

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 1427 of 2019**

**BETWEEN:**

**YVONNE DELCINA YARDE**

**CLAIMANT**

**AND**

**BETTY ROBERTS**

**DEEFENDANT**

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

**Dates of Hearing: 2020: 7 February  
21 February**

**Date of Decision: 2020: 14 May**

**Appearances:**

**Mr. Hal Gollop, QC for the Claimant**

**Mr. Andrew Willoughby for the Defendant.**

*CPR 2008 Parts 8 and 11 – Commencement of Claim – Claim commenced by Form  
10 Application – Whether Claim properly commenced – Summary strike out of Claim  
by Court*

## DECISION

### **INTRODUCTION**

[1] This matter was initiated by way of a Notice of Application identifying itself as having been filed pursuant to **Part 11** of the **CPR 2008** (Form 10). The Application bore the intitule ‘Yvonne Delcina Yarde as Claimant’ versus ‘Betty Roberts as Defendant.’ There was not in existence any prior substantive claim between Ms. Yarde and Ms. Roberts, so the Notice of Application is the means by which the matter was originated. Along with the Application, an affidavit of service was filed attesting to the personal service of the Application. No acknowledgment of service was filed, however on two of the three days of hearing, the Defendant appeared with an Attorney acting on her behalf.

### **PROCEDURAL HISTORY**

[2] The Notice of Application supported by Affidavit was filed on the 7<sup>th</sup> November, 2019. The matter was first listed before another judge of the High Court on the 12<sup>th</sup> December, 2019, where there was no appearance by or on behalf of either party. The matter was then listed before the instant court on the 7<sup>th</sup> February, 2020. On that day the Defendant appeared in the company of her Attorney. There was no appearance by or on behalf of the Claimant, albeit some verbal indication as to the inability of Queen’s Counsel for the

Claimant to attend on that date, was communicated to the Court by Counsel for the Defendant. The matter was adjourned to the 21<sup>st</sup> February, 2020. On that day both parties attended along with their respective Counsel. The Court of its own motion summarily dismissed the Application (that is, without a formal hearing), with costs awarded to the Defendant in the sum of \$1,500.00. The Claimant has appealed and these are the Court's brief reasons for the dismissal of the Application.

### **REASONS FOR DISMISSAL**

[3] The Court's reasons for dismissal of the Application were twofold and inter-related. The first is procedural, and pertains to the failure to file an originating process in conformity with the applicable rules of court. The second reason was substantive, in that the matters attested to in the affidavit supporting the Application, disclosed no cause of action against the named Defendant. The interrelation of these two reasons is that the consequence of the strike out which arose from the procedural error, was informed by the Court's view of the substantive failure arising from the absence of a cause of action.

#### **(i) The Procedural Issue**

**Part 8** of the **CPR 2008** establishes the mode by which civil proceedings are to be commenced in the High Court. **Rule 8.1(1)** establishes the commencement of proceedings by issue of a claim form either:-

- (i) with (or as permitted by **R. 8.2** - without) a statement of claim; or
- (ii) as permitted by any other rule, with an affidavit or other document.

[4] Alternatively, **Rule 8.1(5)** contemplates proceedings being commenced by fixed date claim form in the circumstances prescribed therein. Even further,

**Rule 8.1(6)** provides as follows:-

“A person must make an application under Part 11 if he seeks a remedy from the court

- (a) before proceedings have been started; or
- (b) in relation to proceedings which are taking place or will take place, in another jurisdiction.

Part 11 speaks to interlocutory applications, being applications for court orders, made before<sup>1</sup>, during the course of, or after<sup>2</sup> proceedings (**Rule 11.1**).

The procedure for filing such interlocutory applications is then specified in detail in relation to form and content, throughout Part 11. The actual form and content of the Part 11 application is not pertinent to this case.

[5] The sum total of **rules 8.1 and 11.1** is that a Form 10 application is appropriate only where an interlocutory order is sought – but such an interlocutory order may be sought and obtained *before* the commencement of proceedings, during the course of proceedings or after proceedings. The terminology

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<sup>1</sup> For example, under Part 17.2(1) an application for interim remedy before commencement of proceedings

<sup>2</sup> Proceedings for enforcement after judgment

‘interlocutory’ signifies that the order sought will not put an end to the issue in litigation.<sup>3</sup> Other than the circumstances in which such an interlocutory order is sought, proceedings must be commenced in the manner prescribed by **Rule 8.1(1)**. That is, by the filing of a claim form (with or as permitted, without a statement of claim or affidavit); or by **Rule 8.1(5)** by fixed date claim form for certain types of proceedings. The Application filed by the Claimant in the instant case cannot be categorized as interlocutory. The Claimant was seeking orders from the Court for an entitlement of interest in matrimonial property and for enforcement of a court order for maintenance, which were made in 1998 in previous proceedings between her and her deceased former husband.

[6] This position as to the use of the form 10 application is considered patent on plain reading of the Rules, however the Court refers to two decisions of the Eastern Caribbean Supreme Court, to illustrate its position. The first is **Quorum Island (BVI) v Attorney General**<sup>4</sup>. This case emanates from the Eastern Caribbean (British Virgin Islands), and the ECSC CPR 2000, in respect of which (save for what appears to be deliberate but only a few departures), the **Barbadian CPR 2008** more or less mirror. In relation to the

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<sup>3</sup> Per Gordon QC JA in *Capital Bank International Ltd. v David Holukoff et al*, HCVAP 2009/007 paras 13 – 14. (ECSC Grenada).

<sup>4</sup> HCVAP 2008/004 ECSC British Virgin Islands.

Rules under consideration, save for the omission of reference to ‘interlocutory’ in **Rule 11.1**, Parts 8 and 11 of both jurisdictions are materially the same. In **Quorum**, the Respondents to the appeal had in the court below, sought permission to file a claim for judicial review by the means prescribed in the OECS Part 56 - which was to file a (form 10 equivalent) application supported by affidavit<sup>5</sup>. The application for permission was filed on the final day of the statutory limitation period for filing such a claim and upon permission being granted, the actual claim for judicial review was filed about one month after the expiry of the limitation period. The appellants’ objection to the claim for judicial review on the grounds of expiry of the limitation period was rejected by the trial judge. From that decision the appellants appealed.

[7] The contention of the appellants was that the claim for judicial review had not commenced until the filing of the fixed date claim therein, and the application for leave had not commenced the judicial review proceedings. The appeal was dismissed. **Barrow JA**’s reasoning is extracted in terms that (i) the Act in question in which the limitation period was prescribed<sup>6</sup> made provision for

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<sup>5</sup> Barbados has no counterpart to the ECSC CPR 2000 Part 56 (claims for administrative orders), given the different regime existing by virtue of the Administration of Justice Act of Barbados, but that difference is not material to the issue under consideration.

<sup>6</sup> The Public Authorities (Protection) Act, Cap. 62, Laws of the Virgin Islands

any action, cause or *other proceedings*; (ii) **the Supreme Court Act**<sup>7</sup> individually defined action, cause, matter, and also proceeding. The last term – proceeding – was defined expansively as including ‘action, cause or matter’. In such case, ‘proceeding’ was held to be of greatest possible scope and therefore included an ‘application’.

Given that the **Public Authorities (Protection) Act**, required ‘proceedings’ to have been commenced as opposed specifically to an action or cause, the filing of the application for judicial review was found to have properly commenced the proceedings. **Barrow JA** came to his decision primarily thus<sup>8</sup>:-

“The significance of the word proceeding in **section 2(a) of the Act** is that if the appellants are correct in their argument that an action for judicial review is not commenced until the claim form is filed and filing an application for leave does not commence an action, which I do not accept but do not need to explore, the amplitude of that word easily encompasses an application for leave to apply for judicial review. An application to the court is certainly a proceeding. That proceeding is commenced when the application is filed. It cannot matter that the proceeding commences as an application and continues as, or morphs into a claim. Neither can it matter if the making of the application is not a first stage of, but is rather a condition precedent to, commencing a claim. The proceeding initiated by an applicant for judicial review commences by filing an application for leave. That is a proceeding.

Further:-

“**Section 2(a) of the Act** does not require that an action be commenced. The section simply requires that where any action or

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<sup>7</sup> Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap. 80

<sup>8</sup> *Quorum Island (BVI) Ltd v Attorney General* supra @ paras 9-10.

other proceeding is commenced it must be commenced within a specified time. Whether the manner prescribed by the rules of court for commencing a civil proceeding is by filing a claim form or a notice of application...is immaterial for purposes of **section 2(a)** ... So far as **section 2(a)** is concerned whatever the manner prescribed by rules of court for a person to commence proceedings to obtain the court order that he seeks, the proceeding must commence within the specified time. In this case the proceeding was commenced in time. To my mind that is the end of the matter.”

- [8] The utility of this decision is one of illustration. To be noted, is that the ECSC equivalent to **Barbados’ Rule 8.1(1)** – how to commence proceedings – is identical. The term ‘proceeding’ is defined neither in **Barbados’ Interpretation** nor **Supreme Court of Judicature Acts**. However, the terms ‘action, cause and matter’ are defined and contain therein reference to ‘proceedings’ so as to make clear that ‘proceeding’ likewise encompasses ‘action, cause, or matter.’

It is therefore established that every action, cause or matter is a proceeding but not vice versa, and as such, the wide ambit of ‘proceeding’ recognized by **Barrow JA** can be accepted and applied. Semantics aside, **Barrow JA’s** dictum says in **Quorum**, that the application filed therein was a proceeding and having been filed, had commenced the proceedings for judicial review. On first blush, it is tempting to widely construe his ruling. However, he was referring to the proceedings in issue in that case, which were proceedings for judicial review. The ECSC Part 56 specifically makes provision for the filing

of an application (form 10 equivalent) in order to seek leave to file a claim for judicial review. **Barrow JA**'s point was that the application for permission was a proceeding thereby the statutory requirement for commencement of proceedings within the time limited had been satisfied.

[9] It is not viewed by this Court that there was a general statement by **Barrow JA** in **Quorum** that the filing of a Part 11 application amounts to commencement of proceedings. Rather, it is considered that the proceedings therein were enabled by the rules, to be commenced by the filing of the Part 11 application. This position is buttressed by **Capital Bank International Ltd. v David Holukoff et al.**<sup>9</sup> This case concerned an appeal from a strike out of proceedings filed by the claimant Bank for the revocation of appointment of a receiver against them, as ordered by the Minister. The claimants filed a claim form but did not file a statement of claim. Instead they filed a Part 11 application along with supporting affidavit. The defendant successfully obtained an order striking out the claim, on the basis that having been filed without a statement of claim as required by **Rule 8.1(1)**, the claimant had failed to comply with the requirements of **Rule 8.2** which set out the circumstances in which a claim form could be filed without a statement of claim. The Claimant appealed and **Gordon JA** allowed the appeal, and

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<sup>9</sup> Capital Bank *supra*. Per Gordon JA.

applying **Quorum Island (BVI) Ltd**<sup>10</sup> ruled that the application filed along with the claim had commenced the proceedings.

[10] Again, on first blush this decision could be taken out of context. In this case, the proceedings in question were enabled by statute, namely the Banking Act (Grenada). The Act provided for a company to apply to the court to have an appointment of a receiver made by the relevant Minister, revoked. There were no rules or regulations governing the process therein provided, and the default provision for application of the Supreme Court rules to civil proceedings were deemed applicable. On appeal against the strike out, **Gordon JA** agreed that having not filed a statement of claim with the claim form, and having failed to comply with the requirements of **Rule 8.2**, the *claim* was not properly issued. However, his ultimate decision turned on his classification of the proceedings for revocation of the appointment of the receiver, as interlocutory and not final<sup>11</sup>. Given the interlocutory nature of the application for revocation, the Rules allowed a remedy to be sought prior to the commencement of a claim, and such a remedy was to be sought by filing an application as provided in **Rule 8.1(6)**<sup>12</sup>. Applying *Quorum Island (BVI) Ltd.*, **Gordon JA** held that the application for revocation of appointment of a

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<sup>10</sup> *Ibid*

<sup>11</sup> Capital Bank supra fn.3

<sup>12</sup> Barbados CPR 8.1(6)

receiver, interlocutory in nature, were proceedings which had been properly commenced by the filing of the application.

[11] In **Quorum Island (BVI) Ltd.** the procedure for leave for judicial review by way of application was specifically enabled by **the CPR** itself. That requirement for leave was dubbed a proceeding within the terms of the statute in question, and thereby properly commenced upon filing the application. It need not be said that the determination of the application for leave is not final. In **Capital Bank International Ltd.**, the application in question was deemed interlocutory and therefore fit the wider classification of ‘proceeding’, which in turn accorded with the ECSC Court of Appeal’s prior ruling that the proceedings in question were properly commenced by way of application. Two aspects common to both decisions are regarded as critical. The first is the classification by the court in *Capital Bank* of the revocation proceedings as interlocutory, whilst the application for leave in *Quorum* was on its face not final.

The second, is the statutory underpinning in relation to the commencement of the wider term ‘proceedings’, thereby making available commencement by proceedings other than an action or a cause – or in **CPR** terminology, a claim. Considering that the ECSC Rule 8.1 which is in the same terms as **Barbados’s Rule 8.1** says that ‘proceedings’ (the wider term) are to be commenced by

claim or fixed date claim, the statutory underpinning of both matters to the commencement of the proceedings in those two authorities is significant.

[12] All that discussion on the above two authorities amounts to this – **Barbados’ CPR Rule 8.1(1)** says that proceedings are to be commenced by claim form with statement of claim or affidavit, or by fixed date claim (**Rule 8.1(5)**). Outside of this mode of commencement Rule 8.1(6) allows for a remedy sought before proceedings have been commenced, to be sought by way of a Part 11 application, as is consistent with the categorization of interlocutory applications. Within **the CPR**, a remedy sought before the commencement of proceedings is actually governed by **Part 17, R. 17.2** (interim remedies) and must fall within the parameters of urgency set out therein. In the circumstances, unless the relief being claimed by the Claimant in this case fell to be categorized as interlocutory, or was in some other way enabled by statute as proceedings which could properly be commenced by application, the filing of the application seeking the relief for enforcement of a prior judgment in addition to claiming an interest in what the Claimant asserts as her matrimonial home was procedurally incorrect. The question remains as to whether this breach in procedure justified the striking out of the claim. This question now takes the Court to the substantive issue of the cause of action.

**(ii) The Substantive Issue**

[13] It is first acknowledged that the Court need not have struck out the claim on the sole basis of the procedural breach in commencement of the claim. **Rule 26.4**<sup>13</sup> could arguably have been applied and the Court issue directions to remedy the procedural breach in commencement of the claim. An example of the application of this section is taken from the Eastern Caribbean, the counterpart rule being Rule 26.9 of the OECS CPR 2000.

In **Savita Salisbury v Director of ONDCP**, the ECSC Court of Appeal held (inter alia), that the strike out of a fixed date claim which was not supported by an affidavit as required, was a procedural error, which would have been appropriately remedied by the court's wide powers to set matters right under the said Rule 26.9<sup>14</sup>. In the instant case there were no submissions on this issue of the applicability of Rule 26.4 as the Court exercised its power in a summary manner. The question however was not whether the Court had to power to act pursuant to rule 26.4, but whether the circumstances were as such that it ought to have so acted. The application filed by Queen's Counsel on behalf of the Claimant, prayed as follows:-

- “1. Yvonne Delcina Yarde is entitled to the property situate at...
2. The Order made by Mr. Justice Christopher Blackman, High Court Judge of the 12<sup>th</sup> day of November, 1998 in the Family

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<sup>13</sup> Rule 26.4 – The Court's general power to rectify matters where there has been a procedural error.

<sup>14</sup> Antigua & Barbuda ANUHCVP2021/0044 per Blenman JA @ paras 35-36

matter No. 329 of 1992 between Yvonne Delcina Yarde and Douglas Yarde, be enforced.

3. I am entitled to a share and/or interest in the matrimonial house situation at...
4. Such further or other relief as to this Honourable Court may seem fit:

The application continued by setting out the grounds thereof, in the following terms:-

- “1. My late husband Douglas Yarde died on 30 July, 2005.
2. At the time of the deceased’s death we were living separate and apart.
3. A portion of the debt due to me from my late husband Douglas Yarde, deceased by order of Mr. Justice Christopher Blackman, High Court Judge and made on 12 November, 1998 is still outstanding.
4. The Claimant is entitled to her share and/or interest in the matrimonial home situate at ...
5. The Defendant Betty Roberts cohabited with the said deceased at ... shortly before his death and continue (sic) to reside in the said matrimonial home.”

[14] The Application in the above stated terms, was supported by an affidavit filed by the Claimant from which it could be gleaned the following facts which were very briefly set out therein. The Claimant had been living separate and apart from her deceased husband in 1998 when the Defendant moved in to live with said former deceased husband (who died in 2005). In 1998, there had been in existence an action for maintenance instituted in 1992 and the Claimant obtained an order for arrears of maintenance in the sum of approximately \$5000 against her estranged husband at the time. The order for

the arrears inter alia provided that the monies be a first legal charge on the matrimonial home, to be deducted from the proceeds of sale attributed to the husband. The Claimant further very briefly outlined her prior unsuccessful attempt to have the Defendant Ms. Yarde, removed from her former matrimonial home by way of lawyer's letter which was ignored. It is this order, arising from the award of arrears of maintenance made in 1998 in the prior action against her former deceased husband, upon which the entirety of the Claimant's claim against the Defendant rested.

- [15] The Claimant was not the legal owner of the property; there was nothing exhibited to confirm in whose name the property at this current time was vested, thus for all intents and purposes the last known owner would be the estate of the Claimant's deceased husband. Short of her occupation of the said property, the Defendant Ms. Yarde had on the pleadings, no legal connection to any of the claims that were being asserted. Ms. Yarde was not a party to the suit which ordered the arrears of maintenance; it was not asserted that she was the personal representative of the Claimant's deceased former husband; and more particularly, the application and affidavit established no legal basis for the Claimant to bring an action against the Defendant, who presumably from the facts alleged, cohabited with the deceased husband after his separation from the Claimant and has continued after his death, in her occupation of the

Claimant's former matrimonial home. In as much as the affidavit alleged an understandably lamentable position that the Claimant was in financial need and holds the view that she is entitled to some interest in her former matrimonial home, none of the facts pleaded revealed any cause of action against the Defendant.

[16] In answer to the question therefore as to whether the Court ought to have exercised its discretion to put things right pursuant to **Rule 26.4** instead of striking out the application, the state of the case put before the court was not one which in the Court's view could be set right. The Claimant was seeking to enforce an order against a person who was never a party to nor in any way enjoined by a money order made twenty-two years ago; the Claimant by her own pleadings asserted an equitable interest in the property on the basis of an order made against her husband in 1998. The order affording the Claimant the equitable interest she was claiming to be entitled to, even taken at the highest, was not one to be asserted against the Defendant, a mere occupier of the premises. Given the Court's view that there was no cause of action against the Defendant supported by the facts pleaded in support of the application, it was considered that nothing short of a summary dismissal of the application by the Court, of its own motion (acting pursuant to **Rule 26.2**), was warranted.

The overriding objective of the **CPR Part I**, particularly from the standpoint of saving expense, allocation of judicial resources, complexity and the financial position of the parties, should be considered in equal measure, with respect to any case that is deserving of the sanction of being struck out on the Court's own motion. The Court considered the application herein to have been one of those cases.

  
**SHONA O. GRIFFITH**  
Judge of the High Court

