documents, or to comment on the failure to adduce such witnesses.

[28] Mr. Branche's final submission was that since he had not seen Mr. Young's witness statement he was not in a position to agree or disagree on the proposed supplemental statement. Ms. Straker submitted that this complaint was unbecoming of Mr. Branche since it was his clients' failure to file their witness statements that prevented the exchange of witness statements. She submitted further that had Mr. Young been in a position to include the Certificate in his original witness statement, Mr. Branche would still not have seen it.

[29] The latter limb of Ms. Straker's submission is as speculative as it is irrelevant. As for the first limb, the onus is on the applicant to put before the Court all that may be required to successfully prosecute his application. If evidence of

the contents of a prior witness statement is required to assess the viability an application for a supplemental witness statement, then the applicant must get that evidence before the court.

[30] Mr. Young's witness statement was filed on 12 December 2017. Mr. Brathwaite deposed in his affidavit that communications with the Central Bank of Barbados commenced on July 17, 2017. His further evidence is that the Certificate of Validation was issued on 6 December 2017 and received by Sir Henry Forde Q.C. on 5 January 2018.

[31] It is clear, therefore, that in his first witness statement, Mr. Young could have referred to and produce the letters that were exchanged between the Claimant's Counsel and the Exchange Control Authority between July and September 2017 but not the Certificate of Validation. This Court accepts that Mr. Branche could not have known whether or not he dealt with the correspondence in his first witness statement and it appreciates that precise knowledge as to which course was taken might have assisted his client in formulating his arguments in respect of the application.

Relevance: a key issue

[32] However, the central issue raised by Mr. Branche in his submissions is that the application ought to be refused because the documents that the Claimant seeks to have introduced are not relevant, given the issues that arise on the

pleadings. He was fully able to advance this submission in the absence of any knowledge of the contents of Mr. Young's first witness statement.

[33] This issue of relevance is key to the determination of this application. ***CPR 29.5(3)*** which provides for the filing of supplemental witness statements must be examined in the context of the general purpose of witness statements. It falls within ***CPR 29*** which deals with evidence. The general purpose of a witness statement is captured in ***CPR 29.4. CPR 29.4 (1)*** and ***(2)*** read:

> **29.4(1)** The court may order a party to serve on any other party a statement of the evidence of any witness upon which the first party intends to rely **in relation to any issues of fact to be decided at the trial**. (my emphasis)
>
> (2) A statement of evidence referred to in sub-rule (1) is known as a witness statement.

[34] The first rule of evidence is the relevance rule. Of common law origins, it has been given statutory force by ***section 45*** of the ***Evidence Act Cap 121*** which provides:

> Evidence that is relevant in proceedings is, subject to this Act, admissible, and shall be admitted, in the proceedings; and evidence that is not relevant in the proceedings is not so admissible.

[35] ***Section 44(1)*** of the ***Evidence Act*** defines what is relevant evidence. It reads:

> The evidence that is relevant in proceedings is evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.

[36] The reference in ***CPR 29.4(1)*** to evidence "in relation to any issues of fact" is an implicit reference to relevance. This is buttressed by ***CPR 29.5(2)*** which provides that "[t]he court may order that any inadmissible, scandalous, **irrelevant** or otherwise oppressive matter be struck out of any witness statement" [emphasis mine]. The requirement for relevance applies to any witness statement whether filed pursuant to an order made under ***CPR 29.4(1)*** or to one made under ***CPR 29.5(3)***.

[37] It follows that relevance must be a fundamental consideration in determining whether leave ought to be granted on an application under ***CPR 29.5(3)*** as with any application relating to the admissibility of evidence. However, that is not to say it is the only consideration. If the evidence that the party seeks to adduce is not relevant that is the end of the matter. If it is, the Court must go on to consider whether it is appropriate to exercise its discretion in favour of the application.

Factors relating to the exercise of the discretion

[38] ***CPR 29.5(3)*** does not set out the factors to be considered by a court in determining an application for leave to file a supplemental witness statement. There can be no doubt that the Court must act judiciously. It is enjoined by ***CPR 1.2(1)*** to seek to give effect to the overriding objective of ***the CPR*** which

is expressed in ***CPR 1.1*** as being that of dealing with cases justly. ***CPR 1.2*** sets out a non-exhaustive list of objectives that are included so far as practicable in the notion of dealing with cases justly. This list comprises (i) ensuring that the parties are on equal footing; (ii) saving expense; (iii) dealing with the case in ways which are proportionate to (a) the amount of money involved; (b) the importance of the case; (c) the complexity of the issues, and (d) the financial position of each party; (iv) ensuring that the case is dealt with expeditiously and fairly; and (v) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[39] Ms. Straker submitted that the Court must consider whether granting the application would delay the hearing of the proceedings; or cause prejudice to the other party. I agree. It appears to me that these are subsumed under the duty to ensure that cases are dealt with expeditiously and fairly. Additionally, the court should consider the nature of the evidence the party seeks to adduce, and the reason why the potential evidence was not set out in the previous witness statement. These considerations must form part of the quest to arrive at a just and fair result.

Supplemental witness statements

[40] Counsel on both sides cited authorities which examined the concept of a supplemental witness statement. ***The CPR*** provides no definition of the term. This is unlike the case in Trinidad and Tobago. In that jurisdiction, provision is made for the filing of supplemental witness statements in ***Part 29.8*** of the ***Civil Proceedings Rules 1998*** (***TTCPR***). That rule provides:

> 29.8 (1) Where— (a) a party has served a witness statement; (b) further matters on which the witness can give evidence arise or become relevant or known to the party after it has been served; and (c) the party who served the witness statement proposes to call the witness to give evidence on those further matters, that party must serve a statement of the further evidence which the witness will give.
>
> (2) Such a statement is referred to as a "supplemental witness statement".
>
> (3) A party who serves a supplemental witness statement must do so as soon as possible after the further matters arise or become relevant or known.

[41] Given those provisions, in ***Balroop v Trinidad and Tobago Mortgage Finance Company Limited CV 535 of 2007 High Court of Trinidad and Tobago, date of decision 28 July*** **2009**, a case to which Ms. Straker referred me, Stollmeyer J was able to distinguish between "additional witness statements" and "supplemental witness statements in this way, at pages 3 to 4:

> Additional witness statements are to be distinguished from supplemental witness statements which are provided for under the provisions of Rule 29.8. These allow a witness who has already given evidence in the form of a witness statement to supplement what has already been said by evidence on further matters which arise, or become relevant or known to him, after the original – initial – witness statement has been served on the other party.

[42] In Barbados, the meaning and limits of the term "supplemental witness statement" is less clear. Is it limited to the statement of an intended witness who has given a prior statement; or might it be interpreted to cover any additional statement which a party considers it necessary to file to supplement the initial bank of statements?

[43] In ***Liu Hing Sang v Estate of Li Kwan [2011] 1625***, a decision of the High Court of Hong Kong to which Mr. Branche referred me, at paragraph 42, Master Marlene Ng reproduced some learning that demonstrates some of the added purposes that might fall within the purview of supplemental witness statements. Before reproducing it, I should mention that ***CPR 29.9*** provides that a witness may, with the leave of the court, (i) amplify the evidence set out in his witness statement if the statement disclosed the substance of the evidence he is asked to amplify; (ii) give evidence in relation to new matters which have arisen since the witness statement was served; or (iii) comment on evidence given by another witness. In ***Liu Hing Sang***, Master Marlene Ng stated at paragraph 42:

> There is again no doubt that the court has power, if it thinks fit, to direct that supplemental witness statement of a witness be served. *(sic)* It has been suggested in Hong Kong Civil Procedure 2012 Vol. 1 38/2A/10 at p.758 that "[the] better practice is that the evidence dealing with or contradicting any statements made by witnesses of the opposite party should be given orally rather than be dealt with by a supplementary statement", but "[a] supplementary statement may be allowed to be served to give the witness of a party the chance to fill in gaps in his own statement or to answer the statement of the opposite party. The court may also consider that justice in a case requires that a witness be allowed to file and serve a supplemental witness statement in order to correct an error (in the witness's original statement) which was not the result of his mistake but that of a third party ……"

[44] I will not attempt to delineate the limits of the term in this jurisdiction. Despite citing the authorities, Counsel did not address this question in any detail. In my view, therefore, any firm definitional pronouncements must be held over for another occasion. It suffices to say that I am satisfied that if the intended statement is meant to deal with a relevant document that did not exist at the date of the filing of Mr. Young's witness statement, it is capable of being characterised as a supplemental witness statement for the purposes of ***CPR 29.5(3)***.

Is the intended statement relevant?

[45] This brings me back to the issue of relevance. In this context, I sensed no disagreement between the parties as to the guiding principles, though they differ on what ought to be the outcome of their application to the facts of this case. Mr. Branche cited ***Talent Weaving Dyeing & Printing Ltd v Able***

Billion Textiles Ltd [2013] HKEC 298, a decision of the High Court of Hong Kong while Ms. Straker referred me to ***East Caribbean Flour Mills Limited v Boyea & Ors***. ***Civ App. No. 12 of 2006, Court of Appeal of St. Vincent and the Grendines, date of decision 16 July 2007***.

[46] In ***Talent Weaving***, the court set out a number of principles most, if not all, of which are equally applicable in this jurisdiction. That case concerned an application to strike out portions of a witness statement; but surely the Court will not grant leave to file a witness statement to set out evidence that would be inadmissible. The court stated at paragraph 5:

> a. this court has jurisdiction to strike out or expunge any scandalous matter in witness statements;
>
> b. evidence that bears no relevance to the pleaded issues in dispute is scandalous and is inadmissible and liable to be struck out;
>
> c. evidence given by way of witness statements … shall not make inadmissible evidence admissible;
>
> d. a witness statement which is inconsistent with the party's own pleadings should be struck out, and to decide relevance, the court will only refer to the pleadings;
>
> e. scandalous parts of witness statements by reference to the pleaded issues should be struck out;
>
> f. evidence that is beyond the ambit of the pleaded issues is scandalous and should be struck out;

[47] The proposition that the court will only refer to the pleadings to decide relevance was earlier disagreed with in ***East Caribbean Flour Mills***. In that case, Barrow JA, as he then was, provided a detailed analysis of the role of pleadings and the admissibility of evidence contained in witness statements. He stated at paragraph [43]:

> … the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," … to let the other side know the case it has to meet and, therefore, to prevent surprise at trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleaders case.

[48] Barrow JA, as he then was, went on at ***paragraph 44*** to determine that since witness statements may be used to supply details or particulars, the trial judge had erred in deciding that she should confine herself to the pleadings to ascertain the issues between the parties for purposes of determining the admissibility of certain material in a witness statement. However, crucially, he underscored the necessity for relevance in the context of the pleaded case. He did so in these words:

> It follows … that once the material in [the] witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible …"

[49] Barrow JA, as he then was, went on at paragraph [45] to characterise the adopted approach as a consideration as to "whether the challenged material were particulars of existing allegations or were new allegations". He noted firmly "that additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case". He concluded at paragraph [46]:

> I emphasise the distinction between changing a statement of case and supplying particulars to say I expect the courts will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case by case basis.

[50] This decision will be more easily made in some cases than in others. Ms. Straker submitted that the central issue in the proceedings is whether or not Exchange Control Permission was granted for the purchase of the loan by WM Capital; and that the prospective evidence to which the application relates is material to that issue. She submitted further that any Certificate of Validation issued by the Central Bank of Barbados with respect to the transaction has retrospective effect and validates the transaction. Thus, she urged, the Certificate raises no new issue.

[51] Ms. Straker cited ***Bank of London & Montreal Ltd. v Noel Courtney Sale (1968) 12 WIR 149*** as authority for the proposition advanced with respect to the effect of a Certificate of Validation. This decision of the Court of Appeal of Jamaica considered the effect of a Certificate of Validation under ***section***

20(2) of the ***Exchange Control Law 1952***, a provision which Ms. Straker submitted is similar in terms to ***section 21*** of the ***Exchange Control Act Cap 71***.

[52] Ms. Straker also sought to distinguish ***Balroop***. In that case, Stollmeyer J refused an application for permission to file an additional witness statement where he was satisfied that it was not relevant since it related to a matter that had not been raised in the statements of case as an issue. He considered the first part of a passage which I have located in ***Blackstones Civil Practice 2011*** at ***paragraph 24.25*** to be apposite. That passage reads:

> A judge should not normally make a finding of fact on an issue which depends on evidence and which has not been raised in statements of case, so that all parties did not have a proper opportunity to address it, even if it was raised in correspondence after statements of case have been served (*Sivanandan v Executive Committee of Hackney Action for Racial Equality [2002] EWCA Civ 111, LTL 25/1/2002*).

[53] Mr. Branche submitted that the documents in question are not relevant to the issue which arises on the statements of case. He submitted that the Claimant's case as pleaded is that any requisite exchange control permission existed prior to the date of the deed of transfer, and it follows, at the time of his asserted appointment. Noting that the Claimant's pleadings reflect no reference to a Certificate of Validation or how he intends to rely on any such Certificate, Counsel urged that the Defendants could not be asked to respond

without knowing what case is brought before the Court. He submitted that the Claimant would have to amend his Statement of Claim to plead the existence of the Certificate and indicate how it is being relied on.

[54] I sought to ascertain from Counsel what impact, if any, ***CPR* 8.5** ought to have on my deliberations. ***CPR 8.5(1)*** requires a Claimant to include in the claim form or in the statement of claim "a short statement of all the facts on which he relies". ***CPR 8.5(3)*** precludes him from relying on any "allegation or factual argument" which is not set out in the statement of claim but could have been set out, unless the court gives permission.

[55] Ms. Straker noted the Court's power under ***CPR 8.5(3)*** and submitted that the present application is akin to an application to rely on unpleaded facts. This statement appeared to me to somewhat contradict Counsel's earlier position which suggested that the proposed evidence and related argument arose squarely on the issue as pleaded.

[56] The requirement contained in ***CPR 8.5(1)*** is clear. With respect to a similar provision in ***Part 8*** of the ***TTCPR***, the Privy Council commented in ***Bernard v Seebalack [2010] UKPC 15***, at ***paragraph 27***, as follows:

> If a statement of case contains allegations which are "sufficiently made" (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement.

[57] I do not have to comment on any apparent conflict between ***East Caribbean Flour Mills*** and ***Talent Weaving*** as to whether in determining relevance a court must confine itself to the pleadings or not. That issue does not arise here. There is no doubt that an issue arises on the statements of case in relation to the existence of Exchange Control Permission; and I understand the sense in which Ms. Straker claims the Certificate to be relevant. However, when regard is paid to the Claimant's pleaded case, I think that the issue is narrower than Counsel has articulated. At paragraph 12 of the statement of claim, the Claimant asserts as a fact that Exchange Control Permission was granted for the transfer by letter dated the 7th day of October 2016. That is the assertion which the defendants have put in issue at paragraphs 9 of their defence and by their counterclaim.

[58] The Claimant now seeks to set up a different case in respect of any requisite Exchange Control Permission. According to Ms. Straker, he now seeks permission to facilitate an argument that subsequent to the transfer and his asserted appointment, the Exchange Control Department of the Central Bank of Barbados issued a Certificate of Validation; and that the effect of that document was to retrospectively validate the transfer. Though obviously related to the Exchange Control Permission question, this is a new argument

and one which the Defendants have not been afforded an opportunity to consider or reply to.

[59] Hence, I do not regard the Certificate of Validation and the related correspondence to be relevant in the context of the pleaded case. That material does not constitute mere details or particulars of what the Claimant has asserted in his statements of case. As Mr. Branche submitted, a factual proposition that Exchange Control Permission was granted prior to a particular date is entirely different from a proposition that a Certificate of Validation was granted subsequent to that date but has retrospective effect.

How should any discretion be exercised?

[60] Having determined that the Claimant now seeks to raise a new matter, that is the end of the matter. However, I must add that even if somehow the documents and any related evidence could be considered relevant, I would be disinclined to exercise my discretion in favour of the application. I accept Ms Straker's submission that the grant of the application will not significantly protract these proceedings. However, I agree with Mr. Branche that his clients would be prejudiced by it. They would be forced to defend a matter without any clear indication as to the specifics of the Claimant's case.

[61] As it stands, we do not know whether the Claimant intends to resile from his pleaded allegation that there was a prior Exchange Control Permission, or

whether reliance on the Certificate of Validation is being advanced as an alternative argument. Neither do we know how the Defendant might respond to the claim had a case based on a Certificate of Validation been advanced by the Claimant. It would not be in the interest of good expedition or fairness to allow these proceedings to go forward on the basis of uncertainty as to exactly what argument or arguments the claimant intends to advance at trial. Needless to say, this Court encourages compliance with ***the CPR*** of which ***the CPR 8.5(1)*** requirement to state all the facts on which a Claimant relies forms part.

DISPOSAL

[62] It is for the above reasons that I have determined that the Claimant's application must be refused. I will hear the parties in respect of costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT