IN THE SUPREME COURT OF BELIZE A.D. 2011

CLAIM NO. 645 of 2011

1DB CORPORATE RETREAT CLUB LTD	**1st CLAIMANT**
RUSTY JOHNSON	**2nd CLAIMANT**
TONJA JOHNSON	**3rd CLAIMANT**
AND	
GREEN LIGHT EQUITY PARTNERS LLC	**1st DEFENDANT**
NIGEL MIGUEL	**2nd DEFENDANT**
HERBERT DOGAN	**3rd DEFENDANT**
SCOTT WEISSMAN	**4th DEFENDANT**
TERENCE KUPFER	**5th DEFENDANT**
TERENCE KUPFER (Personal Representative of the Estate of SHARON KUPFER	**6th DEFENDANT**
DAVID LUTHER	**7th DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2015
17th November

Written Submissions
Claimant/Applicant – 16th November, 2015

Mr. Eamon Courtenay, SC along with Ms. Pricilla Banner for the Claimants.
Mrs. Robertha Magnus-Usher for the 1st and 4th Defendants.
Mr. Michael Young, SC for the 2nd and 3rd Defendants.
Ms. Darlene Vernon for the 5th, 6th and 7th Defendants.

Keywords : Application to vary an interim order - Order not yet perfected – Consent and support of all parties – Whether court has jurisdiction to vary an order – Inherent jurisdiction- Reception of British rule to revoke or amend - Overriding objective

RULING

1. This is an application to vary an interim order of the court. An order which in effect barred the fifth, sixth and seventh Defendants from filing witness statements out of time. They were therefore excluded from the proceedings and so for them, it took effect like a final order.

The History:

2. The three Defendants did not file their witness statements on the date directed by the case management order or extended by consent of the parties. Their application for relief from sanctions was strenuously objected to by the Claimants. The court considered same and denied the application with costs to the Claimants. Thereafter, there was some confusion among the parties and the court office regarding the draft order for approval, which seemed to have taken a direct route to lost. Meanwhile, the three defendants applied for leave to appeal before the order had been perfected. That application was accordingly dismissed as being premature. It was anticipated that an application would be made to the Court of Appeal. In the interim, the court adjourned the substantive matter for report. If there was an appeal, the trial would inevitably be delayed. Such is the nature of the claim. The Claimants have now filed an application, consented to and supported by all the defendants, to vary the order of the court to allow the three Defendants the relevant relief from sanctions, while maintaining the original cost order. This, the Claimants say, is being done in order– 1. avoid further delay of the matter; 2. avoid additional costs to prosecute the claim, 3. avoid the further

deterioration of the subject matter of the claim and 4. limit the Claimants' expenses as they are resident abroad.

The issue for the court to consider is:

3. Whether on review or through an application, a court could vary an operative and substantive part of an order which was regularly given and which expressed the true intention of that court.

Whether on review or through an application, a court could vary an operative and substantive part of an order which was regularly given and which expressed the true intention of that court:

4. The parties urge that an order not yet perfected can be varied. Counsel presented ***Re Harrison's Share (1955) 2 WLR 256 and Latiff v Persaud*** – ***Civil Appeal No. 40 of 1968 Guyana*** which approved and applied ***Re Harrison's***. Both cases recognized that the court had the inherent power to recall and rectify an unperfected order. In such circumstances, the court was exercising its continuing jurisdiction, not an appellate function. They stressed that the power to recall and vary such an order did not militate against the principle of the finality of judgments and order. Since their finality really depended on them being drawn up in accordance with the Rules of Court. That is when time begins to run for the appellate process. ***Latiff (ibid)*** seemed to accept that the power to recall and vary was unfettered but stressed at pg 15 that it was not to be exercised *"arbitrarily or capriciously, of course, but where the justice of the case warrants it,"* and only after the parties have been heard.

5. **Blackstones Civil Practice 2013 para 32.42**, relying on **Pittalis v Sherefettin [1986] QB 868** also states that the court has a power to reconsider its decision in an interim application at any point up to the time the order is

drawn. Such a jurisdiction must only be exercised in exceptional cases and where it is in the interest of justice to do so. These decisions were all prior to the current **U.K. Civil Procedure Rules** and our **Supreme Court Rules**. So whereas the law seemed settled previously, one must now consider what the current situation is.

6. With the advent of the new rules, the British court was given a specific power to vary or revoke a previous order, which must necessitate a reconsideration. Rule 3.1(7) states *"A power of the court under these Rules to make an order includes a power to vary or revoke the order."* Our own **Civil Procedure Rules** are silent in this regard.

7. This court considered the case of **Anguilla Business Services ltd v St Kitts Scenic Railway Ltd, Steven G Hites et or Claim No SKBHCV2011/0144** where Thomas J, when faced with a similar application as the present, seemed to accept that the British position on variation and revocation of an order had been received through the reception provision in the Eastern Caribbean Supreme Court Act. Such reception, being made possible, because there were no statute or rules in St. Kitts and Nevis dealing with same. Belize, by virtue of section 60 (a) of the Supreme Court of Judicature Act, has a similar provision:

> *"The practice and procedure of the Court-*
>
> *(a) in its general civil jurisdiction, shall be regulated by this or any other Act or by rules of court and where no provision is made, by the practice and procedure in the High Court of Justice in England;"*

8. Thomas J was also satisfied that the court had an inherent power to entertain such an application. He relied on **McCarthy v Agard [1933] 2KB 417**. I am not convinced that the **McCarthy** case is of much assistance here. It is a thorough discussion of decisions on the issue at hand which concludes that the court only has jurisdiction to correct such errors as can be done under the slip rule. It states categorically that the court does not have an inherent jurisdiction to vary a judgement or order which correctly represents the court's decision. Any correction to such an order ought to be done by appeal and in certain circumstances by an application to set aside. The majority were of the view that perhaps the courts ought to be given the necessary jurisdiction to revoke or amend such orders since it would be obviously faster and less expensive. Nonetheless they felt bound by the authorities discussed. Scrutton LJ dissenting, opined that the court did have an inherent jurisdiction to correct such errors as were caused by the misrepresentation of a party. Although Belize has a 'slip rule', the current application is not for variation based on a clerical error, accidental slip or omission. Counsel clearly appreciated that this rule did not enable any other type of application to be brought, since he never grounded his application there.

9. The court also considered **Bargani Stiftung v JMV Fixed Performance Partners Ltd et al (Anguilla) Claim No AXA 2008/0042.** There George Creque J as she then was (now Chief Justice of the Eastern Caribbean Supreme Court) had this to say *"I regard it as well settled that on an application to discharge an order made on an inter partes hearing the party seeking to discharge must show either (i) a material change of circumstances or (ii) that the judge who made the earlier order was misled in some way whether innocently or otherwise as to the correct factual position before him. The leading authority for this position is* ***Collier-v-Williams*** *in*

which the dictum of Patter J to this effect in ***Lloyds Investment (Scandinavian) Ltd-v-Ager-Hanssen*** *was approved and followed. In Collier, English Court of Appeal court (sic) went on to say that the circumstances as set out above are the only ones in which the power to revoke or vary an order already made should be exercised. This dictum has been approved and followed in the court of the Eastern Caribbean. Whilst CPR 2000 contains no equivalent rule to Rule CPR 3.1(7) [UK] which was there under consideration, it is also well settled that the court retains this power under its inherent jurisdiction."*

10. Her Ladyship (unfortunately for us) offers nothing by way of authority for the well settled principle relied upon. What confuses more is how the ordinarily unfettered inherent jurisdiction has somehow become bound by modern UK cases which rely on the application of a specific rule of court and not on the inherent jurisdiction. With respect, I am of the measured view that if, indeed, there does exist an inherent jurisdiction, it must necessarily be wider than is stated in that judgement. There must be exceptional circumstances which could possibly be considered.

11. The preferred view of this court, right or wrong, is reception of the UK rule and its application. Support for this view is to be found in ***Jeffrey Sersland et v St. Matthews University School, Belize Civil Appeal No. 20 of 2008*** Mottley P, relying on sections 18 and 60 of the **Supreme Court of Judicature Act Cap. 91** stated:

> *"In my view, if the Rules of the Supreme Court in Belize are silent on any matter relating to the practice and procedure which is or ought to be adopted, then the practice and procedure in the High Court of Justice in England is to be adopted and followed."*

12. In ***Stewart v Engel (2000) 1 WLR 2268*** the court had cause to consider in what circumstances Rule 3.1(7) ought to be used. It was accepted that this jurisdiction ought to be "very cautiously and sparingly exercised … fully in accordance with the overriding objective of enabling the court to deal with cases "justly", as particularly used in …. the CPR." **Blackstones Civil Practice 2013 (ibid)** explains the circumstances under which rule 3.1 (7) UK could be invoked. There must be some material change in circumstance example new evidence, a third party is adversely affected or the judge was misled whether innocently or otherwise about the correct factual situation. If there is nothing new or no material factual error has been made, then rightly, an appeal is the available route.

13. In this case, I am of the view that the court misled itself when it formed the belief that the case management order had been filed and was easily accessible by new Counsel for the two defendants. In fact, it had not been and new Counsel could then only safely rely on the file from the previous counsel, which was not immediately forthcoming. To my mind, that is certainly sufficient to invoke the particular rule and I so hold. In any event, if there is an inherent jurisdiction to vary or amend, I also find that where an Applicant is supported by all the other parties in an application to vary, that is, in and of itself, a sufficiently exceptional circumstance. Such a reality ought not to be taken lightly.

14. The applicants also ground their application on the overriding objective and rule 26.1(6) which states: *"In special circumstances, on the application of a party, the court may dispense with compliance with any of these rules."* To my mind, at the stage where an order has already been made, it is not a rule

with which the applicants do not wish to comply, it is a court order. And, a type of court order, which the rules specifically preclude them from varying by consent. They can find no assistance there.

15. When one considers the overriding objective, which requires that all cases be dealt with justly, one cannot ignore the fact that a case really belongs to the parties. The court is invited in (so to speak), to manage and adjudicate, but ultimately, the joint wishes of the parties must be facilitated. The court, I dare say, is duty bound to facilitate. That duty becomes even more compelling where facilitating ensures that a case will be dealt with expeditiously. Although civil litigation is still adversarial, the role of the court should be, essentially, to facilitate a fair and proper contest while upholding the rule of law. Therefore, if the parties determine that they no longer wish to battle on a particular issue and their decision has no negative consequences for other litigants or for the rule of law, then why shouldn't the court facilitate them?

16. The court briefly considered that this decision might open an unwanted and perhaps, uncontrollable floodgate. But such a thought was quickly dismissed from mind. A variation, such as this, would necessitate the mutual desire and consent of all parties. Moreover, the court maintains a discretion throughout, the exercise of which will be in accordance with accepted principles and the specific circumstances of each individual case. So, since the order has not yet been drawn up, rather than risk the frustration of all parties, the incurrence of additional cost and a protraction of the trial process, the variation will be granted as requested. Thereby achieving a result which is not only sensible but consonant with the overriding objective.

IT IS THEREFORE ORDERED BY CONSENT:

1. The order dated 27th July, 2015 is varied to the extent that the 5th, 6th and 7th Defendants are granted leave to file and serve their witness statements out of time and in any event no later than the 15th December, 2015.
2. No order as to costs on this application.

SONYA YOUNG
JUDGE OF THE SUPREME COURT