IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 7 OF 2012

PEDRO ABRAHAM COWO Appellant

v

(1) **RODRIGO DANIEL COWO** junior
(2) **EMMANUEL ALEX COWO**
(3) **NICOLAS DAVID COWO** Respondents

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa President
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Samuel Awich Justice of Appeal

F D Lumor SC for the appellant.
D Vernon for the respondents.

_____

18 June 2014, 24 March 2015 and 29 September 2017.

SIR MANUEL SOSA P

Introduction

[1] The instant appeal concerns a document ('the document' or 'the Will') presented in or about 2011 by the appellant (to be referred to, entirely for the sake of convenience, as 'Pedro' in the remainder of this judgment) to the Probate Side of the court below as the last will and testament of his brother Rodrigo Cowo, late of Orange Walk Town ('the

deceased'). The court below proceeded in due course to make in favour of Pedro a grant of letters of administration with the will annexed ('the grant'). The respondents (to be referred to as such, save where the context otherwise requires, in the remainder of this judgment), all sons of the deceased, then filed a fixed date claim ('the claim') in the court below seeking, an order revoking the grant and, amongst other declarations, one to the effect that the deceased died intestate. On 29 February 2012, the date originally fixed for trial of the claim, Hafiz Bertram J, as she then was ('the judge'), having decided instead to hear an oral application for permission to change the statement of case ('**the change application**') by the respondents under Rule 20.1(3) ('Rule 20.1(3)') of the Supreme Court (Civil Procedure) Rules 2005 ('the Rules'), granted leave for amendment of the claim and made the following further order:

> 'IT IS ORDERED that pursuant to s 16 of the Wills Act of Belize that the said Will is invalid and the Claim as amended is allowed.'

The present appeal is from this order.

The background facts

[2] The facts of this case fall, to my mind, into two neatly separable groups, viz the primary and the secondary. As material on 29 February 2012, the date as earlier indicated on which the judge made her order, the primary facts were these. The document was signed by the deceased and bore date 7 October 1998. The deceased married one Esperanza de La Concepción Aburto Rodríguez ('Mrs Cowo') in Orange Walk Town on 20 December 2003. He died in that same town on 6 June 2010. The grant was subsequently made on 14 March 2011. (These facts are germane in respect of the judge's decision that the marriage in question revoked the will.)

[3] The secondary facts, as I see it, are these. On the filing of the claim on or about 10 May 2011, the reliefs claimed included, as already mentioned above, an order revoking the grant on the sole ground that the document did not constitute a true will for want of unconditionality. The respondents averred in their statement of claim, at paras 4, 8 and 13, that the document was a will of sorts; but, they went on to say, it was conditional upon the deceased dying during a visit to the United States of America which he planned to pay when he signed the document and which he, in fact, went on to pay. Given that the

condition in question was not fulfilled, the respondents further stated, the Will never took effect. A case management conference was held on 21 July 2011; and a trial date of 29 February 2012 was later fixed. On the very eve of the trial date, however, things took a radical turn in the camp, so to speak, of the respondents. First, a notice of trial of preliminary issue ('the Notice') and an affidavit in support ('the Affidavit') were prepared for filing. Then, later the same day, they were duly filed and served on Pedro. (These facts are germane in respect of the way in which the judge, first, dealt with **the change application** and, secondly, went on to dispose of the claim immediately thereafter.)

[4] The preliminary issue stated in the Notice was in truth twofold, reading as follows:

> 'Whether the marriage between [the deceased] and [Mrs Cowo] on the 20th day of December 2003 revoked the Will made by the said [deceased] on 7th day of October 1998;
>
> AND
>
> Whether Probate (*sic*) granted to [Pedro] on the 14th day of March 2011 is valid and subsisting in the face of [the deceased] being legally married after creating the Will.'

[5] Before the judge on 29 February 2012, the respondents' attempt to have the claim determined on a preliminary issue obviously failed. This is to be gathered from the exchanges between bench and Bar following the raising of a pleadings-based objection on the part of Mr Lumor, for Pedro, which exchanges were as follows:

> 'THE COURT: So you have to amend the pleadings?
>
> MS VERNON: We would have to amend, My Lady. If that is the case on a preliminary issue, we'd make an application to amend our statement of case.
>
> THE COURT: Because this is not in the pleadings. That is what Mr Lumor is saying.
>
> MS VERNON: Guided, My Lady. And, I am guided by ***the Court's decision*** on it ...' (emphasis added)

Without skipping a beat, as it were, Ms Vernon, for the respondents, then and there orally launched **the change application** pursuant to Rule 20.1(3), seeking corresponding relief in the process.

The ruling of the judge

[6] The judge's ruling on the matters before her was unreserved and rendered only orally. Her reasoning is, however, largely revealed in the transcript of the hearing.

[7] Before tracing it, the provisions of the whole of Rule 20.1, whose marginal note reads 'Changes to statement of case', may usefully be set out. They are as follows:

> '20.1 (1) A party may change a statement of case at any time before the case management conference without the court's permission unless the change is one to which –
>
> (a) Rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or
> (b) Rule 20.2 (changes to statements of case after the end of a relevant limitation period),
>
> applies.
>
> (2) An application for permission to change a statement of case may be made at the case management conference.
>
> (3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference.
>
> (4) The party amending a statement of case must forthwith –
>
> (a) serve a copy on all other parties; and

(b) file at the court office the amended statement of case endorsed with a certificate of service.

(5) An amended statement of case must include a certificate of truth in accordance with Rule 3.12.'

In the instant case, of course, the case management conference had come and gone by the date of trial and, accordingly, Rules 20.1(1) and 20.1(2) had no application.

[8] Rule 20.1(3) indicates the two links in the short chain of reasoning required of a judge considering an application made under it. Manifestly, the judge was in no doubt as to the nature of the application being made to her. As she was quick to point out to Ms Vernon –

'But that have to be an application to amend the statement of claim.'

The first link to which she would have thereafter needed to address her mind is that represented by a relevant change in circumstances. The alleged change was placed before the judge by way of the Affidavit, sworn by the respondent Rodrigo Daniel Cowo junior, which, according to the transcript, the judge confessed to not having previously read but which was, in the circumstances, read out to her by Ms Vernon. Paras 4 and 5 of the Affidavit state as follows:

'4. That at the time of initiating our claim we were asked by our attorney whether or not our father was married to Ms Cowo but were under the mistaken belief that our attorney was at the time referring to the relationship between our father and our mother as at all times they were referred to as 'casados' which is translated to mean being 'married'.

5. That it was only through final preparation for trial that we understood what was being asked of us and upon checking with [Mrs Cowo] that we learnt that [the deceased] was legally married to [Mrs Cowo] on the 20th day of December, 2003. A copy of the certified copy of the marriage Certificate is shown to me hereto marked "RDC # 1".'

[9] The second link in the chain of reasoning was represented by the need to show that the change in circumstances, ie the obtaining of potential evidence, as opposed to mere information, to the effect that the marriage in question had been entered into after the signing by the deceased of the document, did not become known until after the holding of the case management conference. With respect to this, the judge, speaking somewhat loosely, pointed out to counsel in the course of the hearing that –

> '... [Y]ou have to show me that this became known to you after the date of the case management.'

A little later she was more, albeit perhaps not sufficiently, specific, asking counsel –

> 'So when your client (*sic)* got knowledge of this marriage?

In reply, Ms Vernon purported, it is true, to give evidence, stating that it had only been the day before; but she then proceeded additionally to direct the attention of the judge to the date of issue of the certified copy of the Marriage Register, of which exhibit RDC # 1 clearly purported to be a copy, which date is in fact 28 February 2012. (The transcript indicates that the certified copy itself was then produced in court by Ms Vernon, undoubtedly on a purely *quantum valeat* basis, since she must have known that that was not the way to put it into evidence.)

[10] Having brought her mind to bear on these two links, the judge was then required by the terms of Rule 20.1(3) to ask herself whether she was satisfied that the pertinent change in the statement of case was necessary. I can only conclude that she did just that before arriving at her necessarily implied determination that the respondents were entitled to leave to change their statement of case as desired. (The point is, at any rate, not in dispute: ground of appeal 1, set out at para **[13]**, below, predicates that the judge asked herself whether she was so satisfied.) The basis for regarding such a determination of entitlement as one arising by necessary implication is, of course, the judge's final conclusion that the Will was revoked by the marriage in question. She could not have properly gone that far without first deciding in favour of a changing of the statement of case.

[11] The judge's final conclusion in question cannot have surprised either side. The transcript discloses that it was foreshadowed by her from early on: Record, page 155, lines 19-21. Moreover, Mr Lumor himself properly confessed to having 'absolutely no issue with the law' on the revocation point: Record, page 155, lines 22-23. And, when called upon to reply to the submission of Ms Vernon on this point, he predictably said that he had no answer to it: Record, page 178, lines 16-17.

[12] I would emphasise that in paras **[6]** to **[11**], above, I am merely setting out, in the absence of a written ruling of the judge, what, to my mind, her reasoning plainly was, not prematurely endorsing it.

The grounds of appeal

[13] Under the overarching general complaint that the appellant was 'ambushed' by the filing of the documents already identified above on the very eve of the trial date, Mr Lumor argued before this Court three grounds of appeal, which, for convenience, I shall renumber 1, 2 and 3, and which are as follows:

> '1. [The judge] erred in law when she wrongfully exercised the discretion and allowed the claim of the [r]espondents in a summary judgment without trial on the grounds that the court was satisfied that the [r]espondents have met the requirements of [Rule 20.1(3)] without any amendments being effected to the –
>
> (a) Claim form;
> (b) Statement of Claim; and
> (c) Witness Statements filed on behalf of the Respondents.
>
> 2. [The judge] erred in law when she summarily allowed the "amended claim" of the [r]espondents in a summary judgment without trial when there was no compliance with the mandatory provisions of Rule 20.1(4) and (5) and also contrary to [Rule 15 of the Rules].
>
> 3. [The judge] erred in law when she allowed the claim of the [r]espondents brought against the [a]ppellant in his personal capacity in a summary judgment without trial

when the [a]ppellant at all material times was the administrator of the estate of [the deceased].'

Submissions on behalf of the appellant

[14] As was to be expected, Mr Lumor's submissions to this Court assailed not the correctness of the judge's decision that the marriage in question had revoked the Will but the way in which she (the judge) had, first, dealt with the critical application for leave to change the statement of case and, secondly, gone on to dispose of the claim immediately thereafter.

(i) Ground 1 - Satisfaction under Rule 20.1(3) despite absence of amendment of claim etc

[15] In outline form, the main contentions of Mr Lumor in arguing this ground were that –

(i) there was no proper application before the judge for leave to amend pleadings;
(ii) there was no evidence on which the judge could rely and be satisfied that the requirements of Rule 20.1(3) had been met;
(iii) the pleadings had not been amended as required by the Rules; and
(iv) the order allowing the amendment ought not to have been made in the circumstances of the case.

[16] Mr Lumor directed the Court first to Rules 2.4 and 11.2, the former of which provides that, in the Rules, the words 'application' and applicant have the respective meanings given to them in the latter, which, as material for present purposes, states, first, that 'application' means an application made to the court below by an applicant and, secondly, that 'applicant' means a person who seeks an order of that court by making an application. He further referred the Court to Rule 11.6, according to which –

'11.6 (1) The general rule is that an application must be in writing, in Form 6.

(2) An application may be made orally if –

(a) this is permitted by a Rule or practice direction; or

(b) the court dispenses with the requirement for the application to be made in writing.'

That done, he noted the terms of Rule 11.10(1), relating to notice of application, which are as follows:

'11.10 (1) The notice must state the date, time and place when the application is to be heard...'

and underscored the requirement of Rule 11.11(1), which is in the terms following:

'11.11 (1) The general rule is that a notice of an application must be served –

(a) ...

(b) at least 7 days before the court is to deal with the application.'

Mr Lumor further invited the Court to consider the provisions of Rules 20.1(2)-(5), already set out above, implying that they should be read together with those of Rules 3.12(1) and (5), which respectively state –

'3.12 (1) Every statement of case must be verified by a certificate of truth...'

and

'3.12 (5) Where a statement of case is changed under Part 20 the amended statement of case must be verified by a certificate of truth.'

(Rules 3.12(1) and (5) appear to me to have more to do with ground 2 than with ground 1, a point to which I shall return in due course.)

[17] Reliance was placed by Mr Lumor on the decisions in *Moo Yong v Chong* (2000) 59 WIR and *Bernard v Seebalack* (2010) UKPC 15 in arguing this ground.

(ii) Ground 2 – Absence of compliance with Rules 20.1(4) and (5) and breach of Rule 15

[18] If I may take the liberty of reversing the order adopted in the immediately preceding sub-heading, the attention of the Court was drawn by Mr Lumor to the requirements of Rules 15.1 and 15.3-15.5 of the Rules, whose respective terms, as relevant to his argument, are as follows:

> '15.1 This Part sets out the procedure by which the court may decide a claim or a particular issue without a trial.'
>
> 15.3 The court may give summary judgment in any type of proceedings except –
>
> (a) ...
> (b) proceedings by way of fixed date claim;
> (c) ...
> (d) ...
> (e) ...
> (f) probate proceedings)

For reasons which are hard to find in the light of the plain language of this rule, he proceeded to refer to the rules which apply in connection with an application for summary judgment. I will refrain from setting out the terms of those rules, viz Rules 15.4 and 15.5 here, for the good reason that if, as is clearly the case, summary judgment is not available in proceedings by way of fixed claim and in probate proceedings, it is folly to discuss rules which the respondents would have had to obey if that were not the position.

[19] With regard to Rules 20.1(4) and (5), whose provisions I have already set out at para **[8]**, above, the contention of Mr Lumor was one of non-compliance, which, he implied, was compounded by breaches of Rules 3.12(1) and (5), already set out at para **[16]**, above.

(iii) Ground 3 – Absence of indorsement as to Pedro's capacity of administrator

[20] Mr Lumor's contentions in support of this ground were based in large part on certain provisions of Rules 8.6 and 21.6 of the Rules.

[21] The provisions of Rule 8.6 on which he relied are to be found in Rules 8.6(4) and 8.6(5), which respectively read as follows:

> ‘8.6 (4) A claimant who claims in a representative capacity under Part 21 must state what that capacity is.
>
> 8.6 (5) A claimant suing the defendant in a representative capacity under Part 21 must state what that capacity is.’

[22] Rule 21.6 of the Rules is in the following terms:

> ‘21.6 (1) A claim may be made by or against a person in his capacity as a trustee, executor or administrator.
>
> (2) If a claim is so made, there is no need for a beneficiary also to be a party.
>
> (3) The court may direct that notice of the proceedings be given to any beneficiary.
>
> (4) A decision of the court in such proceedings binds a beneficiary unless the court otherwise orders.
>
> (5) The only grounds for an order that a decision is not so binding on a beneficiary is that the trustee, executor or administrator –
>
> (a) (i) could not; or
>
> (ii) did not in fact:
>
> represent the interest of the beneficiary; or
>
> (b) has acted fraudulently.’

[23] Also prayed in aid by Mr Lumor was Rule 67.3 of the Rules, whose provisions are as follows:

'67.3 Every person who is entitled or claims to be entitled to administer the estate of a dead person under or by virtue of an unrevoked grant of the dead person's will or letters of administration of the estate must be made a party to any proceedings for revocation of the grant.'

[24] Mr Lumor sought to derive support for his submissions in relation to this ground from the cases of *Waterman & anor v Waterman* (1977) 30 WIR, 32 at 34-35, *In re Amirteymour, decd* [1979] 1 WLR 63 at 66, *Haq v Singh* [2001] 1 WLR 1514 at 1597-98, para 9 and *Piggot v Aulton* (2003) EWCA Civ 24 at paras 18 and 19. He relied, in addition, on Blackstone's Civil Practice 2008 ('Blackstone'), 202, para 14.29 and Zuckerman on Civil Procedure: Principles of Practice ('Zuckerman'), 328, para 7.95.

Submissions on behalf of the respondents

(i) Ground 1 - Satisfaction under Rule 20.1(3) despite absence of amendment of claim etc

[25] Ms Vernon, in reply to Mr Lumor, referred to Rule 11.6(2)(b) of the Rules, already reproduced at para **[16]**, above, and submitted that the respondents had satisfied the judge that a change of the statement of case was necessary because of a change of circumstances which became known after the date of the case management conference as required by Rule 20.1(3). She cited the cases of *Charlesworth v Relay Roads Ltd* [2000] 1 WLR 230 at 234 and 238 and *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220 as providing support for her contention.

[26] She further pointed to the fact that *Moo Young's* case was decided at a time when the Judicature (Civil Procedure Code) Law was still in force in Jamaica and argued that it was, moreover, distinguishable on the facts.

[27] Furthermore, it was her submission that the case management powers of the judge under Rule 25.1, which provides for the furtherance of the overriding objective by –

'(a) identifying the issues at an early stage;

(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

...

(m) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application ...'

were of direct relevance, and applicable, to the instant case.

(ii) Ground 2 – Absence of compliance with Rule 20.1(4) and (5) and breach of Rule 15

[28] It was the principal submission of Ms Vernon, in responding to Mr Lumor regarding this ground, that non-compliance with the requirements in question was a matter more of form than of substance. She cited in this respect the ruling of the court below in *Lewis v Board of Trustees of the University of Belize and anor*, Supreme Court Action No 518 of 2000 (ruling delivered on 21 May 2010).

[29] But she further argued that the judge did not render a decision pursuant to Part 15 of the Rules, thus disagreeing with the contention of Mr Lumor, underlying in fact all three grounds of this appeal, that the judge wrongly chose to deal with the claim by way of summary judgment. The judge, in the submission of Ms Vernon, had acted under two other rules. First, she (the judge) had discharged her duty to further the overriding objective of the Rules by exercising such of her powers under Rule 25 as had already been identified in her (Ms Vernon's) submissions in opposition to ground 1 (for which identification, see para **[26]**, above); and, secondly, the judge had availed herself of her case management powers under Rule 26.1(2) to 'dismiss or give judgment on a claim after a decision on a preliminary issue'.

[30] Ms Vernon also adverted, in advancing this further argument, to the far-reaching power of the court below under Rule 26.1(6), which is in these terms:

'(6) In special circumstances, on the application of a party, the court may dispense with compliance with any of these Rules.'

And she went on to underline the comparably drastic powers conferred on the court below by Rule 27.2, which as presently relevant, reads:

> '27.2 (1) ...
>
> (2) On [the first hearing], in addition to any powers that the court may have, the court shall have all the powers of a case management conference.
>
> (3) The court may, however, treat the first hearing as the trial of the claim if it is not defended or if the court considers that the claim can be dealt with summarily.'

As I understood this part of the argument, this rule, metaphorically speaking, opened a back-door to the handling of the claim summarily through the exercise of case management powers, thus obviating the common, beaten track approach by way of Part 15. Therefore, so ran the argument, this, strictly speaking, was not a case of disposal by summary judgment. Ms Vernon sought support for this submission from the judgment of Sykes J, rendered in chambers, in *Strachan v Jamaican Redevelopment Foundation Inc*, Claim No HCV3381 of 2006 (judgment delivered on 16 October 2007).

(iii) Ground 3 – Absence of indorsement as to Pedro's capacity of administrator

[31] Reference was made by Ms Vernon to Rule 21.6(1) but not to Rule 8.6(5), both set out above, in her response to the submissions of Mr Lumor on this ground.

[32] Her main contention was that the ground was a complaint on a matter more of form than of substance. After all, she pointed out, the respondents' reply to the appellant's defence had put it beyond all doubt that 'the Defendant is the party to be sued as he is the Administrator of the Estate'.

Discussion

(I) Ground 1 - Satisfaction under Rule 20.1(3) despite absence of amendment of claim etc

[33] Accepting without hesitation the invitation of Mr Lumor to start with the definitions provided in Rules 2.4 and 11.2, I have considered them and formed, without difficulty, the view that each respondent was an 'applicant' who made an 'application' to the judge within

the respective meanings of such rules. Neither of these words is defined in terms connoting that the relevant application must be in writing. And that is clearly not the result of an oversight on the part of the draftsperson, for Rule 11.6 provides unambiguously for the making of oral applications by way of exceptions to the general rule that an application should be in Form 6. (Whether, in the instant case, the judge granted leave for an oral application pursuant to this Rule is, of course, a separate matter to be addressed below.)

[34] Turning to the next rule invoked by Mr Lumor, viz Rule 11.10(1) relating to notice of application, one can readily appreciate its importance in a case where the application needs to be made in writing. But surely it can have no application, let alone importance, in a case where the judge, properly, not only dispenses with the requirement for writing but also gives leave, whether expressly or by implication, for such application to be proceeded with forthwith. The question whether the judge did so in the present case is, as suggested at the end of the immediately preceding paragraph, one to be considered below.

[35] This brings one to Rules 20.1(2)-(5), read in conjunction with Rules 3.12(1) and (5). Upon concluding, rightly as I have already indicated above, that the judge had upheld the objection of Mr Lumor to the resolution of an issue not raised by the pleadings as they then stood, Ms Vernon wasted no time in orally advancing **the change application**. This application the judge unquestionably regarded as already a *fait accompli* at the point in the hearing when the following exchange between her and Mr Lumor occurred:

> ‘MR LUMOR: The issue that my learned friend failed to address the court’s attention to is: Why is this issue being raised now. I don’t know what she is trying to say whether she is asking the court to do the amendment or - -
>
> THE COURT: It has to be an application now to do the amendment.
>
> MR LUMOR: When she makes the application, I will deal with it. Thank you my lady.

THE COURT: She made the application already.

MR LUMOR: Oh that's the application?

THE COURT: Yes.

MR LUMOR: Oh, thank you, My Lady. My Lady, my ***response*** is that the very Section (*sic*) that my learned friend called the court's attention to - -

THE COURT: Sorry, Mr Lumor. What are the terms of the amendment, please?' (emphasis added)

The question at the end of this quotation elicited a reply from Ms Vernon; and it was, no doubt, a question directed to her. In short, the judge was through with talking to Mr Lumor on the subject of the making of **the change application**, by which making (let it be noted in passing) he, evidently, had been caught off guard. On top of that, Mr Lumor's last reply to the judge in this quotation appears to be an attempt to commence his 'response' to **the change application** rather than an attempt to be heard, albeit after the making of **the change application**, on his reasons why the judge should treat it as not having been properly made. In other words, he, too, was there evincing resignation to the fact that, to put it colloquially, the proverbial ship had sailed.

[36] He could have, instead of so doing, raised objection, even at that stage, to the way in which **the change application** had been made. In this respect, he could have objected at two levels. At the first level, he could have pointed to Ms Vernon's complete omission of a prior preliminary application ('**the preliminary application**') to the judge for leave orally and immediately to make **the change application**, noting in so doing that **the preliminary application** itself would have been caught by the general writing requirement laid down in Rule 11.6(1), for which, see para **[16]**, above. **The preliminary application** would have called upon the judge to make an order pursuant to Rule 11.6(2)(b), set out as just indicated at para **[16]**, above, read together with Rule 26.1(6), set out at para **[30]**, above.) At the second level, Mr Lumor could have drawn attention to the various rules which he has referred to this Court as having been breached by the making of **the change application** orally and without notice.

[37] None of that was done by Mr Lumor. What had, however, occurred, if I may repeat myself for emphasis, was that the judge had effectively invited **the change application** and Ms Vernon had unhesitatingly accepted the invitation. The short exchange was as follows:

> 'THE COURT: But that have to be an application to amend the statement of claim.
>
> MS VERNON Yes, My Lady.'

In these circumstances, it is right, in my view, to proceed on the basis that the judge, while not in terms granting leave to the respondents orally and immediately to make **the change application**, saw fit to dispense with compliance with relevant rules as she was entitled, in her discretion, to do under Rule 26.1(6), already set out at para **[30]**, above. She thus heard **the change application** without first hearing and determining **the preliminary application** and despite the former's oral nature and the absence of prior notice of it.

[38] To be specific, then, the judge plainly dispensed in this way with compliance with Rule 11.6(1), which lays down the writing requirement, and Rules 11.8(1) and 11.11(1) and (4), which together set out different aspects of the service requirement. The way was thus paved for an oral application under Rule 11.6(2).

[39] The judge does not, it is true, appear to have dispensed with compliance with Rule 11.15, under which –

> 'After the court has disposed of an application made without notice, the applicant must serve a copy of the application and any evidence in support on all other parties ...';

but Mr Lumor does not complain of non-compliance with such requirement.

[40] Regarding Rule 20.1(3), my conclusions are these. The judge was properly satisfied that the change of statement of case was necessary as required. The affidavit contained ample evidence of a change of circumstances which only became known to the deponent after the date of the case management conference. The judge was entitled to accept it as true and to regard it as sufficient to render necessary a change of the

statement of case. These are, to my mind, conclusions, wholly inevitable in the circumstances, which stand on their own without the need for support from any decided case.

[41] The respondents have not attempted to show that the requirements of Rules 20.1(4) and 20.1(5) were satisfied. I would assume, therefore, that they did not serve a copy of the amended statement of case on the appellant nor file at the court office the amended statement of case itself endorsed with a certificate of service. I would further assume that there has been no drawing up of an amended statement of case endorsed with a certificate of truth. There is, on the other hand, no indication by the appellant that, if these rules have indeed been breached, he has been prejudiced in any way by the breach. He has certainly been able to prosecute his appeal without let or hindrance arising from the presumed breach. His complaint is all about technical breaches of the rules. In this regard, it is helpful to revisit the judgment of Carey JA in *Brown (Raymond) v Central Bank of Belize & anor*, Civil Appeal No 6 of 2006, at para 1 of which that learned judge, speaking of the Rules, understandably (given the circumstances of that case) observed as follows:

> 'Although the rules came into effect in April 2005, it would appear that persons most affected by them, did not take the necessary time to familiarize themselves with the new procedure, nor to appreciate the importance of the overriding objective of the rules.'

Equally relevantly, he said, at para 4:

> 'Technicalities have given way to the "overriding objective" of the Rules which is "to enable the court to deal with cases justly".'

Citation of further case law on this point from the court below seems to me to be unnecessary.

[42] I come then to Mr Lumor's implied request that the parts of Rule 20.1 dealt with in the two paragraphs immediately preceding this one be read together with Rules 3.12(1) and (5). I believe that what he really meant to ask was that Rule 20.1(5) alone be read together with Rules 3.12(1) and (5), given that all three of these rules concern the

requirement for a certificate of truth. As I have already noted at para **[16]**, above, these rules have more to do with ground 2 than with ground 1. I propose therefore only to focus on them when I come to consider ground 2.

[43] I derive no assistance whatever in the present analysis from the passages from the judgment in the *Moo Yong* case which were cited by Mr Lumor. I agree with the submission of Ms Vernon that the reasoning in that decision should not be applied in the instant case given that it was decided before the Civil Procedure Rules 2002 took effect in Jamaica. The provision under consideration in that case, viz section 259 of the Judicature (Civil Procedure Code) Law is not *in pari materia* with Rule 20.1(3) or, for that matter, any of the other rules with which the Court is concerned in the instant case. Moreover, as was also pointed out by Ms Vernon, *Moo Yong* is wholly distinguishable from the present case on the facts and circumstances.

[44] Nor am I able to see how the passage taken by Mr Lumor from the headnote to the judgment of the Privy Council in *Bernard v Seebalack* (2010) 77 WIR 455 can lend support to his argument. The passage in question is, with slight modification, a reflection of a portion of para [24] of the judgment of the Board in that case. As such, it must be seen for what it is, viz a part of the reasoning of the Board in rejecting the submission of the appellant that the judge at first instance ('the trial judge') was correct in his approach to the interpretation of Rule 20.1(3) of the Civil Proceedings Rules of Trinidad and Tobago: see the opening sentence of para [21] of the judgment . Precisely why the Board saw fit to remark that that rule, which is identical to Rule 20.1(3) of the Rules in Belize, refers to a change to a statement of case, and not to a change in the nature of the case being advanced, is not entirely clear from the judgment. (A reading of the judgment of the trial judge might be enlightening in this regard.) As a matter of pure logic, however, one would think that it must have been the result of a conclusion by the Board that the trial judge had not appreciated that the rule refers to a change to the statement of case as opposed to a change in the nature of the case. The trial judge was, after all, of the view that a change which did not go the very core of the case could be introduced into the pleadings without the need for permission under Rule 20.1(3) in Trinidad and Tobago. The Board was emphasising, in its rejection of the approach of the trial judge, that the

rule was speaking, literally, of a (ie any and every) change to the pleading; although a literal interpretation would, in the Board's opinion, be ruled out by virtue of the overshadowing presence of the overriding objective coupled with the fact that a change will sometimes be required by something as relatively insignificant as a typographical error: see para [24] of the judgment. In the instant case, however, neither the respondents nor the judge have been shown to have been in any doubt as to the nature of the change to which Rule 20.1(3) refers. No one has suggested, as in *Bernard*, that the leave of the judge was not required, let alone that there was a particular reason why it was not required. As a case whose determination ultimately turned on the stark reality that both sides were agreed that there had been no 'change in circumstances' for the purposes of Rule 20.1(3), *Bernard* stands far removed from the present case.

(ii) Ground 2 – Absence of compliance with Rule 20.1(4) and (5) and breach of Rule 15

[45] The assertion made on behalf of Pedro that the judge allowed the 'amended claim' of the respondents in a summary judgment without trial was a common thread running through all three grounds of appeal. But it was only in ground 2 that Mr Lumor went so far as specifically to allege contravention of certain provisions of Rule 15, which have already been set out at para **[18]**, above.

[46] I shall deal first with the Rule 15 point. Ms Vernon did not, and indeed could not, dispute that the general rule that the court below may give summary judgment in any type of proceeding is subject to exceptions in the cases of proceedings by way of fixed date claim and probate proceedings. What she contended was that, rather than giving summary judgment, the judge dealt with the case (in which there had been no application for summary judgment) summarily. The former course, she said, involved taking steps under Rule 15, whereas the latter involved following a procedure analogous to that adopted by the claimant in the Supreme Court of Jamaica in *Strachan v Jamaican Redevelopment Foundation Inc*, Claim No HCV 3381 of 2006 (judgment dated 16 October 2007). This submission must, in my view, prevail.

[47] For present purposes, the material paragraphs of the judgment in *Strachan* are the following:

> '54 Having dealt with the substantive issue the question remains of how the court is going to dispose of the matter. It was brought to my attention that under rule 15.3 of the Civil Procedure Rules (the "CPR") the court is precluded from giving summary judgment in any proceedings commenced by fixed date claim form. However, rule 27.2(2) gives the court at the first hearing all the powers of a case management conference in addition to any other powers the court may have at first hearing. Rule 27.2(8) empowers the court to treat the first hearing as the trial of the claim if the claim is not defended or the court considers that the claim can be dealt with summarily. The procedure arose because this hearing is the first hearing. The previous first hearing scheduled for April 17, 2007, was adjourned to October 10, 2007.
>
> 55 It would seem to me that in keeping with the duty of the courts to identify the issues at an early stage and deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others (as per rule 25.1(b) and (c), there can be no objection to the Court exercising its powers under rule 26.1(2)(j) or under rule 27.2(8). In my oral judgment I have said that I would be acting under rule 26.1(2)(k) (*sic*) and dismiss the claim after deciding the preliminary issue of whether clauses 13 and 14 impose a penalty. On reflection, that would not be quite accurate since that is not a preliminary issue but the claim itself. The better view appears to be that I should act under rule 27.2(8) and deal with the claim summarily. The issue raised by Mr Strachan is purely one of construction of the agreement and can be dealt with summarily. This is what I have done. The claim is dismissed. I have given judgment on the notice of application for court orders filed by JRF.'

The rules referred to in these two paragraphs are all virtually identical to rules found in the Rules in Belize. They can thus be paired, referring for convenience to the Jamaican rules as the CPR, as follows:

(a) rule 15.3 of the CPR with Rule 15.3 of the Rules;

(b) rule 27.2(2) of the CPR with Rule 27.2 (2) of the Rules;

(c) rule 27.2(8) of the CPR with Rule 27.2(3) of the Rules;

(d) rule 25.1(b) and (c) of the CPR with Rule 25.1(a) and (b) of the Rules; and

(e) rule 26.2(j) of the CPR (which, of course, ended up not being applied in *Strachan*) with Rule 26.2(j) of the Rules.

[48] In *Strachan*, it is true, the matter had only reached the stage of first hearing, and the Jamaican court took a step forward, whereas in the present case the stage of trial of the claim had already been arrived at and the judge took, first, a step backward and, then, one forward. But this difference cannot, in my view, be of any significance when regard is had to the following. In *Strachan* the court was able to treat the matter as having reached the trial stage because of its prior finding that the claim could be dealt with summarily. In the instant case, the matter had already reached the trial stage when, after an abortive attempt by the respondent to proceed along the lines of resolution of a preliminary issue, an amendment of the statement of case was permitted (the step backward above referred to). It is obvious that, in the light of that development, the judge formed the view that the claim could be dealt with summarily rather than by a full-length trial, a view resonating impressively with the overriding objective. Thus, in the final analysis, the Jamaican court in *Strachan* and the judge in the present case, albeit via different routes, both found themselves arriving at the same point: one at which they found themselves satisfied that the respective actual claim before them could be determined summarily (This then led to the taking of the step forward, to the trial stage and summary determination, by the court in *Strachan* and by the judge in the present case, respectively). In *Strachan*, the actual claim of which I speak was the original claim: in the instant case, it was the original claim as necessarily modified by the change to the statement of case. It would, in my respectful view, be sheer pedantry, and hence antithetical to the overriding objective, to distinguish these two cases on the basis that, in the one, the matter was at the first hearing stage and, in the other, the trial stage had already been reached and to suggest that the decision to resort to summary treatment was, therefore, one open only to the court in *Strachan*.

[49] Coming now to Rules 20.1(4) and (5), and their post-amendment requirements, there can be no denying that these rules were not complied with. Such non-compliance resulted in a less than pretty final scene, with loose ends left hanging and a lack of tidiness.

[50] But that said, one is unable to see how the exercise of placing such non-compliance alongside non-compliance with Rules 3.12(1) and (5), which Mr Lumor, at para 20 of his Written Submissions, implicitly invited the Court to carry out, can advance the cause of the appellant. In regard to the former rule, the statement of case filed with the claim at the very outset was, in fact, verified by a certificate of truth. Invoking the provisions of Rule 3.12(3), Ms Vernon gave such certificate herself; but she somehow omitted thereby to certify that it was being so given on the instructions of the respondents. (If Mr Lumor regarded that as amounting to non-compliance, he could have applied to strike out under Rule 3.13(2); but he did not so apply.) In regard to Rule 3.12(5), as already noted at para **[41]**, above, one has to assume that the respondents did not, after the grant to them of leave to change the statement of case, draw up a statement of case verified by a fresh certificate of truth. Once again, however, there is nothing to show that what we have here amounts to more than mere technical breaches of the rules. The words of Carey JA, cited in the closing sentence of the last-mentioned paragraph, come forcefully back to mind.

(iii) Ground 3 – Absence of indorsement as to Pedro's capacity of administrator

[51] Although Mr Lumor directed the attention of the Court to the terms of Rule 8.6(4), there is no need to dwell on it, given that it applies only to claimants in representative capacities, which the respondents were not.

[52] On the other hand, Rule 8.6(5), upon which Mr Lumor heavily relies, does, in my opinion, apply to the respondents; and they should, therefore, have 'stated' the representative capacity in which Pedro was being sued, ie that of administrator with the will annexed. Did they, however, fail to comply with that requirement? Ms Vernon's retort that Pedro was being sued as a beneficiary under the Will, which I think he undeniably was, does not go far enough, for there are no rules which provide for the reverse of what Rules 21.6(1) and (2), read together, achieve. In other words, while, by indorsing on the

claim a statement to the effect that Pedro was being sued as administrator with the will annexed, the respondents would have obtained exemption from the need to sue him as a beneficiary as well, they could not, by suing him only as a beneficiary, obtain exemption from the need to sue him as administrator with the will annexed as well. The proper answer to Mr Lumor must be that the Rule 8.6(5) requirement is vague in a material respect: it omits to say where the statement as to representative capacity should be made. Appreciation of the full significance of this is attained when one bears in mind that, while rule 16.2(4 of the English Civil Procedure Rules expressly requires capacity to be stated in the claim form, our Rule 8.6(5) merely requires that it should be stated, ie without saying where. In my view, it should, given that lack of specificity, suffice, as a general rule, if the statement is made anywhere in the statement of case, a term which, of course, is so broadly defined as to include a reply: see rule 2.4. I can see no reason why that general rule should not apply here. On that basis, I am unable to accept Mr Lumor's submission that the respondents were in breach of Rule 8.6(5).

[53] But, turning now to Rule 67.3, were the respondents in breach of it, as Mr Lumor further argued, simply because their claim form nowhere stated that Pedro, being at the relevant time administrator with the will annexed of the estate of the deceased, was being sued as such? The answer must, to my mind, be in the negative. This rule required no more than that Pedro was made a party to the revocation proceedings. He was in fact made such a party. The adjectival clause 'who is entitled or claims to be entitled to administer the state of a dead person ...' cannot be dressed in borrowed garments. It is there merely to qualify the noun 'person', not to impose a requirement additional to that constituted by the last 13 words of the rule, viz 'must be made a party to any proceedings for revocation of the grant'. There is, to put the position a little differently, no overlapping between the terms of this rule and those of Rule 8.6(5). Rather these are rules which complement each other in the sense that the one requires a person, as therein described, to be made a party to the proceedings, while the other requires that his/her representative capacity be stated. In a nutshell, then, the requirement of the former was satisfied when Pedro (then being a person 'who is entitled or claims to be entitled to administer the estate of a dead person') was made defendant in the claim, while the requirement of the latter

was satisfied when it was made abundantly clear in the reply that he was being sued in his representative capacity.

[54] I do not disregard Ms Vernon's submission that Mr Lumor's complaint is one which, after all has been said and done, goes more to form than to substance. But surely that is a submission which misses the larger point. The reality is that Pedro was the defendant to the claim. And, besides, the reply of the respondents made it crystal clear that, to borrow its words, 'the Defendant is the party to be sued as he is the Administrator of the Estate'. The significance of these facts cannot, in my judgment, be overestimated. And, in fairness to her, these were facts not lost on Ms Vernon. But she relied on them only for support of the modest submission mentioned in this paragraph, when their full significance goes far beyond that, as I have demonstrated in the two immediately preceding paragraphs. Her submission, in short, accepts that there were breaches of both Rule 8.6(5) and Rule 67.3, when there is, in truth, no reason whatever for so doing.

[55] I have not been able to derive any assistance from the case law and textbook material brought to the attention of the Court by Mr Lumor in connection with this ground and already cited in full at para **[24]**, above.

[56] *Waterman* had to do with the application of the rules under the old dispensation in Barbados, in a situation where a person ('the first plaintiff') who was in fact executor of the will of a deceased person brought an action, together with other persons named as beneficiaries in the will, against another person so named as well. The first plaintiff's representative capacity was not indorsed on the writ. The action failed for the simple reason that the writ was not so indorsed. The case stands as a classic example of the unsophisticated, often unjust approach to technical breaches of the rules in the days when the overriding objective was a concept still utterly unknown in the realm of civil procedure and practice in the English and Commonwealth Caribbean jurisdictions. For some reason, Mr Lumor, while citing this decision, did not see fit to direct any attention to the similar decision of this Court in *Reneau (executrix Estate (sic) Maurice Bladden deceased) v Williams*, Civil Appeal No 15 of 2003 (judgment delivered on 18 June 2004), to which I referred in passing in the course of oral argument. Needless to say, that case, too, is of no assistance to Pedro in the instant appeal.

[57] *In re Amirteymour, dec'd*, decided before the advent of the Civil Procedure Rules in England in 1998, concerned the application of Ord 15, r 6A of the Rules of the Supreme Court then in force in that jurisdiction. That was a rule introduced there to give effect to the provisions of section 2 of the Proceedings Against Estates Act 1970. Mr Lumor did not refer the Court to any local Act modelled on that English statute nor to any rule in force in Belize which could be said to be similar to that English rule. I can readily follow the reasoning of the English court which led to the conclusion that the judgment purportedly entered against the personal representatives of the deceased in that case was a nullity. But such reasoning is based on the provisions of the English rule and Act already mentioned and cannot be transplanted in the circumstances of the instant case without first establishing that legislation containing similar provisions exists in Belize. As has already been made clear above, such local rules as have been invoked by Mr Lumor were, in my respectful view, not breached at all.

[58] *Haq* is a case in which the questions for decision had to do with (i) the meaning of the term 'capacity' for the purposes of rule 17.4(4) of the English CPR and (ii) whether an assignment made in favour of Ms Haq by her trustee in bankruptcy could give rise to a change in her capacity. The rule in question was derived from section 35 of the Limitation Act 1980; but there was no suggestion by Mr Lumor before this Court that any rule or Act in force in Belize bears a material similarity to either the English rule or the English Act. There is nothing in the judgment in *Haq* which has any relevance to the issues raised by this ground of appeal.

[59] *Piggott* decided a question as to whether the judge at first instance was correct in concluding that he had jurisdiction under section 33 of the Limitation Act 1980, which, as already noted in the paragraph immediately preceding, is an English statute not said by Mr Lumor to be similar in any material respect to any Act of Belize. In the context of the provisions of that section, it was held that proceedings issued against an estate at a time when there was no personal representative of it had been a nullity. The decision on this point cannot be taken out of its peculiar English statutory context and applied to the wholly different Belizean statutory context of the present case.

[60] Mr Lumor sought to rely on the following passage occurring in Blackstone, page 202, para 14.29:

> 'If an individual who has, or against whom there is, a claim dies before the claim is started, it must be brought by or against the personal representatives of the deceased if they have been granted probate or letters of administration (CPR, r 19.8(2). The capacity of the executor or administrator must be made clear in their description in the claim form, for example, 'Mr Joe Bloggs as the personal representative of Mrs Sharon Bloggs (deceased)' (PD 7, para 5.5; CPR, r 19.8(3)(a)). A claim brought against a person who was in fact dead at its commencement will be treated as if it had been commenced against his or her estate (r 19.8(3)(b)). However, the irregularity must be corrected by the making of an application for a person to represent the deceased for the purposes of the claim. Until that happens there is no defendant with legal personality (*Piggott v Aulton* [2003] EWCA Civ 24, [2003] RTR 540).' [emphasis added]

The opening sentence of this passage can have no relevance to the instant case in the absence of any indication that the deceased was an individual who had, or against whom there was, a claim before he died. Nor can the second sentence, for, as has already been pointed out above, it is only in the English rule that there is specificity as to where capacity should be stated. The remaining two sentences relate to the case of *Piggott*, which, is not, in the view which I have already expressed in the paragraph immediately preceding, similar to the instant case.

[61] He suggested, as well, that support for his contentions was to be found in Zuckerman, page 328, para 7.95, at which it is stated:

> 'The court may allow an amendment to alter the capacity in which a party claims, if the new capacity is one which that party had when the proceedings started or has since acquired (CPR 17.4(4)). Thus a court may allow a party who was sued in a personal capacity to change his capacity to a representative capacity, or allow a party to change from a representative capacity to a personal capacity or to a different representative capacity. However, it is doubtful whether the power may be exercised to revive proceedings which were a nullity when brought. In *Millburn-*

Snell v Evans an action brought by claimants purportedly as administrators of a deceased's estate was a nullity as they had not obtained a grant of letters of administration. The Court of Appeal held that CPR 19.8(1) could not be relied on to correct the deficiencies in the claim, since a later grant of administration would not retrospectively validate what had been done by someone not having letters of administration.'

Mr Lumor's argument was that the proceedings were a nullity and that the relevant omissions could not be repaired by amendment. The latter half of this paragraph might have assisted that argument if it were indeed the case that rule 8.6(5) requires it to be stated in the claim form itself that the claimant is suing in a particular representative capacity. That, however, not being the case at all, there can be no suggestion of nullity here; and the latter half of this paragraph cannot, in the circumstances, provide any such assistance.

Disposal

[62] The end result, then, in my opinion, is that these three grounds of appeal do not, whether taken individually or as one, amount to anything. Moreover, they are being advanced in circumstances where the result of the litigation is a foregone conclusion capable only of being deferred, not of being avoided. In short, the hopeless mission of Mr Lumor in this appeal seems to me to be to have the inevitable postponed. The time of the Court must, however, be judiciously used rather than wasted. For my part, I would dispose of this appeal by dismissing it with costs to the respondents to be taxed if not sooner agreed.

[63] This order as to costs would be provisional in the first instance but would become final in 15 days from today, such period to be inclusive of today, unless Pedro were to file application for a contrary order within such period, in which event the matter of costs would be decided on submissions in writing to be filed and exchanged by him and the respondents in 10 days from the making of such application.

Apologies

[64] It is only left for me to grasp this opportunity to offer my very sincere apologies to the parties for the delay in preparing this judgment, a delay which has been the result of great pressure of work and for which I accept full responsibility.

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SIR MANUEL SOSA P

MORRISON JA

[65] The learned President has carefully threaded his way through a veritable procedural maze and come up with what is, in my view, the only possible answer in this case. I agree with everything he has said and have nothing to add.

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MORRISON JA

AWICH JA

[66] I concur in the order that this appeal be dismissed, with costs to the respondents.

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AWICH JA