BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 404 of 2014

BETWEEN:

HURST HOLME INSURANCE CO. LTD.	**CLAIMANT**
AND	
HOUGH CAPITAL MANAGEMENT LIMITED	**1st DEFENDANT**
HOUGH CAPITAL MANAGEMENT (BARBADOS) LIMITED	**2nd DEFENDANT**
CHRISTOPHER J HOUGH	**3rd DEFENDANT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: **2020: 18 May**

Date of Oral Decision: **2020: 06 July**
Date of Written Decision: **2020: 13 July**

Appearances:

Mr. Tariq Khan for the Claimant

Sir Elliot D. Mottley, QC in association with Ms. Michelle Shepherd for the Defendants

CPR Part 20, Rule 20.1(2) – Application for Permission to Amend Defence after Case Management – Factors to be considered – CPR Rule 30.3 – Application to Strike out Affidavit.

RULING

INTRODUCTION

[1] This is a claim for fraudulent misappropriation of funds arising out of the provision of investment management and brokerage services by the first and second Defendants to the Claimant, pursuant to certain agreements, between the period 2005 and 2013. The terms as to remuneration for services provided under the agreements, as well as the question of which agreements governed the relations between the parties are in dispute. The Claimant alleges that approximately 2.1 million United States dollars have been misappropriated by the Defendants from the Claimant throughout the said period of 2005 - 2013. The Defendants contend that all monies received from the Claimant throughout the relevant period, were fees legitimately earned for services provided pursuant to the agreements between the parties. The proceedings are fairly advanced towards trial, with dates having been set on two occasions. Before the Court for determination however, are two applications filed by the Defendants.

[2] The first, is an application to amend the defence pursuant to **CPR Rule 20.1(2)**, which was filed on 31st October, 2019. The second, is an application to strike out the Claimant's affidavit in response to the application to amend the defence.

The Application to strike out the Claimant's affidavit in response was filed on 10th February, 2020. The Claimant resists both applications, in particular the application to amend, on the basis that being late in the day, any amendment would be prejudicial to the Claimant in terms of further delay to the trial and expense to the Claimants. A brief factual background and summary of the procedural history of the proceedings, are helpful before framing the issues for determination.

BACKGROUND AND PROCEDURAL HISTORY

[3] The Claimant ('Hurst Holme Insurance') is an insurance company incorporated in Bermuda which contracted the 1st and 2nd Defendants ('Hough Capital' and 'Hough Capital Barbados') to provide trading and investment management services. Hough Capital is a Bermuda company registered in Barbados, whilst Hough Capital Barbados is a local IBC, both carrying on business which they broadly describe as private asset management services. The services provided by the Defendants are more particularly described in terms of identifying securities available on the global market and engaging in purchase, sale or other disposition of such securities with funds provided for this purpose by Hurst. The 3rd Defendant (Mr. Hough) is the director and owner of the first and second Defendants.

[4] Key players involved in the contractual undertakings include Marsh IAS, which is described as the manager/agent of the Claimant; Bank of New York Mellon (custodian of the Claimant's fixed income fund); and first DGM Bank and Trust Inc, followed by Front Street Private Bank Barbados, banks both domiciled in Barbados, which served as custodian of the Claimant's equity fund. With respect to Front Street Private Bank however, the Claimant alleges that whilst it was of the belief that this bank was the custodian of its equity fund, the 3rd Defendant as part of the Defendants' fraud, caused this account to be held under his name to the exclusion of the Claimant and its shareholders.

[5] By amended claim filed in November 2015, the Claimant sought (primarily) payment of US$2.1 million being monies fraudulently misappropriated by the Defendants from the Claimant, during the course of their contractual relationship for provision of investment management and securities trading services. The 3rd Defendant is sued further to a prayer to pierce the corporate veil in relation to his ownership and control of the 1st and 2nd Defendant companies. The services provided to the Claimant by the Defendant companies were provided in relation to two separately managed accounts – namely, a fixed income account, and an equity account. These separate accounts were governed by two separate agreements, titled likewise.

The Fixed Income Agreement was said to have been executed in March, 2007 whilst the Equity Agreement was said to be executed in October, 2006. The terms of these two agreements made provision for the remuneration of the Defendants, comprising essentially commissions and fees, calculated with reference to the trading and investment activities carried out with monies from the Claimant's accounts.

[6] In May, 2013, based upon an internal review of the Defendants' activities and charges between 2005 - 2013, the Claimant alleges that the Defendants inflated the commissions payable to them under the agreements or otherwise fraudulently misappropriated the Claimant's monies. As a consequence, the Defendants' services were terminated in May of 2013. In April 2014, the Claimant instituted this claim for the US$2.1 million being the amount alleged to have been collected by the Defendants in excess of what their entitlement should have been under the agreements. The Defendants filed a defence in December, 2015 in which they pleaded[1] what they alleged to be the specific agreements which governed the parties' relations. The defence also pleaded the specific bases or formulae upon which their fees were calculated and paid under those agreements.

[1] Defence filed 23 Dec 2015 paras 12 – 14 & 26 - 27

Between the filing of the defence, to October, 2019 a number of applications and affidavits were filed, including the replacement of a freezing injunction against the defendants, by an undertaking pertaining to the Defendants' assets in Barbados.

[7] Of relevance to the application at hand is a witness summons issued by the Defendants with the permission of the Court, to Front Street Private Bank Barbados. The witness summons was issued to compel production of electronic data pertaining to the trading activities of Claimant's account carried out by the Defendant, including the price per trade; and the custodian agreement between the private bank and the Claimant. The Court will return to the witness summons. Also relevant are the case management orders and directions issued throughout the proceedings and variations of such orders, as follows:-

(i) 22 October, 2015 – Case Management timetable including trial dates fixed for May & June, 2016;

(ii) 12 February, 2016 – by Defendants' application, order for inter alia - variation of trial dates to October 2016 and extension of time to file and exchange witness statements;

(iii) July, 2016 – subsequent to removal from record of Defendants' attorneys, October 2016 trial dates vacated upon request of Defendants' new attorneys;

(iv) September, 2016 – application by Claimant to set new trial dates;

(v) November, 2016 through August, 2017 – applications, affidavits and submissions filed pertaining to Defendant's application for Front Street Private Bank to produce certain documentation;

(vi) February, 2018 – without notice application by Defendant for witness summons for documents to be produced (the same documents, sought by earlier applications). Witness summonses issued pursuant to order in October, 2018;

(vii) November, 2018 – further case management orders including a pre-trial review date for May, 2019;

(viii) January, 2019 through May, 2019 – compliance with case management directions by Claimant; non-compliance by Defendants;

(ix) June, 2019 – order on pre-trial review granting extension of time to Defendants to comply with case management directions;

(x) September, 2019 – compliance with case management directions by Defendants; trial dates set for April, 2020;

(xi) October, 2019 – Defendants' application to amend defence;

(xii) November, 2019 – directions for hearing application to amend defence, hearing date scheduled for February, 2020;

(xiii) February, 2020 – proceedings reassigned to different judge; application filed to strike out Claimant's affidavit in response to application to amend;

(xiv) March, 2020 – hearing of Applications to amend and to strike out scheduled;

(xv) March, 2020 – COVID 19 measures restrict operation of Court; trial dates for April, 2020 vacated in any event; and

(xvi) May 18th 2020 – Applications heard. Trial dates have not been reset.

ISSUES

[8] Against this background and brief summary of the proceedings considered relevant to the Applications, the following issues arise for determination:-

(i)(a) What are the legal principles to be applied and factors to be considered in determining an application for permission to amend a defence after the case management conference?

(i)(b) Based on such principles and factors, should the amendment sought by the Defendants be allowed within the circumstances of the instant case?

(ii) Should the Claimant's affidavit filed on 23rd December, 2019 be struck out for failure to comply with **Rule 30.3** of the **CPR 2008**?

THE APPLICATIONS AND SUBMISSIONS OF COUNSEL

Part I - The Application to Amend the Defence

[9] The Application to amend the defence was filed on the 31st October, 2019 pursuant to **CPR Rule 20.1(2)**. The grounds of the Application are paraphrased as follows:-

(i) The amendments will allow the Defendants to fully and clearly set out the basis of the Defence to the Claim, thereby giving effect to the overriding objective of the Rules;

(ii) The amendments are necessary so that the real dispute between the parties can be adjudicated;

(iii) The Defendant has a reasonable prospect of success; and

(iv) The Claimant will not be unfairly prejudiced or burdened by the amendments as it will not be obliged to investigate facts or obtain evidence outside of the ambit of or unrelated to matters raised in the defence already filed.

The Application appended the proposed draft defence but a supporting affidavit was not filed until the 6th December, 2019. The affidavit in support (sworn by the 3rd Defendant) alleged the following (extracted and paraphrased):-

(i) The 1st and 2nd Defendants' electronic information was kept by a third-party e-mail service provider, as part of management of their domain name. Due to the instant proceedings, the Defendants lost business and eventually sold their domain name as it was no longer needed;

(ii) Their electronic data was backed up on a physical Mac OSX server in the 2nd Defendant's office, which however failed over time. The Defendants therefore say they had limited access to data between 2002 to 2016 which was stored on that server;

(iii) The defence filed was prepared in order to meet a time limit, all relevant documentation could not be located within the time limited, and there was the limited access to their data on the Mac system.

(iv) It is said to be only after the filing of the defence in December, 2015 that the Mac data was restored and only during the time for filing of witness statements that the Defendants were finally able to thoroughly review over 5000 emails, together with an additional 5000-8000 documents as attachments (including scanned copies of faxed documents). This review of documents and emails then enabled the Defendants to have 'more precise and particular means by which to defend the claim.'

> Also, it was stated that the additional emails and documents would allow the Defendants to 'state exact particulars of the business relationship, provide time lines and events, give details of agreements, both oral and written … correct errors in the Defence.

The Claimant filed an affidavit in response to the Application[2] however, that affidavit is the subject of the Defendants' application to strike out, so no mention will be made of the contents of that affidavit without a ruling on the application to strike it out. That affidavit however, did not purport to offer any factual evidence that was truly in answer to the Defendants' affidavit in support of 6th December, 2019, thus nothing turns on there being no reference to that affidavit at this stage.

[10] It is considered that the best approach in determining this Application is to

A. extract the most important aspects of the pleadings, namely, the statement of claim; defence and proposed amended defence;

B. set out the respective cases for and in objection to the proposed amendments;

C. set out the relevant law as submitted by Counsel; and

D. apply the law according to what the Court determines as relevant within the circumstances of the matter.

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[2] Affidavit of Michael Dalhauser filed on 23 December, 2019

A The Pleadings

(i) The Claimant's case

[11] The Claimant's case as pleaded is in brief extracted as follows:-

(i) In or around 2005, the Claimant contracted with the Defendant to provide private asset management services, particularly – trading, buying, selling or otherwise acquiring or disposing of securities for the Claimant. The services were provided in respect of two separately managed accounts – the 'fixed income account' and the 'equity account';

(ii) Services provided in relation to those two separate accounts were governed by two separate agreements – (a) – the Fixed income agreement, executed on 22 March, 2007; and (b) the Equity agreement, confirmed on 18 October, 2006. The agreements were appended to the claim;

(iii) The Claimant's funds utilized in carrying out the services under the agreements were housed – the fixed income account – at Bank of New York Mellon as trustee for the Claimant. The equity account funds were initially held at DGM Bank & Trust Inc. (in Barbados). This account was allegedly closed on the Defendants' instructions and transferred to an account under their name at Front Street Private

Bank Barbados. Neither the Claimant nor its shareholders were given notice of the transfer and were unable to access the funds held at the Front Street Private Bank Barbados;

(iv) Due to suspicions which arose in May, 2013, the Claimant caused an internal review and analysis of the Defendants' trading activities over the period 2005 – 2013 using trading data provided by Bank of New York Mellon;

(v) The analysis was conducted by using actual share and purchase price of bonds and shares (from both the fixed income and equity investments); applying the contractual rates of commission, compared against actual monies paid to the Defendants. The result of the analysis estimated that the Defendants were paid approximately US$2.1million in excess of their entitlement under the agreements. Documentation in the form of a report was submitted as evidence of the analysis conducted;

(vi) It is contended that the misappropriation occurred by means of the Defendants inflating or wrongfully claiming for commissions in connection the services carried out under the agreement.

(ii) The Initial Defence

[12] The Defendants' initial defence filed in December, 2015 pleaded the following, as extracted by the Court, in answer to the most important aspects of the claim identified in paragraph [11] above:-

(i) The Defendants firstly aver that the parties' relationship commenced in 2002, not 2005;

(ii) The Defendants expanded the account of the services they provided by acknowledging that they provided investment management services in relation to securities. However, it was alleged that they also provided investment management services in relation to fixed income products and that the 1st Defendant drew a commission as broker, of only 2% of trades executed on equity accounts;

(iii) Reacting to the Claimant's pleaded allegation that the agreement with the Defendants was to provide private asset *management* services in connection with securities by two separately managed accounts, the Defendants alleged that in addition to securities management, the parties engaged in two distinct *trading* arrangements, traded on two distinct accounts, pursuant to two different agreements and fee structures. The Defendants denied that the agreement of March 2007 governed any trading arrangements

between the parties. The trading on the fixed income account was based on an agreement dated 8th July, 2003. The rate chargeable on this agreement was said to be 30bps calculated on a yield basis per trade. This trading fee was later increased with the authorization of the Claimant's representative to 35bps. Documentation in support of the July 2003 agreement and July 2008 rate increase was appended;

(iv) Trade on the equity account was governed by the same agreement identified as 'Investment Guidelines. From this account however, the defence pleaded that the investment guidelines authorized the use of some funds to purchase fixed income products, purchased on the same basis as stocks in the equity account. A performance fee of 10% of portfolio gains in excess of 7.4% paid annually, on the anniversary date of the portfolio;

(v) Regarding the custody of the Claimant's funds, the Defendants accept that the fixed income fund was held by the Bank of New York Mellon and that the equity account was held by Front Street Private Bank Barbados and DGM Bank and Trust Inc. However, the Defendants deny having procured the transfer of the funds from DGM Bank and Trust to Front Street Barbados.

Instead, the Defendants claim that it was impossible for them to have authorized such a transfer as advisor only on the account. The Claimant remained on the account at DGM as the Ultimate Beneficia Owner. The transfer, the Defendants say, was authorized by the Claimant's representative (the same who authorized the rate increase on the fixed income fund) and as such the Claimant was at all times aware of the fact that Front Street Private Bank was its custodian. The Claimant in fact had a separate custodian agreement directly with the Bank; received periodic statements directly from the Bank and as the UBO, the Defendant alleged that they would have had access to the accounts at all times.

(vi) With respect to other fees, the Defendant alleges that the Claimant was aware of the 1st Defendant's entitlement to 2% commission brokerage fee on each trade on the equity account; as well as fees payable to the custodian banks for their role in each trade (for example a trading fee charged by Front Street Bank to place a trade advised by the (2nd) Defendant; or a fee charged by the actual broker executing the trade on the relevant stock market.

It was pleaded that all of these costs would then have to be added to the market price of the stock being traded and on that total price, the Claimant was charged;

(vii) In relation to the fixed income account, the 1st Defendant was authorized to charge a trade execution fee on **each** transaction (as opposed to quarterly or annually). On this fixed income account, Front Street Bank was used as an intermediary with the bond broker who was entitled to charge a fee.

(viii) The Defendant's primary answer to the claim was therefore that the charges of inflation made did not take into account the actual contractual rates, nor did the calculations made by the Claimant, take in account the 3rd party charges for example by Front Street Bank or the broker carrying out the actual trades on the market;

(ix) Further that the costs calculated in the Appendix containing the review carried out by the Claimant did not even reflect calculations based on the contract of July, 2007, as alleged by the Claimant.

(x) As a consequence the Defendants aver that all the monies they received, they were authorized to charge pursuant to the various agreements.

(iii) The proposed defence

[13] The proposed amended defence would make the following material changes or additions which correspond with the initial defence as numerated in paragraph [12] above:-

(i) In relation to paragraph 12(ii), the proposed defence would remove the reference to the 2% commission and restate in a different way that which is already stated - that the Defence provided two separate services – that of **management** and that of **brokerage (trading***);*

(ii) In relation to paragraph 12(iii) the proposed defence would add that the August 2007 pleaded by the Claimants was executed for the sole purpose of providing for the 1st Defendant to **manage** the Claimant's fixed income account. It maintains that the August 2007 agreement did not govern the parties' trading arrangements but that trades on the fixed income account was governed by the July 2003 agreement, which was executed between the 1st Defendant and IAS, the Claimant's manager. The rate chargeable under this July, 2003 (trades on fixed income account) was maintained at 30bps calculated on a yield basis per trade.

(iii) Still in relation to paragraph 12(iii), significant amendment proposed by the draft defence would be the assertion that:-

> "By way of correspondence dated September, 22nd 2006 from the Claimant company to the 1st Defendant, the Claimant authorized the increase of the trading execution fee on the Claimant's fixed income account to 75bps calculated on a yield basis. The Defendants aver that they continue the fee arrangement as set out under the July 8th 2003 agreement. The correspondence dated September 22nd 2006 is annexed as SCHEDULE 2 hereto."

[There is no attachment to the draft defence of this correspondence of 22nd September, 2006]

(iv) Further in relation to paragraph 12(iii) as extracted from the defence, the proposed defence will strike the allegation of the increase in trading fee on the fixed income account from 30bps to 35bps, authorised by the Claimant's representative Nicole Rozon and evidenced by email.

(v) Paragraph 12(iv) as extracted above from the defence would also be materially altered insofar as the defence had agreed that **trade** on the equity account was governed by the Investment Guidelines [*the October 2006 agreement as per the Claimant*]. The proposed defence would now say that **management** of the equity account is based on the Investment Guidelines. **The execution of trades however would now be stated to be governed by an oral agreement between the 1st Defendant and Nicole Rozon made in or around October, 2002.**

This oral agreement provided for a trading execution fee on the Claimant's equity accounts at a flat rate of 2%.

(vi) The final reference for comparison is in relation to paragraph 12(vii), which pertains to the allegation in the defence that the 1st Defendant was authorized to charge a trade execution fee on each transaction pertaining to fixed income products; the proposed defence would add that in addition to the authority to charge a trade execution fee on each transaction, the 1st Defendant was authorized by virtue of the March 2007 agreement *[the Claimant's Appendix I]*, to charge a management fee pursuant to exhibit C of that agreement, for the management of all of the Claimant's accounts.

B The Submissions of Counsel (the factual bases)

[14] Queen's Counsel for the Defendants explains the factual matrix existing in relation to the claim and defence and the differences sought to be introduced by the proposed amendment, with a view to demonstrating the need for the amendment to enable the real dispute between the parties to be adjudicated. With respect to said factual matrix, Queen's Counsel describes the Claimant's case in terms that the nature of the services contracted between the parties was for **management** services based on the agreement of March, 2007 (fixed income account) and the October, 2006 Investor Guidelines (equity account).

Further, that the dealings with the Claimant's monies were limited to only that which was authorized by the 2007 agreement and 2006 Guidelines. Additionally, Queen's Counsel alludes to the fact that the Claimant failed to mention in its claim that it acted through its agent Investment Advisory Services (IAS) as well as that the parties' relations commenced in 2002; thereafter governed by an agreement of July, 2003; that agreement being executed with IAS, as agent of the Claimant. Further, that the prior relations in fact started with brokerage (trading) services being provided to the Claimant through its agent IAS and one Musco Lighting, a client of the Claimant at the relevant time, being the beneficiary of two accounts with the Defendant.

[15] The relevance in the proposed defence of specifying dealings with the Claimant through IAS is that this relationship is important because of the actions of Nicole Rozon, who was in fact vice president of IAS as well as she held official positions within the management of the Claimant. In particular, there are the specific allegations that the **trading** as distinct from **management** relationship of the parties arose prior to 2005; that Ms. Rozon authorized certain dealings regarding fees in relation to the pre-existing and continuing trading relationship; and again, Ms. Rozon, as representative for IAS who was the Claimant's manager, was involved in the decision and prior

discussions regarding the alleged unauthorized move of the Claimant's equity account from DGM to Front Street Private Bank.

[16] Counsel for the Claimant on the other hand holds the strong view, that the Defendants are wrongfully trying to substitute IAS as the main party into the Claim. Counsel submits that any such assertion in relation to IAS is rebutted by paragraphs 1 and 2 of the amended statement of claim which was open to be, but was not denied by the Defendants in their defence[3]. Counsel for the Claimant notes that the basis of the proposed amendment in relation to IAS, seems to be the July, 2003 agreement which had been in the possession of the Defendants from December, 2015, having been pleaded in the defence, as well as appended to a December, 2016 affidavit filed on behalf of the Defendants.

[17] Counsel for the Claimant also observes the absence of specificity in the alleged emails recovered which are said to give rise to the need to amend, as well as the absence of a Certificate of Truth, verifying the Application to amend. The result of such observations is that the Court understands Counsel for the Claimant to be saying that the reason put forth in support of the application to amend is not credible and that the Defendants' objective is to substitute IAS as the principal party to the parties' agreements.

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[3] Submissions of Counsel for the Claimant on Application to Amend – para 22 – 23 & 25.

In oral arguments, Counsel for the Claimant supplemented his written submissions to the effect that the Defendants were attempting to recast the July, 2003 agreement which was in their possession from the inception of the Claim, as a 'master agreement' with whom the principal party was IAS. Specifically in relation to the Defendants' lack of credibility Counsel for the Claimant attacks the supporting affidavit of the Application to amend, by pointing out that of the 5000-8000 emails and documents recovered, none were appended to the draft defence and neither were any pleaded or relied upon with any specificity. More particularly, that none of the information regarding the technological issue of losing and retrieving data, has been corroborated in any way by any supporting documentation or other evidence.

C Legal Submissions of Counsel

[18] The Court considers that both Counsel were ad idem in relation to the legal principles to be considered in determining the application for leave to amend. Queen's Counsel for the Defendant incorporated wider principles applicable in the overall defence of a Claim, starting with **Rule 10.7** which provides that a defendant may not without the permission of the court, rely on any allegation or ground not set out in the defence, but which could have been set out there. In other words, a failure to plead the matters sought to be included in the proposed defence, would result in the Defendants being unable to rely on them

at the trial – at least, not without the Court's permission. Prior to the trial therefore, the Defendants are availing themselves of Rule **20.1(2)** which makes provision for a party to seek the permission of the Court to amend their statement of case. Queen's Counsel notes that **Rule 20.1(2)** is silent on what factors ought to be taken into account when considering such an application for permission to amend. However, there are factors prescribed in the equivalent rule of the Eastern Caribbean Supreme Court CPR2000 (Rule 20.1(3)) which are as follows:-

(i) How promptly the Applicant applied to the Court after becoming aware that the change is desired;

(ii) Prejudice to the Applicant if amendment is refused;

(iii) Prejudice to other parties if amendment is permitted;

(iv) Whether any prejudice to any other party can be compensated by costs or interest;

(v) Whether the trial date or likely trial date can still be met or the application is granted;

(vi) The administration of justice.

[19] With reference to the nature of prejudice referred to in the factors, Queen's Counsel cited OECS authority **Murtland Watterton v Nigel Landreth Smith et al**[4] in which **Carter J** noted that the prejudice with which the rule was concerned was not prejudice 'relating to the nature of the defence'.

[4] SKBHCV2012/0181

Rather, **Carter J** went on to refer to **Ketteman et al v Hansle Properties Ltd**[5], **Lord Keith** of Kinkel referring to *Clarapede & Co v Commercial Union Association*[6] per **Brett MR** that:-

> *"The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made".*

Per **Lord Keith** of Kinkel

> *"The sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case than he would have been in if his opponent had pleaded the subject matter of the proposed amendment at the proper time. If he would suffer no prejudice from that point of view, then an award of costs is sufficient to prevent him from suffering injury and the amendment should be allowed."*
>
> *"… The real issue is whether the respondent has been precluded from making a particular response by the late amendment."*

[20] In relation to the factors to be considered on an application for permission to amend, Queen's Counsel made further reference to **Mark Brantley v Dwight Cozier**[7] in which an amendment to a defence was allowed after a four year delay.

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[5] [1988] 1 All ER 38
[6] (1883) 32WR 262
[7] SKBHCVAP2014/0027

The OECS Court of Appeal's listed additional factors to be considered as *"…the justice to the parties; the legitimate expectation that the basis of the claim will not be fundamentally challenged at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs."* Additionally, Queen's Counsel for the Defendants referred to **Glennis Marlon Mills v Caribbean Resorts t/a Mariner's Hotel**[8] per **Henry J** as follows:-

> *"The court must evaluate a non-exhaustive list of factors including how soon the applicant applied to amend its pleadings after it became [aware] of the need to do so, the history leading to the application and regarding previous amendments; and the reasons for delay…whether the text of the amendment is satisfactory in terms of clarity and particularity…"*

A final word on authorities was cited as **Cobbold v London Borough of Greenwich**[9] per **Gibson LJ**, that:-

> *"…Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed. There is always prejudice when a party is not allowed to put forward his real case, provided that that is properly arguable"*

[8] SVGHCV2015/0099
[9] [1999] Lexis Citation 1496

[21] In applying these factors to the Defendants' case, Queen's Counsel acknowledged that the Court's duty in giving effect to the overriding objective requires a balancing exercise to be carried out between the parties. In this particular case, Queen's Counsel submits that the Court should examine the facts of the matter leading up to the Application. Particularly, the number of preliminary applications (including the application for freezing injunction by the Claimant which began the matter), for production of documents. Queen's Counsel submits that none of those applications were adjudged frivolous or vexatious and were all within the Defendants' rights to pursue. In particular, the Defendants' position is to be regarded thus:-

(i) The 4 year delay in the application to amend should be regarded in light of the history of the matter, meaning the applications for production of documents which were properly sought by the Defendants;

(ii) The Defendants would be prejudiced in not being allowed to put forward their full case, and as such the real dispute between the parties would not be adjudicated;

(iii) The Respondent/Claimant would not be in a worse position as the proposed amendments do not introduce a new case, but rather clarifies and expands the original defence.

The Respondent/Claimant would not be precluded from making any particular response by reason of the late amendment;

(iv) Insofar as the Respondent/Claimant argues in relation to the increase in costs to the Claimant by reason of the amendment, such costs are quantifiable and as such a remedy in costs would be adequate compensation to the Claimant;

(v) The Respondent/Claimant would not be obliged to investigate facts and obtain evidence of matters outside the ambit of facts already in existence;

(vi) There is a plausible explanation for the initial failure to plead the details now sought to be included, the proposed amendments are relevant and have a real prospect of success.

[22] By contrast, Counsel for the Claimant categorises the application to amend as 'very late' as opposed to a 'late' amendment, which has affected the trial date. In the case of a very late amendment, Counsel for the Claimant cites **Blackstone's Civil Practice**[10] as authority that the party seeking to amend must discharge a heavier burden to show the strength of the new case and why the justice of the case requires him to pursue it.

[10] 2019 Ed. Para 31.9

Counsel for the Claimant does not differ from Queen's Counsel for the Defendants in relation to the need for the real dispute between the parties to be adjudicated upon and the fact that prejudice caused by the amendment could be compensated by costs. Counsel for the Claimant submits however that the Defendants fail to identify what the real issue in dispute is and their application to amend is merely an attempt to substitute a party. In relation to the Defendants' legal authorities, Counsel for the Claimant makes the following observations:-

(i) **Murtland Watterton v Nigel Landreth Smith et al**[11] – paragraph 26(v) therein should be considered highly relevant. (This paragraph speaks to the stage at which the matter has reached. Unlike the case at bar, the trial date in this case had not yet been set);

(ii) **Mark Brantley v Dwight Cozier** – at paragraph 47 of this authority, the Applicant/Appellant was not found to have applied with promptitude as the reason for the application – a high court judgment in a related matter – had been handed down some 3 years prior to the application to amend. In the instant case, it is submitted that the Defendants' prior affidavits and initial defence disclose the existence of the documents upon which the application to amend is

[11] Supra

based, being in the Defendants' possession from as early as December, 2015. As such the application is not prompt.

(iii) With further reference to the above authority, Counsel for the Claimant refers to paragraph 50 thereof[12] insofar as it is stated that even where an award of costs can be made, the question remains as to whether it is appropriate for costs to be considered adequate compensation, having regard to the date of filing of the claim and the information pertinent to the application to amend. The distinguishing feature in this case from the case at bar is that in the former there had been no date for trial or even pre-trial review.

(iv) **Glennis Mills v Caribbean Resorts Ltd[13]**. – paragraph 36 thereof speaks to there being a heavy burden to be discharged by a party making a very late amendment to amend. A good explanation for the lateness is called for and any amendment which imperils the trial date which has been fixed is a significant factor.

[23] Counsel for the Claimant makes the further submission against the grant of the permission to amend on the basis of the prejudice that will be occasioned in the following ways:-

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[12] Brantley v Cozier supra
[13] supra

(i) The Claimant will be obliged to file a reply to the amended defence setting out why an agreement with IAS is not relevant to their claim against the Defendants;

(ii) The Claimant will be forced to review and investigate the alleged 5000-8000 documents (unearthed by the recovery of their electronic data), in order to understand and rebut the amended defence;

(iii) The Claimant will have to alter, amend or provide supplemental witness statements to address the amended defence;

(iv) There will be further delay to the trial process as a further pre-trial review will be necessitated.

Further to the above considerations, Counsel for the Claimant submitted that the proposed amended defence had no prospect of success, for reason stated before regarding the attempt to introduce another party; the need for the amended defence is implausible as it arises from information in the hands of the Defendants from the inception of the proceedings; a potential witness in support of the proposed amendments is already shown not to be co-operative thereby casting legitimate doubt on the ability of the Defendants to support their case.

Counsel for the Claimant finally commended a series of questions posed by **Alleyne J** in **Steve Straughn v David Corbin.**[14]

D Discussion and Analysis

[24] In determining the application to amend the Court must be clear on (i) the legal principles to be applied and factors to be considered; (ii) the case sought to be advanced by the amendment, and its possible effect on the case of the opposing party; and (iii) the circumstances which have given rise to the application to amend. In relation to the legal principles and relevant factors applicable to an application for permission to amend a statement of case, the law is settled. Authorities are legion and there is no need for the Court to try to restate what has been comprehensively presented by both Counsel. The Court will instead set out what it considers to be the overarching principles and those factors which are most relevant to the circumstances of the case at bar. In relation to the second and third aspects of the framework for its decision, the Court will consider these together.

Legal Principles

[25] The enabling **Rule 20.1(2)** need not be reproduced, it is accepted that there is no guidance provided by the Rules in relation to any factors to be considered.

[14] BB2019 HC 15

The Court accepts the recourse made by Queen's Counsel for the Defendants, to the factors prescribed in the corresponding Rule 20.1(3) of the Eastern Caribbean Supreme Court Rules 2000, which have already been set out in paragraph [18] herein. These factors will shortly be examined with reference to the case at bar. The Court also accepts as overarching principles to be applied, first from the pre-**CPR** but oft affirmed dictum of **Brett MR** in **Clarapede & Co v Commercial Union Association**[15]

> *"The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made".*

A further overarching principle is that expressed by **Blenman JA** in **George Allert et al v Joshua Matheson et anor**[16]:-

> *"In exercising its discretion the court should be guided by the general principle that amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing inconvenience to the other party and can be compensated in costs…The rules must be applied in a manner that is fair to both parties and should not be applied in an inflexible manner that will prevent a litigant from prosecuting its case based on mere technicality".*

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[15] Supra fn 5 above, para 20 herein; Affirmed as a universal and timeless principle by Neuberger J in Charlesworth v Relay Roads Ltd. et al [2000] 1 WLR 230@235

[16] GDAHCVAP 2014/0007 @ para 49

> *"There is a public interest in allowing a party to deploy its real case provided it is not irrelevant and has a real prospect of success."*[17]

[26] From the above two cases the Court extracts principles of general application that an amendment should be allowed even if late or due to careless omission if it can be made without injustice. This broad statement of some vintage, is to be tempered by the requirement for the amendment to further the real dispute between the parties, and it is allowable only if it can be made without inconvenience to the other party, or where any such inconvenience can be compensated by costs. Where the amendment is very late, the proposed case must be shown to have a real prospect of success. Evidently, if such principles arose to be applied in circumstances where they could be easily attained, there would be no need for the plethora of authorities on the subject. The factors which have governed the application of the Eastern Caribbean Supreme Court will be considered in the instant case, as they have invariably been considered against the backdrop of the general principles stated above. Before embarking on its consideration of the relevant factors however, the Court must consider the second and third aspects of its framework for decision.

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[17] Ibid @ para 53

The true nature of the proposed amendment, the effect it will have on the Claimant's case, and the circumstances leading to the amendment.

[27] Counsel for the Claimant and Queen's Counsel Defendants are at variance with what the proposed amendments seek to achieve.

(i) Counsel for the Claimant labels the intended amendment an improper attempt to introduce a third party (IAS) into the claim as the main party, based on the pre-existing agreement of July, 2003. Queen's Counsel for the Defendants dismisses this charge by contending that the role of IAS is that pleaded by the Claimant in the first place – its agent, as manager of the business. The Court finds that the Defendant's categorization of IAS in the proposed defence indeed goes no further than that which is pleaded by the Claimant itself. The Court views the proposed amendment as expanding the Defendants' earlier allegation that its dealing with the Claimant began prior to 2005. The allegation remains unchanged in terms that the Defendants commenced a business relationship with the Claimant prior to the period pleaded in the claim [2005], but is intended to specify that that prior relationship existed with the Claimant through its agent IAS.

(ii) Counsel for the Claimant alleges that the proposed amendment does not address the real issue of the dispute before the Court and instead lacks substance and coherence. The Court finds that aside from any question of strength of case, the proposed amendment is expanding upon the tenor of the original defence, insofar as it was initially pleaded that the agreements put forward by the Claimants did not represent the totality of arrangements between the parties. The proposed amendment clearly pleads a difference between provision of management services (in relation to the two different accounts – fixed income and equity), as well as provision of trading services (again in relation to the two different accounts – fixed income and equity). The Defendants' position is that the real dispute is wider than that brought to the Court by the Claimants;

(iii) In addition to the two distinct kinds of services – management and trading, both on the two distinct accounts – fixed income and equity, the proposed defence does seek to alter and introduce different terms for charging fees in relation to both services, by way of (i) a new base document (the Rozon email 22 September, 2006) and (ii) an oral agreement made with Rozon as representative of the Claimant's agent IAS, in 2002;

(iv) In addition to alleging the parties' prior dealings and the further agreements as described in [27](iii) immediately above, the proposed defence seeks to put context to what those agreements governed and what fees and charges they authorised.

[28] In the circumstances, the Court's view is that the proposed amendments are relevant to and do advance the real dispute between the parties. The real dispute remains whether the Defendants (whether fraudulently or not), charged and obtained for their services rendered, more monies than they were authorized to receive by the terms of their engagement. The fact that the Claimant sees the dispute within a narrower matrix of terms and conditions of agreement, cannot preclude the Defendants from pleading relevant facts which place the dispute according to their version, in a wider context. Whether that wider context exists, is in the Court's view a matter for trial.

[29] With reference to the effect the amendment would have on the Claimant's case, the Court views the position tendered by Counsel for the Claimant as having merit.

(i) Counsel says that the Claimant will not only be forced to review the 5000-8000 documents asserted to have been recovered by the Defendants in order to properly assess and rebut the allegations

raised by the proposed defence; but also that further pre-trial work will be required such as the reissuance of witness statements.

(ii) Counsel for the Claimant points out that the Defendants have not even filed updated disclosure which specifies the documentation alleged.[18] Queen's Counsel for the Defendants on the other hand has submitted that the Claimant will not be required to investigate or make inquiries beyond the ambit of their case as already pleaded.

(iii) The Court disagrees with Queen's Counsel for the Defendant and agrees mostly but not entirely with Counsel for the Claimant. The tenor of the Defendants' defence remains the same – i.e. – that their relationship with the Claimant was wider than that put forth in the claim; that the claim spoke only to management services, whilst they provided both management and trading services - both of those in relation to the two different accounts of fixed income and equity; and the bases of remuneration for these services was defined by several other agreements made with the Claimant, via their agent. The additional aspects of the defence are accepted by the Court as relevant and sufficiently expressed in the draft defence.

[18] The Court notes that the Defendants did file an updated disclosure in October, 2019 and therein listed an entry as '*email correspondence between the agents and officers of the Defendants and agents and officers of the Cliamant during the period 2002 to 2014 and vice versa*.'

However the Claimant will be obliged to speak to these additional specifics of the dispute, which would now be put in issue.

(iv) Having regard to the existing pleadings, the Court finds that even if a different view is held by Counsel for the Claimant, the original defence begged a reply which was not filed and the proposed defence will similarly beg a reply from the Claimant. Therefore, the Court is of the view that at the very least Counsel for the Claimant will have to seek and receive instructions in relation to what if any response is to issue to the proposed amendments. It is foreseen that some adjustment to witness statements and pre-trial memoranda will also have to be made. However, it is not the Court's view that the Claimant's position in terms of its ability to advance its pleaded case will be affected.

(v) In relation to this issue, the Court will finally state that insofar as the thousands of documentation recovered is concerned, the Defendants' continuing duty to disclose is not discharged with the item listed as 23 in their further list of documents filed in October, 2019. That item seeks to disclose '*email correspondence between the agents and officers of the Defendants and agents and officers of the Claimant during the period 2002 to 2014 and vice versa.*'

This statement does not discharge their duty to disclose and the Defendants would not be able to rely on any document not specifically identified and itemized, on the basis that it falls within the broad parameters of item 23.

(vi) Counsel for the Claimants' apprehension of having to review the 5000-8000 documents alleged to have been recovered does not arise in relation to any documents that might be relied upon by the Defendants, as item 23 will not provide the right to rely on documentation that was not properly disclosed. On the flip side, the Court doubts that the alleged existence of 5000-8000 documents raises the same level of apprehension as it relates to documents that might be of assistance to the Claimant remaining unseen in the possession of the Defendants.

[30] In terms of the effect of the proposed amendment on the Claimant's case therefore, the Court finds that the Claimant will be obliged at the very least to join issue with the Defendants on the proposed amended defence but in any event be obliged to address the amendments by further or additional witness statements. In terms of the original basis of the Defendants' case, the Court finds that the proposed defence expands and particularizes what was their position in answer to the claim to begin with.

It is not found to be vague or lacking in substance as contended by Counsel for the Claimant. This view is quite separate from any assessment of relative strength, to the extent that is appropriately addressed hereafter. On the final aspect of the events leading up to the amendment, the Court finds that there were applications for production of documents which accounted for the time post the filing of the initial defence. The ultimate grant of the witness summonses in October, 2018 provides in the Court's view, a good enough explanation for the delay in the application to amend, at least until that time.

[31] Counsel for the Claimant in his submissions categorized the application as a very late amendment which put the trial date at risk, thereby necessitating the discharge of a heavy burden to show the strength of the new case[19]. The Court finds it convenient to address the question of the strength of the case ahead of the factors prescribed in the Eastern Caribbean CPR's counterpart Rule 20.1(3), as the question of strength of the proposed amendment is not listed amongst the factors therein stated. On this question of strength, the Court finds useful guidance in Eastern Caribbean Supreme Court's authority **Darrel Montrope v The Public Service Commission et anor**, in which **Smith J** extracted a number of principles to be applied in considering permission to

[19] Submissions on behalf of Claimant, para 13.

amend, arising from his examination of two Eastern Caribbean Supreme Court of Appeal cases.

[32] These cases were **George Allert et al v Joshua Matheson**[20] and **Commodo Holdings Limited v Renaissance Ventures Ltd. et anor.**[21] The principles listed by **Smith J** represent ground covered by the overriding objective and the principles already distilled from ***Clarepede & Co***, as well as from ***Ketteman*** (as stated in submissions of Queen's Counsel for the Defendant).[22] Thus save for one principle stated below, the other principles need not be extracted. The particular principle the Court wishes to extract from **Smith J** was stated in terms that '*there is a public interest in allowing a party to deploy its real case, provided it is not irrelevant, will serve a useful purpose, has a real prospect of success and is not fanciful*.' In this regard, the Court has already expressed its views in relation to the proposed defence not being irrelevant and serving a useful purpose (paragraph [28] herein), and now will address whether the defence has a real prospect of success, or as expressed by Counsel for the Claimant, whether the proposed defence can discharge the heavy onus of relative strength.

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[20] Supra fn 15
[21] BVIHCCMAP 2014/0032
[22] Submissions on behalf of the Defendant, para 40; supra fn 5

[33] Reference is once more made to the approach of **Smith J** in **Darrel Montrope v PSC** (St. Lucia).[23] In embarking upon his assessment of the relative strength of the proposed amendments, **Smith J** examined the intended amendments against what he viewed as the most important question – what is the scope of the inquiry required to be conducted to determine whether the amendments have a realistic prospect of success? This question of scope of inquiry, is likewise considered by this Court, as critical to the issue of the strength of the case on the proposed amendments. **Smith J** reverted to the well-known authority of **Three Rivers District Council v Bank of England (No. 3)**[24], which arises from competing applications to amend and strike out a statement of claim. The facts pertained to alleged failures of public duty by the Bank of England in connection with the regulation of a commercial bank which collapsed, causing loss to depositors.

[34] The allegation in opposition to the application to amend and underpinning the application to strike was that the proposed defence (by then up to draft no. 8) was bound to fail. From paragraph 94 therein[25], after setting out the requirements of the tort in question, **Lord Hope** of Craighead examined 'the sufficiency of the pleadings' relative to the requirements of the tort and

[23] supra
[24] [2001] 2 All ER 513
[25] Three Rivers supra @ 540, para 87 et seq; pg 542 para 94

addressed the question of how to approach whether a case has a realistic prospect of success at trial. As the starting position, **Lord Hope** alluded to the well settled manner of determining issues of fact by the trial process itself. However, he continued:-

> *"To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of court as soon as possible.*
> *In other cases it may be possible to say with confidence before trial that the factual basis of the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to be take [sic] that view and resort to what is properly called summary judgment."*[26]

Lord Hope then continued on to make reference to the similarly well-known caution of **Lord Woolf MR** in **Swain v Hillman**[27] that the object of the rule (of summary judgment) was not to conduct a mini-trial without discovery and without oral evidence.

[35] In relation to any question of the strength of the case, the Court is guided by these dicta and can further acknowledge the availability at this stage of the proceedings, of affidavit evidence from earlier proceedings and witness

[26] Ibid @ para 95
[27] [2001] 1 All ER 91 @ 95

statements, as well as the fact that there has been discovery. It must also be noted that the case of ***Three Rivers*** was described by the House of Lords to be a case of exceptional complexity, which is not the nature of the case at bar. However, the case at bar is one that alleges fraudulent misappropriation, arising out of a subject matter that is not everyday fodder for the Court, namely securities, investment trading and management.

[36] Further, in order to prove its case, the Claimant itself has resorted to an area of expertise outside of the Court's general knowledge – formal accounting, within the subject area of securities and investment services. Thus whilst not of the complexity of a ***Three Rivers***, the Court considers that the case at bar will take the scope of its enquiry beyond usual everyday subject areas of litigation. There are already facts arising from the existing defence which are properly distilled only within the context of the trial process and the Court is unable to accede to Counsel for the Claimant's view that should the Defendants prove the expanded allegations pleaded in the proposed defence, they would still not be able to make a successful defence.

[37] The Court is also not able to say that the factual basis of the proposed defence is fanciful. Issues of credibility asserted by Counsel for the Claimant as they relate to the bona fides of the expanded bases for the defence are entirely a matter for trial.

The absence of the certificate of truth from the Application to amend can be set right pursuant to Rule 26.4. The conflict engendered by the absence of the certificate of truth, as asserted by Counsel for the Claimant does not arise, as the Court's position is that the proposed defence is not in conflict with the existing defence on file. In the circumstances, the proposed defence can withstand the scope of enquiry in relation to its strength, that is appropriately made at this stage of the proceedings.

[38] With these aspects of the framework in place, the Court will now assess the application to amend with reference to the factors which follow hereafter, as adopted from the counterpart Rule 20.1(3) of the Eastern Caribbean Supreme Court CPR, 2000:-

(i) *Promptitude* –

Counsel for the Claimant urges that the Defendants have not been prompt in seeking the amendment which is sought not only after case management, but after a trial date was fixed. Queen's Counsel for the Defendants points to the extended interlocutory process in which they were obliged to seek the Court's aid to obtain production of documents from Front Street Private Bank Barbados. Additionally, Queen's Counsel points to the late recovery of electronic data from the Defendant companies' crashed server.

The Court treats the recovery of electronic data with some reserve due to the absence of any evidence tending to support or verify that process.

- The existence of the prior interlocutory proceedings seeking production of documents does however provide some answer in relation to what would otherwise be a patent lack of promptitude arising from the filing of the existing defence in December, 2015 to the application to amend in October, 2019. The Court notes that the witness summonses having been granted by the Court in the face of objection by the requested third party, the process obviously was found to have some merit. This process concluded by grant of the order for the witness summonses in October, 2018.
- Relative to the intervening proceedings, the delay in making the application is taken as being late, but not very late. This factor bodes in the Claimant's favour, albeit, consideration can nonetheless be afforded the Defendant having regard to the dictum from the Eastern Caribbean Court of Appeal in **Marinor Enterprises Ltd et al v FCIB**[28]

[28] DOMHCVAP 2013/0003

> *"lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done."*[29];

(ii) *Prejudice to the Defendants vs prejudice to the Claimant –*

Given that the Court has already ruled that the proposed amendments do speak to and advance the real issue of the dispute, there is obviously great prejudice to be occasioned by the Defendants if not allowed the amendment. This prejudice is magnified given that the claim arises out of an allegation of fraud. On the other hand, there were trial dates set, the Claimant will be obliged to pursue some degree of further pre-trial preparation by means of a possible reply, further or additional witness statements and adjustments to its pre-trial statements. The effect on the Claimant therefore takes the form of further delay, additional preparation and expense.

- Recalling the nature of prejudice explained in **Ketteman et al v Hansel Properties,**[30] the Claimant's case as advanced will not be prejudiced in terms of injury in being deprived of a particular

[29] Ibid per Baptiste JA para 10
[30] Supra

response, but the Claimant will be negatively affected in terms of further delay and expense in order to answer the proposed amendments. This factor is resolved in favour of the Defendants, meaning that it is found that the Defendants will suffer the greater prejudice by not being permitted to amend;

(iii) *Whether prejudice to other party can be compensated by costs* – the Court is of the view that the manner in which the Claimant stands to be affected as stated in [37](ii) herein, is a matter that can be adequately met by costs in any event for the delay and if successful in its claim, by interest. This factor is resolved in favour of the Defendants;

(iv) *Whether trial date will be affected* – There were trial dates already set when the Defendants filed their application to amend. The application was filed approximately 6 months ahead of the trial dates set for late April, 2020. All things being equal, it was possible for the application to have been *determined* without affecting the trial date. However, subsequent to determination, it would have been an unknown whether the effects to the Claimant's case could likewise have been remedied within time.

- Unfortunately, all things did not remain equal as the application could not be accommodated in a timely manner by the Court due to no fault of the Court itself. Thereafter the unforeseen event of a global pandemic intervened which would have derailed the trial dates in any event and also resulted in the late hearing of the Application. Short of speculating in relation to all of the unknowns and taking into account the unforeseen events outside the control of Counsel, the parties and the Court, it is not possible to weight this factor fairly for or against either side.

(v) *The administration of Justice* – Under this head, the wider context of the Application must be considered beyond the relevant principles and factors already discussed. Counsel for the Claimant commenced his submissions with an acknowledgment that the Court is required to perform a balancing act in order to determine this Application. This is in fact so, as matters such as the public interest to be served and the need for litigation to be conducted efficiently have to be weighted against the public interest in a party being allowed to deploy its real case.

- The due administration of justice is served through the proper application of the overriding objective of the **CPR** and a fair balance being struck between the Defendants being permitted to advance their true case, and the Claimant not being adversely affected by any amendment. That balance cannot easily be attained in this case as the Claimant will be obliged to seek instructions and make adjustments to answering the expanded case of the Defendants.
- The Court does not consider however, that it would be anymore of a just result were the Defendants to be denied the opportunity to amend. The best balance to be struck must therefore be achieved with an order for costs against the Defendants upon the grant of permission to amend.
- With respect to costs, regard is had to Barbadian authority **Wiggins v Abeds Enterprises**[31] in which an addition of a party after case management and pre-trial review was allowed. The addition of the party necessitated permission being granted for the amendment of statements of case. The Court awarded costs against the Claimant upon her successful application to amend her statement of case and add a party.

[31] Barbados High Court No. 883 of 2009

Costs were also awarded against parties who obtained permission to attend in **Astaphan Co. Ltd. v Mary Ann Lee et al**[32] and **Mark Brantley v Dwight Cozier**[33]

Costs will therefore be awarded to the Claimant upon the grant of the application to amend, to be assessed in accordance with **CPR Rule 65.11(5)**.

Part II - The Application to Strike Out the Affidavit of Michael Dalhauser

[39] This Affidavit was filed by the Claimant in response to the Defendants' application to amend. The Application to strike this affidavit was filed on the 10th February, 2020, on the basis that the affidavit offends the requirements for affidavits as stipulated in **CPR Part 30**, particularly **Rule 30.3**. Queen's Counsel's challenge to the affidavit was that it contained material that was misleading (by way of omissions), scandalous, emotive language, speculation as to the Defendants thoughts, comment, opinion, legal arguments and legal submissions.

[32] DOMHCV2011/0282
[33] Supra fn 7

This position was supported by various cases[34] illustrating the judicial context of some of those terms as well as common requirements as to the contents of affidavits. Queen's Counsel's objections to the affidavit were specifically as follows:-

(i) Paragraphs 9-12 contained misleading omissions;

(ii) Paragraphs 3(iv), 4, 9, 12&13 contained speculation as to the Defendants' thoughts and emotional language;

(iii) Paragraphs 3(i)-(iv), 13 & 14, contain primarily legal arguments and legal conclusions.

[40] Counsel for the Claimant was resolute in being availed of the opportunity to respond seriatim to the material objected to and to distinguish the authorities cited by Queen's Counsel from the circumstances and the affidavit in the case at bar. Counsel proceeded to do so quite thoroughly – distinguishing each and every authority cited. Counsel also affirmed his client's entitlement to make the statements contained in the affidavit on the basis of the client's knowledge of the submissions, the litigation and his obvious interest in the conduct of the proceedings.

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[34] A.J.c aka A.J.F. v R.C. 2006 BCSC 828; R v Araujo [2000] 2 S.C.R. 992; Holder et al v Wray 2018 ONSC 6133; Decline Thomas v Victor Wilins et al ANUHCV2007/0530; Home Equity Development Inc v Crow 2002 BCSC 546; Gutierrez v The Watchtower Bible and Tract Society of Canada et al, 2019 ONSC 3069

In relation to objections relating to the statements which reflected legal argument or submissions, Counsel for the Claimant's response was to the effect that it was proper for the litigant to set out the basis for his counsel's instructions. Counsel for the Claimant submitted that the authorities cited were not comparable, having regard to the respective circumstances of the cases therein, relative to the material complained of in the affidavits.

[41] The Court's view on the Application to Strike is that whilst the objections to the material contained in the affidavit were properly grounded, the Application was unnecessary. It is not considered that it was even necessary to resort to judicial authority to make the objections in relation to the particular paragraphs complained of. The Court is also of the view that it was also unnecessary to engage the Court in such an extensive response to distinguish the cases - for what is irrelevant or scandalous in any one case will always be relative to the peculiar circumstances under consideration. That being said, having been filed, the Application must be determined. Paragraphs 3(i) - (iv), and 9 through 12 do not comply with the requirements of **Rule 30.3** as they fall within the realm of legal argument and legal submissions. Paragraphs 4 and 13 do not comply with the requirements of **Rule 30.3** as they contain inappropriate language which express the litigant's opinions on material placed before the Court, as well as opinion regarding the Defendants'

credibility or bonafides of the application to amend. These paragraphs are struck out, but in their wake leave nothing coherent in the remainder of the affidavit. In that case, it really means that the affidavit is struck in its entirety.

[42] Upon the disposal of the Application the question of costs must invariably be reckoned. The Court repeats its position that whilst not incorrect, the Application was unnecessary, and this position is borne out by the fact that the Application to amend was determined without recourse to the affidavit at all. Insofar as Counsel for the Claimant elected to fully engage the Court in his response, he is unsuccessful as the Court has struck the majority of the affidavit. Insofar as there is success on the part of the Defendants, this exercise was a tax on judicial time and need not have been undertaken. Queen's Counsel was entitled to register his objection to the contents of the affidavit for the purposes of the record and invite the Court to disregard it. Given its lack of value there was really no reason to afford the affidavit this much if any attention at all. For this reason there is no order as to costs upon the success of the Application to Strike the Claimant's affidavit in response to the Application to Amend the Defence.

DISPOSITION

[43] The following orders are made in disposition of the application to amend

(i) Permission is granted to the Defendants to file an amended defence on or before the **20th July, 2020**;

(ii) Liberty to the Claimant to file a reply on or before the **3rd August, 2020**;

(iii) Costs are awarded to the Claimant in the sum of to be assessed pursuant to **Rule 65.11(5)**;

(iv) Counsel will be heard on the assessment for costs on the **24th August, 2020**.

[44] The following orders are made upon the Application to Strike Out the Claimant's affidavit in response to the Application to Amend –

(i) Paragraphs 3(i-iv); 4, 9, 10, 11, 12 and 13 are struck out;

(ii) There is no order as to costs.

SHONA O. GRIFFITH
Judge of the High Court